1978 *Present:* **Rajaratnam, J., Tittawella, J., and Gunasekera, J.**

M. F. ABDUL CAFOOR, Appellant

and

THE ATTORNEY-GENERAL, Respondent

S.C. 72/75—D.C. Colombo 100/T (Special)

Estate Duty Ordinance (Cap. 241), section 6(a), (b) and (d)—Donation subject to a trust—Absolute power retained by settlor—Whether charitable trust—Rule against perpetuities—Resulting trust Property passing on death—Liability of trust to estate duty.

Donation of property more than 3 years before death of donor—Amending Act No. 3 of 1948—Extending of period of exemption from estate duty to 5 years—Retrospective operation—Liability of donated property to estate duty—Vested rights—Interpretation of Statutes—Interpretation Ordinance (Cap. 2) section 6 (3).

The deceased settlor by Deed No. 1832 donated certain property to three trustees to be held by them upon the terms of the trust set out of Deed No. 1833. This latter deed empowered the trustees to expend a sum not exceeding Rs. 1,000 per month "for the education..... of deserving youth of the Islamic faith....." The recipients were classified and the order in which those classes of recipients were to receive the benefits was also stated. But the Trust was subject to the proviso that "during the lifetime of the grantor the trustees shall apply, the nett rents profits dividends and income of the trust property for such purposes and in such manner as *the grantor in his absolute discretion whether such purposes shall fall within the objects specified in any provision above or not,* may through the Board direct".

(This trust deed has already been considered by the Supreme Court and the Privy Council in connection with the claim of the Commissioner of Income Tax for tax on the income from the same property. See the case in 60 N.L.R. 361 and 63 N.L.R. 56—PC).

The Commissioner of Inland Revenue assessed the property in question for Estate Duty on the death of the settlor and on an appeal therefrom to the District Court, that Court upheld the assessments. This appeal is against the order of the District Court.

Held : (1) That the proviso suspended the operation of the trust until the death of the settlor; that during the lifetime of the settlor the trustees did not function at all except to carry out the orders of the settlor; and that the absolute power retained to the settlor completely nullified the trust during its operative period.

(2) That therefore the property gifted to the trustees on Deed No. 1832 was liable to estate duty under section 6 (*b*) and (*d*) of the Estate Duty Ordinance, and the assessments concerned were correctly made.

(3) That the entire trust failed as a charitable trust and it could not remain as a private trust as it offends against the rule of perpetuities.

(4) That on the failure of the trust a resulting trust occurred vesting the property back in the settlor. Such property was "property of which the deceased was at the time of his death competent to dispose" and was liable to be assessed under section 6 (*a*) also.

The settlor also gifted certain other properties to several donees by Deeds Nos. 1944 to 1953 all dated 10.4.1944 and certain shares of a company to donees on 4.8.1945. Whether these gifts were liable to estate duty depended on whether the Estate Duty Amendment Act, No. 3 of 1948 (which made the period of time necessary for exemption from estate duty of dispositions made during the deceased's lifetime in section 6(*b*), (*c*) and (*d*) five years instead of three years as earlier) applied to these properties.

Held : (Rajaratnam, J. *dissenting*) (1) That as the deceased died on 1.11.1948 after the amendment came into force, those gifts were liable to be assessed for estate duty in terms of section 6 (*d*) as amended.

(2) That the taxable event was the death of the donor and section 6 (*d*) had come into operation on that date. The unamended section 6 (*d*) never had any application to these properties.

(3) That accordingly the assessments were correctly made.

Per RAJARATNAM, *J. dissenting*—

(1) As regards the properties gifted on 10.4.1944, the donees have for a period of 3 years been in bona fide possession and enjoyment of the same to the entire exclusion of the owner. If the taxable event as contemplated by the law is the death of the donor within the stated period, the death of the donor thereafter is not a relevant event in relation to the said properties and in such a case not a taxable event.

(2) On the date of the amendment (28.1.1948) the properties donated on 10.4.1944 had gone out of the pale of the Ordinance. There is no express provision (in the amending Act) to affect restrospectively the rights that have accrued (to those donees) before 28.1.1948 under the repealed law. Therefore those properties donated on 10.4.1944 are not liable to estate duty.

(3) The shares gifted on 4.8.1945 would not be free from liability to estate duty till after 4.8.1948, by which time the amending Act had come into operation. These shares are therefore liable to estate duty.

Cases referred to :

Commissioner of Income Tax v. Trustees of the Abdul Gafoor Trust. 60 N.L.R. 361.

Abdul Cafoor v. Commissioner of Income Tax, 63 N.L.R. 56 (PC) ; (1961) A.C. 584 ; (1961) 2 All E.R. 436 ; (1961) 2 W.L.R. 794.

Vesteys (Lord) Executors v. Inland Revenue Commissioners, (1949). 1 All E.R. 1108 ; 31 T.C. 80 ; (1949) T.R. 149.

Oakes v. N. S. W. Commissioner for Stamps, (1953) 2 All E.R. 1563 ; (1953) 3 W.L.R. 1127 ; (1954) A.C. 57.

Akilandanayaki v. Sothinagaratnam, 53 N.L.R. 385 ; 46 C.L.W. 67.

Hai Bai v. Perera, 55 N.L.R. 442.

Suppramaniam Chettiar v. Wahid, 53 N.L.R. 140.

Free Lanka Insurance Co. Ltd. v. Ranasinghe, 63 N.L.R. 481 (PC). (1964) A.C. 541 ; (1964) 1 All E.R. 457 ; (1964) 2 W.L.R. 66.

Queen v. Fernando. 61 N.L.R. 395.

Cadgil v. Lal & Co. 53 Indian Tax Reports 231.

J. P. Jani Income Tax Officer v. Induprasad Shankar Bhatt, 72 Indian Tax Reports 595.

West v. Gwynne, (1911) 2 Ch. 1 ; 104 L.T. 759 ; 80 L.J. Ch 578.

APPEAL from a judgment of the District Court Colombo affirming assessments made under the Estate Duty Ordinance.

C. Ranganathan, Q.C., with *S. Ambalavanar* and *Miss C. Joseph,* for the appellant.

G. P. S. de Silva, Deputy Solicitor-General, for the State.

Cur adv. vult.

March 1, 1978. RAJARATNAM, J.

The matter before us is an appeal by the administrator of the estate of the late Mr. N. D. H. Abdul Cafoor from the order made by the District Judge of Colombo whereby he was liable to pay estate duty with regard to—

(*a*) Certain property referred to in the schedule to deed No. 1833 dated 24.12.1942.

(*b*) Certain properties which were gifts made by the said deceased N. D. H. Abdul Caffoor by deeds Nos. 1944-1953 of 10.4.1944 referred to in the first schedule to the petition filed under section 40 of the Estate Duty Ordinance in the Court below (p.12) and

(*c*) Certain shares gifted on 4.8.1945 by the said deceased in N. D. H. Abdul Caffoor Ltd. set out in the second schedule to the same said petition.

It was the appellant's case that there was no benefit reserved in favour of the grantor within the meaning of the Estate Duty Ordinance and therefore there was no liability to estate duty with regard to the properties referred to in the schedule to deed No. 1833 of 24.12.42. It was also his case that since the donor died more than 3 years after the respective donations the said

properties and shares were not liable to estate duties notwithstanding the fact that Act No. 3 of 1948 on 28.1.48 extended the period of time from 3 years to 5 years after the donation.

