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FERNANDO *et al. v.* CANNANGARA *et al.*

D. C., Galle, 3,354.

Deed of gift—Acceptance—Gift to minor children—Who may accept a deed of gift.

A deed of gift by a father in favour of certain of his minor children contained a clause that the deed, together with the donor's title deeds of the property gifted, was handed to the child first named in the deed. The deed was in fact handed to a nephew of the donor who was present at its execution, and who immediately thereafter returned it to the donor to get it registered. The donor gave it back to him a month afterwards, and since then it remained in his possession—

Held, that the donor's nephew was not a competent person to accept the gift on behalf of the children, and that the deed was inoperative for want of a valid acceptance.

THIS was an action brought by four minors through their next friend, under the 247th section of the Civil Procedure Code, with the object of freeing from seizure and sale certain shares in the soil of, and houses standing on, a land called Kosgahawatta. The shares and houses were seized on September 26, 1894, in execution of a judgment against Eliagedare Tamby *alias* Lewis Fernando of Bentota. The minors alleged that through their next friend, the fifth plaintiff, they objected to the seizure and sale of these shares, and their claim being disallowed this action was instituted. They averred possession of the land, and based their title to it upon a deed of gift dated 15th June, 1893, which they said was duly accepted by them. At the end of this deed there was a clause which purported to hand the notarial act itself and the title deed to Charles Fernando, the first-named child in the deed of gift. The defendants impeached this gift alleging that the donor was in insolvent circumstances when he made it, and that it was made to defeat the claim of the defendants to the costs in the action under which the shares in the land were seized in execution. They further pleaded that the land remained in the possession of the donor.

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The District Judge upheld the deed of gift and entered judgment for plaintiffs.

The defendants appealed.

Dornhorst, for appellant.

Pereira, for respondent.

13th July, 1897. WITHERS, J.—

The issues agreed upon were the following :—

(1) Have plaintiffs a good title by the deed of gift ?

(2) Was it executed without consideration to defraud the defendants ?

(3) Was the donor in insolvent circumstances when he made the gift ?

The defendants were called upon to begin. This was objected to by their counsel, who said the onus of proving the acceptance of the gift lay upon the plaintiffs. The plaintiffs undertook this burden. The fifth plaintiff was called, and he said he was present when this gift was accepted ; that the donation deed was handed to him ; and that he returned it to the donor to get it registered, who returned it to him a month afterwards, since which time it has been in his possession. These acts, he says, were intended by him and the donor as acceptance by him for the minors. This witness is the donor's nephew by marriage, and he lives with the donor and his children. The donor was called, and he confirmed what the former witness said about the acceptance.

The father swears that at the time he made this gift, which embraces as many as twenty-one lands, he owned other property worth three or four thousand rupees, and that he owed nothing at the time of the gift to anybody. Afterwards, when he was cast in costs by the defendants, he tendered other property of his own for execution, but the defendants managed to get the Fiscal to seize part of his children's property. No evidence was called to contradict the witness, so I think it must be taken that the gift cannot be said to be void on the ground of fraud.

The only question is, Did this gift pass the shares to the minor children ? The District Judge supports the gift. He says, a gift to minor children by a parent is not invalid by reason of the donees being the infant children of the donor. It is too late for us now to say that a parent cannot legally make a gift to minor children under his or her tutelage in view of previous decisions of this Court, though how that came to be laid down as law in the teeth of the Roman-Dutch Law authorities I am not able to

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understand. It however still remains law that a donation is not valid unless the donee has accepted it. These children were one and all incompetent to accept this gift. As I said before, the deed professed to surrender itself and the title deeds to one of the children. Now, the case for the plaintiff was that the fifth plaintiff accepted the gift for the children.

The recent decision on that point is in the judgment of this Court in the case of the *Government Agent, Southern Province, v. Carolis* (*2 N. L. R. 72*). This lays down two propositions that an acceptance on the face of the document by some person or other is not necessary, and that acceptance of a gift will be presumed when there are circumstances to justify such a presumption.

The question is, Was this an acceptance, and was the fifth plaintiff capable of accepting it? I think it was an acceptance if the fifth plaintiff was competent to accept the gift for the children. Voet is at one with Vander Linden, that a donee may signify his intention of accepting a liberality by a letter or a messenger, who is a living letter. But I take it that in such a case the donee must himself be competent to take the gift. Then Voet goes on to say that slaves could accept a gift for their master, but then they were by law capable of acquiring property for their master. Indeed, a gift to an infant too young to speak and to appreciate the nature of the gift could be accepted by the infant's slave. So tutors could accept gifts for infants, and curators for the insane, and certain public officials were competent as such to accept gifts for others incompetent (*Voet, XXXIX. 5, 12*).

I gather the law to be that a gift can only be accepted at the time by an agent of the donee, conventional if the donee is competent to appoint one, or one considered by law as his agent, such as a legal and perhaps a natural guardian, or by a public official.

I do not think there was any valid acceptance of this gift, the fifth plaintiff not being competent to accept the gift for the children. So I would set aside the judgment and dismiss the plaintiff's action with costs.

LAWRIE, A.C.J.—

I agree. Mr. Justice Temple in 1851, in the case reported in *Ramanathan, 1843–54, p. 114*, declared that by the Roman-Dutch Law parents cannot legally make a donation in favour of the children who are still minors and under their tutelage. That case was from the District Court of Jaffna, where Roman-Dutch

Law did not apply, and the case was remitted for inquiry whether there was any local customary law superseding the Roman-Dutch Law on the subject. The first case I find reported is *Maartensz v. Casinaden*, a Batticaloa case reported in *Ramanathan, 1863–68, p. 132*, where remit was made for further evidence whether possession had followed on a donation by a father to his son from which acceptance might be evidenced. Without that evidence the judgment of this Court implied that the donation would be invalid. In 1875, in a case reported in *Ramanatahan, 1872–75, p. 215*, there was a donation by a father to three illegitimate children, two of whom were minors at the date of the donation. He reserved his own life-rent, and thirty years afterwards he died. The donees then claimed. This Court, setting aside the judgment of the District Court, held that there were in the case many circumstances from which acceptance might fairly and reasonably be implied, but what the circumstances were the short judgment does not indicate. Then followed the case reported in *8 S. C. C.*

Dias, J., said that he had never heard of a single case in which it was either contended or decided by a court of law that a donation to a minor child is void.

Mr. Justice Clarence also said that he knew of no case in which such a gift was beyond the parent's power to make. Both these Judges however concede that in Roman-Dutch Law a donation by a parent to a minor still subject to the donor's parental authority is (if not absolutely void) at least revocable or unavailing against the parents' creditors. The Jaffna case in 1851 I have referred to shows that the learned Judge had overlooked one expression of the opinion of this Court, that by the Dutch Law such a donation could not be sustained. The case reported in *8 S. C. C.* is peculiar. There the donation was to the mother and the child of the donor. It was accepted by the donee, and was certainly good as regards the one-half gifted to her. It appears that the minor child lived with the grandmother, for