I shall now deal with the appellant's case on the first matter that is to say the main matter in issue whether the property mentioned in the schedule to deed No. 1833, A9, passed on the death of the deceased in terms of s. 6(*b*) of the Ordinance. The terms of the very same deed A9 have been subject to examination both by the Supreme Court and the Privy Council when a question arose with regard to the liability of the trustees of the Abdul Caffoor Trust to pay income tax for the income derived from this same property. It was held that the trust instrument did not contain the element of public benefit which should characterise a charitable trust as defined in s. 99 of the Trusts Ordinance. Vide *Commissioner of Income Tax v. Trustees of the Abdul Caffoor Trust*, 60 N.L.R. 361 (S.C.) and 63 N.L.R. 56 (P.C.). It was held further that the income of the trust was not exempt from income tax because the trust failed to attain the qualification of public character required by s. 7(1) (*d*) of the Income Tax Ordinance.

I agree with learned Counsel for the appellant that the decision in the Supreme Court and the Privy Council does not relieve us of the responsibility in this case to approach a different question whether the said property passed on the death of the deceased for the purposes of determining whether it was liable to estate duty, mindful however that some of the observations made in the said decisions are not entirely without any relevance to determine this separate question before us. The Privy Council has held that the instrument (deed A9) was drawn for educational purposes and the recipients of the benefit were 'deserving youths of Islamic faith' but the primary disposition of the trust income was in favour of the family of the grantor and therefore it was no trust of a public character established solely for charitable purposes.

The proviso to clause 2 of A9, viz.

> "Provided however that during the lifetime the grantor the trustee shall apply the net rents, profits dividends and income of the trust property for such purposes *and in such manner as the grantor in his absolute discretion whether such purposes shall fall within the objects specified in any provision above or not may through the Board direct.* The Board shall not be nor be liable to be questioned regarding or asked the grounds or reasons for any decision of the Board in regard to any of the matters provided for in sub-clauses

(b), (c), (d), (e), (f) and (g) of this clause it being the aim intention and object of These Presents that the Board and every member thereof shall at no time be liable to have their decisions or their grounds or reasons in regard to such matters revised discussed gone into challenged modified or altered in any manner howsoever by any person body authority or Court ".

did not and need not have loomed large in the consideration of the Supreme Court and the Privy Council to arrive at their decisions relevant to the provisions of the Income Tax Ordinance. On the other hand our consideration has to be focussed largely to the above proviso. It cannot be denied that this proviso refers.

(1) to the lifetime of the Grantor,

(2) to the absolute discretion of the Grantor overriding the absolute and uncontrolled decision of the Board referred to earlier in clause 2 of A9, and

(3) the Grantor's absolute right to direct the Board that the nett rents, income, etc. be applied to such purposes whether such purposes shall fall within the objects of any provision specified in the instrument or not. It means therefore that the Board of Trustees on the death of the Grantor held the property free from the terms of the said proviso to the extent that the interest of the deceased in the property ceased.

Learned Counsel for the appellant submitted that the deceased's interest was not a personal one but only a fiduciary interest and he did draw our attention to the fact that the proviso confined the absolute discretion of the Grantor to direct the trustees to apply the income from the property ' to such purposes and in such manner '. He emphasised the term ' purposes ' and submitted that it could not include a payment to the Grantor himself. Even if I am prepared to go so far as to accept this submission on this point, I am faced with the difficulty with the words following " whether such purposes shall fall within the objects specified in any provisions above or not . . . . . ". In other words the Instrument was made with certain objects and each provision had the common charitable object of benefiting ' youths of Islamic faith ' and the ' male descendants along either the male or female line of the Grantor .... ', and the relief of poverty. The proviso, however, was left wide open for the Grantor in his absolute discretion, during his life time to go beyond the objects of the provisions specified in clause 2 of A9. It cannot be said that in terms of this proviso, the Grantor could not have directed the Board to give Rs. 10,000 to A, nor could the

Board have questioned why the Grantor gave this direction. Mr. Ismail one of the original trustees in his evidence at p. 31 admitted that the Board would have had to obey such a direction of the Grantor and could not have questioned the reasons for such a direction. In such a case, the reasons need not have been related to any of the objects of any of the provisions specified in clause 2 of A9.

When interpreting the terms of this proviso, the Court has to confine itself to the scope of the proviso according to the words used, therein with an objective approach. There is no doubt that the grantor in this particular case was a great philanthropist and he would never have abused the absolute discretion vested in him. But the fact remains that on his death the Board held the property free and unencumbered by any direction the Grantor could have given for any purpose in his absolute discretion, whether such purpose fell within or without the objects of the specified provisions. It is not open either to the Commissioner of Estate Duty or to this Court to go beyond the words in the proviso, to determine whether the Grantor reserved for himself some interest in the property which ceased on his death. The terms in the proviso did not preclude the Grantor acting beyond his fiduciary power.

We were referred to certain English authorities which though not exactly in point laid down certain sound principles which we respectfully accept for our guidance. Our particular attention was drawn to the decision in the case of *Vestey's Executors v. Inland Revenue Commissioners,* (1949) 1 A.E.R. 1108, and in particular to the judgment of Lord Simonds at page 1114 :—

> "The first question here for consideration is what is the nature of the right to direct investment which is vested in the authorised persons. On behalf of the Crown it is urged that it is not a fiduciary power or right, but a right exercisable by the authorised persons for their own benefit, so that they can require the trustees to invest the trust funds by way of loan to themselves or any company in which they are interested at any rate of interest whether or not such an investment is or is intended to be for the benefit of the trust estate. It is, therefore, in this view some kind of beneficial interest, albeit a kind, I think, hitherto unknown to the law. So far as s. 38(3) and (4) is concerned, I observe that, even if the argument for the Crown so far prevails, it must still be established that by reason of the settlor's right to direct investment the income or property arising under or comprised in the settlement is 'payable to or applicable for the benefit of the settlor'. I am clearly of opinion that it

is not. I think that these words contemplate an out-and-out parting with the trust property or income by payment to the settlor in money or money's worth. They are as familiar words as any in the conveyancing art. Investment is the very antithesis of this, for it contemplates the retention of something as part of the trust property. I think, therefore, that in any case the claim of the Crown on this head under s. 38 (3) and (4) must fail".

It cannot be argued in this case that the fiduciary power in the absolute discretion of the grantor which went beyond the objects of the specified provisions in the instrument was a power in the words of Lord Simonds "to be exercised with a single eye to the benefits of the beneficiaries" specified in the Instrument. The interest reserved in the proviso is not merely of a fiduciary power. The words are wide enough to include a beneficial interest over-riding the objects of the provisions specified in the Instrument. In other words it is not possible in this case with respect to the proviso to say that absolute discretion the Grantor reserved for himself to give directions to the Board with regard to the funds regardless of the objects of the specified provisions was only a reservation of a mere fiduciary interest in the property. Again the term 'interest' in the property in s. 6 (b) is wide enough to include what the Grantor in this case reserved for himself for purposes outside the objects of the specified provisions laid down in the instrument.

On his death, it can be said that this reserved interest ceased and to this extent there was a benefit accruing or arising in respect of the said property. In interpreting the terms of this proviso Lord Radcliffe in his judgment, 63 N.L.R. at p. 58, observed :—

> "The overriding trust in the Deed was that during the life of the Grantor the Trustees were to apply the whole of the income for such purposes and such manner as the Grantor himself should in his absolute discretion direct, whether or not such purposes should fall within those directed by the Deed to be operative after the Grantor's death. It is plain therefore that until his death, which took place on 1st November 1948, the current trust income was not in any sense devoted to charitable purposes".

The appellant cannot maintain that the Board of Trustees enjoyed bona fide possession of the property from 1942 to 1948 "to the entire exclusion of the donor.....". The submission of the appellant with regard to the property specified in the schedule to Deed 1833 (A9) must fail and I hold that the appellant is liable to pay Estate Duty on the said property.

With regard to the properties and shares (b) and (c) referred to in the first and second schedules to the petition presented to the Court below in terms of s. 40 of the Ordinance, although learned Counsel for the appellant made his submissions to apply to both, I find that it will be more helpful to treat them separately. It was his case which he put very colourfully that these properties and shares stood 'liberated' from estate duty three years after they were gifted, and since the deceased died on 1st November, 1948, they were not liable to the payment of estate duty notwithstanding Act No. 3 of 1948 which extended the 3 year period of liability to 5 years, Before dealing with this submission, I shall refer to the relevant dates—

(1) Properties (b) in the 1st schedule to the petition were gifted on 10.4.1944.

(2) Shares (c) in the 2nd schedule to the petition were gifted on 4.8.1945.

(3) Amendment extending 3 year period to 5 years was on 28.1.1948.

(4) Death of the donor was on 1.11.1948.

(5) The appointed day was 1.4.1947 under Act No. 3 of 1948.

It will be seen that properties in the first schedule were liable under the existing law for estate duty till 10.4.1947. Thereafter since the donor died only on 1.11.1948 the property for purposes of estate duty was free of estate duty but for the amending Act No. 3 of 1948 as contended which came into force on 28.1.1948. The question for the consideration of this Court is whether the amending Act No. 3 of 1948 could alter the situation when the properties no longer belonged to the deceased and were not properties liable to estate duty under the existing law after 10.4.1947 for almost eight months before the amending Act No. 3 of 1948.

The shares in the second schedule, however, were liable to estate duty under the existing law till 4.8.1948 by which time the amending Act No. 3 of 1948 came into operation on 28.1.1948 altering the situation.

If we do not take into account the amending Act No. 3 of 1948, both the set of properties and the shares referred to in the first and second schedule would not have been liable for estate duty at the time of the death of the donor on the 1st of November, 1948, under the existing law without the amending Act No. 3 of 1948.

It cannot be disputed that the said donations were made bona fide and that bona fide possession and enjoyment was assumed by the donees immediately upon the gifts to the entire exclusion of the Donor or of any benefit to him by contract or otherwise

The deceased at the time of his death had no power or competence to dispose of these properties and shares and under the existing law at the time of the donation these properties and shares would have long ceased to be part of his estate and they would not have been property " deemed to be passing on death " under s. 6 of the Ordinance and liable to duty in terms of the unamended s. 6 (*d*) of the said Ordinance.

It was submitted by learned Counsel for the appellant that the donees became owners of these properties and shares under the existing and unamended law to the entire exclusion of the donor and the said properties and shares were free from any charge or liability for the payment of estate duty if the donor died 3 years after. It was also contended that the taxable event was the act or deed of the donation. On the other hand it was submitted on behalf of the Attorney-General that the taxable event was the death of the donor, and in the words of the Deputy Solicitor-General the Estate Duty Ordinance " springs into life and speaks only at the death of the donor ". I find it difficult to accept the submission that the taxable event is the act or deed of the donation and that there were rights which were acquired or vested in respect of these properties and shares on the date of donation to be free from any charge or liability for estate duty if the donor died 3 years later. It cannot be said that the right thus to be free of liability after 3 years vested at the time of the donation. In this case the properties in the first schedule became thus free of any liability for duties only after 10.4.1947, but the properties in the second schedule, i.e. the shares had to wait till 4.8.1948 by which time the amending Act came to be passed.

It was argued on behalf of the Attorney-General, that the taxable event was the death of the donor and took place after the amendment Act No. 3 of 1948 which came into operation on 28.1.1948 and therefore though the 3 years had elapsed on 10.4.1947 since the date of donation, because the death of the donor, i.e. the taxable event had not taken place, the law as amended had to be applied to impose the charge and liabilities for estate duty. It was the Attorney-General's case that the provisions of the Estate Duty Ordinance came into operation only on the taxable event taking place and since this event was on 1.11.1948 and subsequent to the appointed date, the period to be reckoned is 5 years and not 3 years. The question therefore arose whether if the taxable event in respect of the properties in the first schedule is the death of the donor, then would the amending Act No. 3 of 1948 operate retrospectively when it fixed the appointed date on 1.4.1947. Learned Counsel for the appellant maintained that since the taxable event was the act and deed of the donation therefore the amendment was retrospective and

bad in respect of both the properties and shares in the first and second schedule which in his own words became 'liberated' before the death of the deceased.

I will accept the submission that the taxable event cannot be the date of the donation and there were no vested rights on the date of the donation and that the Estate Duty Ordinance only 'springs into life and speaks only on the death of the donor', and consider the question on this basis in respect of (*a*) the properties in the first schedule and (*b*) the shares in the second schedule.

I shall first deal with the shares in the second schedule. These shares though gifted on 4.8.1945 were subject to estate duty till 4.8.1948 even without the amending law. If the taxable event, i.e. the death of the donor happened before 4.8.1948, regardless of the amendment, these shares would have been subject to estate duty under s. 6 (*d*). It was at a stage when these shares were still liable to duty, that the amendment came into operation extending the period of liability to 5 years, and since the donor died within the extended period, these shares in my view could never have been at any point of time till the death of the donor be considered as having been free of liability. For purposes of estate duty, on the date of the amendment, the shares were still subject to the unamended s. 6 (*d*). The argument advanced on behalf of the appellant fails for two reasons:—

(1) on the date of the donation there vested no rights on any body in respect of the shares to be free of estate duty as the death of the donor after 3 years was a requisite condition under the existing law and if this event took place within 3 years, it was a taxable event removing any such rights. Vested rights can never exist if it is dependent on the happening or not happening of an event. A conditional or a contingent right is not a vested right.

(2) In any case no rights had accrued to anybody as yet under the existing law at the time of the amendment, for him to have and own any rights.

I therefore hold that the shares in the second schedule referred to above are liable for estate duty.

I proceed now to the last category of properties, that is to say, the properties in the first schedule referred to above regarding which different considerations arise as these properties on the date of the amendment had passed the 3 year period under the existing law and the taxable event which is the death of the donor had not taken place as contemplated in s. 6 (*d*) which stood unamended and the holding of these properties passed

that period. In my view the taxable event is the death of the donor but under the existing law it had to take place before a stipulated period of 3 years as required by s. 6 (*d*). That taxable event as contemplated by the existing law did not take place. The question follows that in this situation, could it be said that the taxable event could be made to take place anytime thereafter without express retrospective legislation regardless of the fact that the period of 3 years contemplated by the existing law had passed and the properties were in the hands of the donees or their successors in title for the stipulated period. In other words the donees had for a period of 3 years as required and contemplated by the law been in bona fide possession and enjoyment of the same to the entire exclusion of the donor. It is my view that in such a situation when the donees had held the properties for 3 years and the taxable event as contemplated by the law had not taken place within the stated period, the death of the donor thereafter is not a relevant event in relation to the said properties and in such a case not a taxable event with regard to the said properties. The amendment, however, was passed thereafter—

(1) when the death of the donor was neither a taxable event nor a relevant event for purposes of the Estate Duty Ordinance in regard to the said properties.

(2) when the said properties were not within the scope of s. 6 (*d*) of the existing law and therefore not passing on the death of the donor, and

(3) when the donees had or their successors in title had acquired a right to own the properties without the liability to pay estate duty.

There can be no question that the amendment came into operation—

(1) when the death of the donor was neither a taxable event or a relevant event in relation to these properties for purposes of the Estate Duty Ordinance, and

(2) when the properties were not within the scope of s. 6 (*d*) of the existing law and could not pass on the death of the donor if the donor died after the 3 years and before the amendment. There can also be no doubt that any amendment extending the period thereafter to 5 years in this situation must be retrospective. We were referred to s. 6 (3) (*b*) of the Interpretation Ordinance which reads :—

"Wherever any written law repeals in whole or part a former written law and substitutes therefor a new provision such repeal shall not, in the absence

of any express provision to that effect, affect or be deemed to have affected—

(*a*) .....

(*b*) any offence committed, any right, liberty or penalty acquired or incurred under the repealed written law".

Maxwell on Interpretation of Statutes (11th Ed) at page 206 lays down this principle as follows:—

> "It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions or unfair contracts that the rule in question prevails. Every Statute, it has been said which takes away or impairs vested rights acquired under existing laws or creates a new liability in respect of transactions or considerations already past, must be presumed out of respect to the legislature to be intended not to have a retrospective operation".

I shall first deal with the provision of the appointed date being 1.4.1947 in the amending statute. The appointed date, in my view, cannot apply to a situations where the stipulated period of 3 years has passed and the taxable event has not taken place within the stipulated period in the existing law.

Although the taxable event is the death of the donor, the gifts which have been made more than 3 years before 28.1.48 under the existing law as unamended were not properties deemed to be passing on death. The death of the donor is the taxable event, but for purposes of the Estate Duty Ordinance it must be related to properties that have not gone out of the pale of the existing law.

It is clear that the said properties gifted on 10.4.1944 could never have been properties deemed to pass on the death of the donor within the meaning of s. 6 (*d*) of the Estate Duty Ordinance after 10.4.1947 and it cannot be disputed that if the death of the donor took place between 11.4.1947 and 28.1.1948, (the date of the amendment) the said properties were not properties passing on the death of the donor. Between these dates at least the donees and the gifted properties would not have been concerned with the death of the donor for the purposes of the Estate Duty Ordinance. The said properties could have been sold as properties that were absolutely free of estate duty, and in no manner concerned with the death of the donor. The purchaser of these properties had no reason to expect there to be ever a change for purposes of estate duty under s. 27(1) (*b*) of the Ordinance nor to be in terms of the provisions of the relevant law notionally brought in as part of the estate of the deceased donor. In case

of the shares however which were gifted on 4.8.1945, they could not be said to have ceased to be subject to estate duty till 4.8.1948 and for this reason the amendment which came into operation on 28.1.1948 had an undisputable impact on the said shares and this impact was not retrospective and these shares I have already held are liable for estate duty in terms of the amending Act No. 3 of 1948. The properties mentioned in the first schedule would never have been considered by any purchasers of these properties to be liable to estate duty after 10.4.47 and in any case before 28.1.48. It cannot be said that the holders of these properties did not enjoy certain rights to hold these properties free from any charge for estate duty on the death of the donor, whenever it occured thereafter. It follows, therefore that the amending Act No. 3 of 1948 has a retrospective impact on the rights of the holders of the said properties. In my view the taxable event under the unamended law had to occur within 3 years of the donation and if it occurred after 3 years it was not a relevant event with regard to the properties donated 3 years earlier. For instance if A owned Whiteacre, Blackacre, Greenacre and Redacre and donated Whiteacre 5 years before his death and Blackare 4 years before his death Greenacre 2 years and Redacre 1 year before his death, his death will be the taxable event but the taxable event will not be relevant under the old law in relation to Whiteacre and Blackacre and if the amending law is to relate to Whiteacre and Blackacre it must expressly be made retrospective.

I am unable to hold that a mere fixing of a date as the appointed date in relation to the death of the donor, is an express provision affecting or deeming to affect rights acquired under the old law.

Amending Act No. 3 of 1948 fixes the appointed date of death as 1.4.1947 on 28.1.1948. If the dissenting order of Gunasekera, J. is correct then if the donor died on 2.4.1947 or thereafter before 28.1.1948 and if the donation had been 3 years before the death, the law at the time of death would have been on the 3-year rule and the appointed date in the amendment would be meaningless where the death took place during the period from 1.4.1947 to 28.1.1948 when the donation was 3 years earlier. There is therefore no express provision to catch up at least such a case. The following cases have been sought to be affected by the said amendment of 28.1.1948 :—

(1) Where the properties donated have not passed the 3-year period on 28.1.1948 and the death of the donor had not taken place on 28.1.1948.

(2) Where the properties donated have passed the 3-year period on 28.1.1948 and death has not taken place before 28.1.1948.

(3) Where the properties donated have passed the 3-year period on 1.4.1947 and the death of the donor has taken place after 1.4.1947 and before 28.1.1948. I find it difficult to oversimplify the problem and state that the taxable event is the death of the donor and that it is a relevant event in all these 3 cases.

In my view the taxable event is relevant only in the first case as in the cases of the shares in the present case, because no existing rights have been affected but not relevant in the second and third cases where on the date of the amendment, the properties donated have gone out of the pale of the Ordinance. Further there is no express provision to affect the rights that have accrued before 28.1.1948 under the repealed law.

It is a cardinal rule of construction that a retrospective effect is not to be given to a statute so as to affect an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. Moreover if the enactment is expressed in language which is fairly capable of either interpretation, it must be construed as prospective only—Craies on Statute Law (6th Ed. pp. 388-9). The provisions of our law are most stringent and no repeal shall have retrospective effect " in the absence of any express provision to that effect ". The language of the amending statute, in my view, is not express enough to apply to the third, fourth and fifth cases. In the words of Gratiaen, J. " Section 6 (3) of the Interpretation Ordinance has laid down a less flexible test than adopted in the corresponding English enactment. This is implicit in the phrase ' in the absence of any express provision to that effect ' as contrasted with the words ' unless the contrary intention appears ' employed in s. 38 of the English enactment ..... ". Section 6 (3) of the Interpretation Ordinance controls the operation of all repealing enactments. It protects vested rights acquired under a repealed Act from the impact of subsequent legislation unless there be unequivocal language within the four corners of the repealing Act pointing to a deliberate intention on the part of Parliament to impair those rights. *Akilandanayaki v. Sothinagaratnam,* 53 N.L.R. at p. 393. We have been referred to this principle being followed in several cases thereafter. (55 N.L.R. 443 at 449 ; 58 N.L.R. 142-144 and 65 N.L.R. 481 at 486 (PC)).

It is the appellant's case that the donees became owners of the properties free from any charge or liability for payment of estate duty on the date of donation. I am prepared to accept the

position that only after 10.4.1947 they became such owners of the properties. It is also submitted on his behalf that the amending Act in 1948 did affect the rights of the said donees to have and own properties that were free of any charge or liability for estate duty. I am prepared to accept this position too as correct after 10.4.1947. On the other hand it is the case on behalf of the Attorney-General that ' vested rights ' could arise only in relation to property rights and the question here is not one of rights but liability and further the taxable event is only on the death of the donor.

It cannot be argued that this is a pure question of liability and not of rights. Every liability pre-supposes a right in another to impose that liability, and every non liability pre-supposes a right of another to be free of a liability. In this case on 10.4.1947 the donees or their successors in title had such rights in respect of the properties which they owned.

On a consideration of s. 27 (1) (b) of the Estate Duty Ordinance, it is clear that the estate duty payable by any person other than the executor in respect of any property shall be the first charge on that property. The said properties are only notionally brought in as part of the estate under the law and under s. 27 (1) (*a*) the estate duty payable by an executor shall be a first charge only on all the property of which the deceased was competent to dispose at his death and such charge may be enforced against any such property for the recovery of the whole or any part of such estate duty. Under s. 25, no executor is liable for any duty in excess of the assets which he has received as an executor and has the discretion to pay estate duty in respect of any other property passing on such death if requested to do so by the person liable for estate duty in respect thereof. I hold that the donees did acquire vested rights in the said properties to have and own them free of any liability whatsoever for the payment of estate duty after 10.4.1947. It was argued that in matters of taxation the rules with regard to retrospective legislation do not apply and the observations of Basnayake, C.J. were referred to that retrospective laws are generally found in the field of taxation, 61 N.L.R. at p. 401 in *Queen v. Fernando*. This observation does not alter the cardinal principles in the rule of interpretation to be applied in the consideration of retrospective legislation. There must be express provision to that effect.

In this case even if the donor died on 2.4.1947, i.e. after the appointed date, and if the estate duty had been charged, imposed and paid before 28.1.1948, these properties would have been outside the pale of liability to estate duty, unless the legislation

was made expressly retrospective. The appointed date cannot be fixed from time to time regardless of the stipulated periods under existing laws without express provisions removing rights already vested.

I find it difficult to hold that Amendment No. 3 of 1948 does not have a retrospective impact in certain situations as mentioned earlier. This amendment which extends the period of 3 years to 5 years, if not retrospective another similar amendment which extends the period of 3 years to 50 years will not be retrospective in the case of properties gifted half a century before the death of the donor. In my view, the death of the donor is no doubt a taxable event but it will be so only with regard to properties belonging to his estate and it will not relate to properties donated 47 years earlier unless there is express provision in the amendment to include such properties. The taxable event does not automatically bring into the pale of the operation of the Estate Duty Ordinance all gifts made during the life time of an octogenerian under the existing law, unless the amending law makes express provision to that effect.

It is rather difficult to agree with learned Counsel for the appellant that the 'taxable' event is the date of the donation. On the other hand for the mere reason that the 'taxable' event is the death of the donor it does not mean that all properties that were gifted by him during his life time became taxable regardless that some of the properties may have been freed under the existing laws before the amendment.

Can it be said that the amendment Act No. 3 of 1948 is prospective in the case where the deceased died on 2.4.1947 and the gifts were made more than 3 years earlier ? The death of the donor is a taxable event, no doubt, but not a taxable event as regards such properties gifted 3 years earlier in relation to which rights have accrued. In such a case the death of the donor is not a relevant or taxable event in relation to such properties gifted. Similarly even where the donor died after the amendment, since the 3 years had passed after the gifts and the existing law continued to be in force after the 3 years had elapsed, the death of the donor sometime thereafter on 1.11.1948 was not a taxable event in relation to these properties.

For instance on 11.4.1947 which is 3 years after the gift the death of the donor thereafter was an irrelevant and a non taxable event as regards these properties. There was something that the properties donated and the donees gained that day. There was something that the estate of the donor gained that day. The amending Statute however extended the period to 5 years which

was a prospective piece of legislation with regard to all properties which had not been freed in terms of the existing law. The fixing of the appointed date, however, was retrospective legislation with regard to gifted properties which did not come within s. 6 (*d*) (unamended) of the Ordinance and where death did not take place before 1.4.1947.

In the case of *Cadgil v. Lal & Co.*, 53 I.T.R. 231 (SC), as the provisions of the Act stood, a notice of assessment or re-assessment could not be issued against a person deemed to be an agent of a non-resident after the expiry of one year from the end of the year of assessment. The law was amended extending this period of limitation to 2 years. The amendment was given retrospective effect from April 1, 1956. The assessee was noticed in March 1957 in respect to the assessment year 1954-55. It was held that the right to commence proceedings for assessment in the case ended on 31.3.1956 before the amendment. The decision in this case was relied upon in the case of *J. P. Jani, Income-Tax Officer v. Indraprasad Devashankar Bhatt*, 72 I.T.R. 595 (SC), which also held that unless the terms of the Statute expressly so provide or unless there is a necessary implication, retrospective operation should not be given to the Statute so as to affect, alter or destroy any right already acquired or to revive any remedy already lost by the efflux of time.

Moreover as Act No. 3 of 1948 reads, it has been sought to be made applicable to two situations. The first situation is where the death of the donor can still take place within the period of 3 years as required in terms of the existing law as in the case of the donees who held the shares and the second situation where the death did not take place within the required statutory period in terms of the existing law. I have already held that the principles of interpretation with regard to retrospective legislation does not apply in the first situation but it does come up for consideration in the second situation. The law as it was on 10.4.1947 and till 28.1.1948 contemplated the death of the donor within 3 years of the donation.

In the words of Buckley, L. J. in the case of *West v. Gwynne*, (1911) 2 Ch. 1, referred to above " if an Act provides that as at a past date, the law shall be taken to have been that which it was not, that Act, I understand to be retrospective ". It is my view that Act No. 3 of 1948 could not have included properties already freed from liability after the expiry of 3 years, without " express provision to that effect ".

I have awaited the views of Tittawella, J. and Gunasekera, J. before the delivery of the order in this appeal. I have had the benefit of reading Gunasekera, J.'s judgment and with great

respect, I find it difficult to agree with his observations at pp. 224 and 225:

(1) "But this entire submission is founded on the wrong assumption that s. 6 (*d*) (then in its unamended form) was in operation in respect of these properties on 10.4.1944 and 4.8.1945 ..... It can have no legal force or effect whatsoever nor can it have the remotest application to the properties which belonged to him in his life time".

(2) "As I have held that the unamended s. 6 (*d*) never had any application to these properties, there can be no question of any rights to exemption from duty in terms of that section arising either on 10.4.44 or three years later on 10.4.47".

With regard to these observations it cannot be said that properties that have been donated "belonged to him during his life time". *If that be so, a donor can never legally be said to part with the property he donates till his death which is the taxable event.*

In terms of the Estate Duty Ordinance s. 6 (*a*) only "property of which the deceased was at the time of his death competent to dispose" is property that belonged to him. Other properties were notionally brought into his estate by the operation of the rest of the sub-section in s. 6. The properties under our consideration could have been brought in by law under s. 6 (*d*) of the Ordinance notionally into the estate of the deceased if he died within 3 years of the donation till 10.4.47. It cannot be said that the law in its unamended form had no operation whatsoever at any date before the death of the donor in respect of the said properties.

An examination of s. 25, s. 26 and s. 27 of the Ordinance together with s. 6 (*a*) to (*h*) therein reveals the scheme for the liability and non-liability. For the mere reason that the taxable event is the death of the deceased, it does not mean that all the gifts made during his life time are affected by his death notwithstanding the provisions in the Ordinance which limit the properties deemed to pass on death. The question is not what the law was at the time of the death of the deceased. In my view the question is whether the amendment had a retrospective impact on the rights of the holders of the properties under the existing law and if so whether there was express provision therein to affect the said rights. I find considerable difficulty to answer these questions against the appellant.

I have not been fortunate to find my difficulties, with great respect, resolved in the dissenting judgment.

I therefore hold that the properties donated and referred to in the first schedule are not liable to estate duty and the appeal of the appellant is accordingly partially allowed with one-third taxed costs.

Since the majority view, however, is different the whole appeal stands dismissed with costs.

TITTAWELLA, J.

I have had the benefit of reading the judgments of Justice Rajaratnam and Justice Gunasekera. I am in agreement with Justice Gunasekera that the order and decree of the District Court be affirmed and that the appeal should therefore be dismissed with costs.

GUNASEKERA, J.

The appellant, as administrator of the estate of one I. D. H. Abdul Gaffoor filed these proceedings in the District Court of Colombo against the Attorney-General by way of an appeal under sections 35 and 40 of the Estate Duty Ordinance (Cap. 241) (hereafter referred to as the Ordinance). He has thereafter filed this appeal in this Court in terms of section 45 against the Order of the learned District Judge affirming the decision of the Commissioner of Estate Duty (A7), upholding the estate duty assessments on the appellant (A2, A3, A5).

The deceased died on 1.11.1948 and on this appeal two questions arise with regard to liability for estate duty of his estate. Firstly, whether the property transferred by the deceased to certain trustees on two contemporaneous Deeds, No. 1832 (A8) and No. 1833 (A9) dated 24.12.1943, can be considered to be 'property passing on the death of the deceased' in terms of section 6 (*a*) and/or 6 (*b*) and/or 6 (*d*) of the Ordinance. Secondly, whether gifts of immovable property set out in the first schedule to the petition, made by the deceased to several donees on Deeds Nos. 1944 to 1953 dated 10.4.1944, and certain gifts of shares of a registered company made on 4.8.1945 by the deceased to the donees mentioned in the 2nd schedule to the petition, were liable to estate duty under section 6 (*d*) as amended by Act No. 3 of 1948. These two questions can conveniently be considered in this same Order.

Section 6 of the Ordinance as it stood on 1.11.1948, the date of death of the deceased and as relevant to the question arising in this appeal is :

"6. Property passing on the death of the deceased shall be deemed to include the property following, that is to say :—

(*a*) Property of which the deceased was at the time of his death competent to dispose ;

(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest ; inclusive of property the estate or interest in which has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bona fide* made or effected three years before the death of the deceased where the date of his death is prior to the appointed date or five years before his death where the date of his death is the appointed date or any subsequent date, and *bona fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise ; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole ;

(*d*) Property taken as a *donatio mortis causa* made by the deceased or taken under a disposition made by him purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made three years before his death where the date of his death is prior to the appointed date or five years before his death where the date of his death is the appointed date or any subsequent date, or taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise :

Provided that—

(i) the property shall not be deemed to pass on the death of the deceased if subsequently, by means of the surrender of the benefit reserved or otherwise it is enjoyed to the entire exclusion of the deceased and of any benefit to him by contract or otherwise, for three years before his death where the date of his death is prior to the appointed date or for five years before his death where the date of his death is the appointed date or any subsequent date ;

(ii) in the case of a gift made for a religious, charitable, or public purpose this subsection shall be read as if one year were substituted for three years or five years, as the case may be ;

(iii) nothing herein contained shall apply to gifts made in consideration of marriage, or which are proved to the satisfaction of the Commissioner to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income, or to the circumstances under which the gift is made, or which, in the case of any donee, do not exceed in the aggregate one thousand five hundred rupees in value or amount ;

(iv) where an Assessor is of opinion that a disposition of property purporting to be a transfer for valuable consideration was not in fact a *bona fide* transfer for full consideration in money or money's worth received or receivable wholly by the deceased for his own use and benefit, he may treat such disposition as a gift, and the onus of proving that such disposition was in fact *bona fide* shall lie on the transferee or his successors in title ; "

Stated very briefly the position of the Attorney-General, on behalf of the Commissioner of Estate Duty, is that though in respect of the ' trust property ' the gift was made well over five years before the donor's death, the donor had retained an interest in the property ceasing on his death and also that *bona fide* possession and enjoyment of the property was not assumed by the donee trustees immediately upon the disposition and thenceforward retained to the entire exclusion of the donor, and that therefore this property was liable to assessment in terms of sections 6 (*b*) and 6 (*d*). It was also his contention that the entire trust having failed as a charitable trust, according to the decision of the Privy Council, the settlor became competent to dispose of this ' trust property ' at death in terms of section 6 (*a*).

In respect of the gifts in schedule 1 and schedule 2 of the petition his submission is that though he concedes the gifts were absolute and that the donees did enter into and retained bona fide possession and enjoyment of the gifted properties to the entire exclusion of the donor, a period of five years had not passed since the gifts were made before the death of the donor and that therefore these properties were liable to be assessed under section 6 (*d*) of the Ordinance.

With regard to the first question before us, by Deed No. 1832 (A8 aforesaid) the deceased transferred the property known as 'Gaffoor building' situated on the Main Street, Fort, Colombo, and valued at Rs. 2,050,000 to three trustees to be held by them upon the terms of the trust set out in the Deed No. 1833 (A9). This deed *inter alia,* provided that the trustees were to expend out of the income a sum not exceeding Rs. 1,000 per month "for the education, instruction or training in England or elsewhere abroad of deserving youths of the Islamic faith. . . . . " (Clause 2 (*b*)). It went on however to say,

> "the recipients of the benefits provided for in this clause shall be selected by the Board of the following classes of persons in the following order,
>
> 2 (*b*) (i) Male descendants along either the male or female line of the Grantor or of any of his brothers or sisters."

Thereafter were enumerated—

> "2 (*b*) (ii) Youths of the Islamic faith not of group (i) born of Muslim parents permanently resident in the city of Colombo.
>
> 2 (*b*) (iii) Such youths of such parents resident elsewhere in Colombo, etc. ....."

This deed also stated—

> "PROVIDED however that during the lifetime of the Grantor the trustees shall apply the net rents profits dividends and income of the trust property for such purposes and in such manner as the Grantor in his absolute discretion whether such purposes shall fall within the objects specified in any provision above or not, may through the Board direct."
>
> (This will hereafter be referred to as the 'proviso').

This trust deed has come before this Court and the Privy Council for interpretation earlier, when the Commissioner of Inland Revenue assessed the income of this property for income tax and the trustees contended that such income was not liable to income tax, being income of a Charitable Trust. (See *C I Tax v. Trustees of the Abdul Gaffoor Trust* (1958) 60 N.L.R. 366 and (1961) 63 N.L.R. 56 (P.C.)).

The question now before us is whether the estate of the deceased settlor was liable to estate duty on the property gifted to the trustees on the deed A8, and so those judgements of this Court and the Privy Council will not be directly relevant in the determination of this liability under sections 6 (*b*) and 6 (*d*) of the Ordinance ; they will be directly relevant however on the question of liability under section 6 (*a*). But even on the question whether the settlor reserved an 'interest ceasing on death', or whether '*bona fide* possession and enjoyment of the property was assumed thereunder immediately upon the disposition' the observations of the learned Judges in those judgements will be highly persuasive authority and of considerable assistance.

This first question can be determined on a consideration only of the 'proviso'. The proviso has clearly suspended the operation of the trust until the death of the settlor and during the settlor's lifetime the trustees did not function at all as such, except to carry out the orders of the settlor. This is the plain meaning of the words of the proviso ; and what happened in fact also is just this. Mr. Ismail, himself a lawyer and the sole surviving Trustee, in his evidence said :

> "The Board during the Settlor's lifetime had no power to give donations on their own without having received directions from the Settlor. The Trustees did the disbursements on the sole directions of the Settlor because no act could be done without reference to the Settlor. The discretion was with the Settlor to direct the Board of Trustees as to how any money should be disbursed.
>
> *Q* : Did the Board of Trustees have the power to deal with the income derived from the property mentioned in the deeds of trust on their own ?
>
> *A*. Not during the lifetime of the settlor.
>
> *Q*. How did the Board of Trustees function during the lifetime of the settlor ?
>
> *A*. The trustees held the income. The settlor gave directions with regard to the disbursement of the money. Thereafter the Board considered and sanctioned it."

This also is what Lord Radcliffe meant when at p. 58 of 63 New Law Reports he said,

> "The overriding trust, in the Deed was that during the life of the Grantor the Trustees were to apply the whole of the income for such purposes and in such manner as the Grantor himself should in his absolute discretion direct,

whether or not such purposes should fall within those directed by the Deed to be operative after the Grantor's death. It is plain therefore that until his death, which took place on 1st November, 1948, the current trust income was not in any sense devoted to charitable purposes."

"Once the grantor was dead his overriding trust came to an end."

It need hardly be said that if the settlor had the complete disposing power over the entire income of the 'trust property' during his life-time and he could use such income for purposes even outside the objects of the trust, he had 'an interest' in the entirety of the trust property ceasing on his death and also that bona fide possession and enjoyment of the property was not assumed by the trustees for the beneficiaries, immediately on the disposition to them (sections 6 (*b*) and 6 (*d*)). The evidence of Mr. Ismail also is that the settlor did in fact use the income of the trust for purposes completely outside the objects of the trust.

Mr. Ambalavaner's only submission on this question was that because the proviso appeared in a trust deed, it must be understood as giving the settlor only a 'fiduciary power' over the income of the trust property, and that he could not exercise this power outside the trust purposes, and that therefore there was no interest remaining in him in the trust property. But this is against the plain meaning of the clear words of the proviso, that the settlor can utilise the trust income for "such purposes and in such manner as the grantor in his absolute discretion whether such purposes shall fall within the objects specified in any provision above or not ..... ".

Mr. Ambalavaner relied for this submission on the case of *Vesteys (Lords) Executors v. I.R.C.*, (1949) 1 All England Reports 1108. In that case certain settlors were assessed for tax, *inter alia*, on the ground that the trust instrument gave them as 'authorized persons' certain powers of investment of the trust funds and the assessees contended that they were not so liable for the reason that the power retained to them was only a 'fiduciary power'. Lord Simmon from whom Mr. Ambalavaner quoted at length accepted the reasons and conclusions in the judgment of Lord Morton, who had he said 'fully narrated' the facts. I will therefore cite from Lord Morton just to show that that case cannot be at all helpful to us in interpreting the proviso. Lord Morton said

"It is said on behalf of the Crown that cl. 3 of the lease (already quoted) put the annual profits of Union into the hands of the Paris trustees, and that the power to direct investments, vested in the 'authorized persons', was the

means by which the Vesteys were able to obtain, out of these profits the cash necessary for financing the business which they controlled. It is further said that certain passages in the cases stated show that the power was, in fact used for this purpose. *My Lords, in my view, one must solve this question of construction on a consideration of the words used in the trust deed, by which alone this right or power is constituted, applying to these words the ordinary principles of construction,* without regard to the fact that this deed is part of a scheme of tax avoidance. If it appears that there is some latent ambiguity in the deed itself, one can seek to resolve it by a consideration of the relevant surrounding circumstances."

He next analysed the clauses in the deed bearing on the exercise of this power and also referred to the similar language contained in the Settled Land Act of 1882, and said,

"The result is that, in my view, *on the true construction of the trust deed, the power of direction is a fiduciary power,* and the authorised persons are not entitled to use it for the purpose of obtaining a benefit for themselves."

Applying the very principle enunciated by Lord Morton in that very case, I can with certainty say that "a consideration of the words used in the trust deed" and especially the 'proviso', put it beyond any question that the absolute power retained to the settlor was not a fiduciary power but a power that completely nullified the trust during its operative period.

Mr. Ambalavaner also cited the case of *Oakes v. N. S. W. Commissioner for Stamp Duty,* (1953) 2 All England Reports p. 1563, as authority for his submission that even if the settlor, under the proviso, used the trust income for the use of his own family, he was still not getting any benefit for himself. But what Lord Reid held in that case (p. 1568) was that if a trustee used the trust income for the education and maintenance of the beneficiary, in accordance with the terms of the trust and 'without impairing or diminishing the value of the gift to them', he got no taxable benefit for himself just because he happened to be the father of the beneficiary. In this case the settlor is not the trustee nor is his family the beneficiary of this 'charitable trust'.

I therefore hold that the property gifted to the trustees on deed A8 was liable to estate duty under sections 6 (*b*) and 6 (*d*) and that the assessment made thereon on the appellant was correctly made.

The further question whether the 'trust property' became assessable in terms of section 6 (*a*) becomes then only of academic value, as I have held that the assessment can be validly

made on the value of the entire property under sections 6 (*b*) and 6 (*d*). However as Mr. Ambalavaner spent considerable time on this aspect of the case I will consider his submissions. He says,

"4(11). It is accepted that consequent to the decision of the Privy Council in the Gaffoor Trust that this clause is not charitable. *The other clauses* 2(*b*) (*ii*), 2(*b*) (*iii*) *were in fact held charitable.* The trust as a whole has not failed as shown in paragraph 4.12. Whether this clause is *charitable or not,* whether it is effective or not, whether it is effective for a period of time or not *does not affect the validity of the trust.* If this submission is correct, then no liability to estate duty will arise since the trust and transfer of property was created well before the statutory period during which gifts and settlements can be brought into assessment.

4(12). The next question to consider is the effect of clause 2 (*b*) (i). Since it has been held and it is accepted that this clause is not charitable, it offends the rule against perpetuity as set out in section 110 of the Trusts Ordinance. In accordance with section 110(2) of the Trust Ordinance where an interest fails as regards some persons in a class by reason of the provisions of section 110(1), the interests of the whole class fails. In the result clause 2(*b*) (i) is of no effect and is void. *There is no failure of the trust as a whole. It is only the interest of the class that is affected by section 110 (1) that fails. There is no resulting trust in favour of the grantor. Therefore there is no liability to estate duty in respect of the property under section 6 (a) or any other section of the Estate Duty Ordinance.*"

He expressed surprise that very able Counsel had not both in the Supreme Court and in the Privy Council submitted this argument of his that the trust was divisible and had not failed in the 'Public' part of its objects, and submitted that both those judgments were wrong and had been entered *per incuriam.* But Fernando, C.J. in 60 N.L.R. at p. 376 has given the reason why Mr. H. V. Perera, Q.C., advisedly did not make this submission thus :

"Counsel for the trustees did not argue that the income intended by the settlor to be utilised under clauses (*c*) to (*f*) of the instrument can be regarded as being income of a separate trust and therefore entitled to exemption from tax. Indeed having regard to the powers exercisable by the Board under paragraph (*g*) and the uncontrolled discretion

to restrict the use of the income and of the reserve fund for the purposes mentioned in paragraph (*b*), one can well understand why no question of separation was raised in these proceedings. I am not called upon therefore to make any further observations with regard to it."

Although for the same good reason it can be assumed that Mr. Gratiaen, Q. C., also did not make this submission in the Privy Council, Lord Radcliffe in 63 N.L.R. at p. 66 has given the answer to this submission thus :

"Is then the Abdul Gaffoor Trust a charitable trust? It was not disputed that to determine this it is necessary to treat the whole trust income as if it were appropriated for the purposes specified in clause 2 (*b*). This is so because the form in which the various trust sub-heads are expressed is such that no definite sum of money is dedicated to any one and the power given by sub-head (*g*) makes it possible for the whole of the income to be carried to a reserve fund which could then be expended as from time to time the Board thought proper in the exclusive implementation of the purposes of sub-head (*b*). To test whether any particular trust is a charitable one what must be asked is whether the income is bound with certainty to be applied to charitable purposes, not whether it may be so applied. Unless therefore sub-head (*b*) itself declares a valid charitable purpose, no part of the Trust comes within the exempting provision of the Ordinance."

He also said that,

"It was argued with plausibility for the appellants that what this trust amounted to was a trust whose general purpose was the education of deserving young people of the Islamic faith and that its required public character was not destroyed by the circumstances that a preference in the selection of deserving recipients was directed to be given to members of the Grantor's own family. Their Lordships go with the argument so far as to say that they do not think that a trust which provides for the education of a section of the public necessarily loses its charitable status or its public character merely because members of the founder's family are mentioned explicitly as qualified to share in the educational benefits or even, possibly, are given some kind of preference in the selection. They part with the argument, however, because they do not consider that the trust which is now before them comes within the range of any such qualified exception. Considering what is in effect the absolute priority to the benefit of the trust

income which is conferred on the Grantor's own family by clause (i) of sub-head (b), the only fair way to describe this Trust is as a family trust under which the income is made available to provide for the education or training of relatives of the propositus, in this case the grantor himself, provided only that they are young, deserving and of the required faith. The conditions do not make it the less a family trust. Such a trust is not a trust of a public character solely for charitable purposes."

As pointed out by Mr. de Silva, the Deputy Solicitor-General, therefore it is factually incorrect to say that the Privy Council held that the trust in clauses 2 (*b*) (ii) and 2 (*b*) (iii) in the trust deed were good charitable trusts; and adopting with respect Lord Radcliffe's analysis of the various clauses in the trust deed and his conclusion in law thereon, I hold that it is incorrect in law to say that a part of this trust deed survived as a good charitable trust. The entire trust fails as a public charitable trust and it cannot remain as a private trust as it offends against the rule of perpetuities. And so, Mr. de Silva's further submission that on the resulting trust that occurred the property vested back and remained in the deceased settlor, and that this was therefore 'property of which the deceased was at the time of his death competent to dispose' (section 6 (*a*)) is entitled to succeed. I therefore hold that the 'trust property' was liable to be assessed also under section 6 (*a*).

The second question before us, i.e. whether the gifts in schedules 1 and 2 of the petition are liable to be assessed for estate duty, depends solely on whether the Estate Duty (Amendment) Act, No. 3 of 1948, is applicable to these properties.

This amendment became law on 28.1.1948, but it became operative as is usual with all tax laws, from the beginning of that year of assessment, viz., 1.4.1947, which date was referred to therein as the 'operative date'. The legal effect of the amendment was only to make the period of time necessary for exemption from estate duty of the dispositions made during the deceased's life-time in sections 6 (b), 6 (c) and 6 (*d*) (*supra*), five years if the death referred to therein occurred after 1.4.1947. Prior to this amendment the period was three years.

As the deceased died on 1.11.1948, well after this amendment came into force, any gift made within five years of the date of death, that is in the instant case after 1.11.1943, was liable to be assessed for estate duty in terms of the amended section 6 (*d*).

Mr. Ambalavaner however contends that this is not so. He submitted that though these gifts were made on 10.4.1944 and

4.8.1945 respectively, because the law then was that only gifts made within three years before death were liable to be considered as 'passing on death' under section 6 (*d*), the donees

(1) took these gifts under that unamended section 6 (*d*), and that

(2) they acquired immediately a 'vested right to non-liability' if the deceased did not die within three years thereafter and, that

(3) as the Amendment does not do so in express terms, it cannot retrospectively affect these 'vested rights' (section 6 (3) (*b*) of the Interpretation Ordinance, Cap. 2).

The donor in fact died after three years had passed since the gifts and Mr. Ambalavaner says that these properties cannot therefore be assessed for estate duty.

But this entire submission is founded on the wrong assumption that section 6 (*d*) (then in its unamended form) was in operation in respect of these properties on 10.4.1944 and 4.8.1945. The donor Abdul Gaffoor was very much alive on 4.8.1945 and section 6(*d*) or any other section whatsoever of the Ordinance had absolutely no application to any of his properties whilst he was alive, and so, on these two dates as well, whether in his hands before the gifts or in the hands of the donees after the gifts. It is self-evident that the Ordinance begins to apply to properties that belonged to a person only after his death and only if he happens to leave a taxable estate; necessarily therefore before that event the Statute not being in operation, it can have no legal force or effect whatsoever nor can it have the remotest application to the properties which belonged to him in his life-time. But to sustain his submission Mr. Ambalavaner was compelled to say that under the Ordinance the taxable event is not the death of the donor but the giving of the gift by him. To my mind, this is as erroneous as saying that the moment a person acquires a property he becomes liable to pay estate duty on it, and I will therefore only say that this is to me a totally unacceptable submission.

If thus, section 6 (*d*) was not in operation in respect of these gifted properties on the dates of the gifts, it follows that the donees did not as submitted,

(1) take the gifts under that section, or

(2) acquire on the gifts any 'vested rights to non-liability' under that section.

A further fallacy in this submission is that it assumes that a donee can acquire 'vested rights to non-liability' on the estate

of the deceased donor. Estate duty is a tax on properties that comprise the 'estate of the deceased' and not a tax on a donee of the deceased (section 3). It is, and always remains, primarily a liability or a 'first charge' on all the properties which 'pass on the death' and that 'first charge' goes with the property as a liability, to 'any person in whom the same (the property) is vested in possession by alienation or other derivative title' (section 26). Thus, this condition of liability (or non-liability) does not attach to a donee, qua donee, on the date he receives a gift; but a charge on the gifted property may arise on the death of the donor, and attach to it in the hands of whoever owns and possesses it on that day. The liability to pay the duty or 'discharge' the property of that tax burden, lies on the owner not because of the gift but on account of the fact of ownership on the date of death. It is therefore incorrect to talk of the donee acquiring 'vested rights to non-liability' as a donee on the date of the gift.

As I have thus held that the taxable event in this case was the death of the donor and that therefore section 6(*d*) began to come into operation in respect of these properties only on the date of death of the donor, and that therefore, the unamended section 6 (*d*) was not in operation in respect of these properties on the date of the gifts and could not in any way give rise to 'any vested rights to non-liability' in the donees on the date of the gifts, I need not consider Mr. Ambalavaner's further submission that the amending Act could not affect the donee's 'vested rights' retrospectively.

On the same reasoning I regret I cannot accept the distinction drawn by my brother Rajaratnam, J. and his finding based thereon, that the gifts made on 10.4.1944 are not liable to be assessed for duty. As I have held that the unamended section 6(*d*) never had any application to these properties, there can be no question of any rights to exemption from duty in terms of that section, arising either on 10.4.1944, or three years later on 10.4.1947. Besides, with all respect, even on our common view that the taxable event in this case is the death of the donor, no 'vested rights to non-liability' can arise at any time before that event, because liability or non-liability to duty can only be determined according to the law in force on the date or happening of the taxable event.

I accordingly affirm the Order and Decree of the District Court in terms of section 45 of the Estate Duty Ordinance and dismiss this appeal with costs payable to the respondent.

Appeal dismissed.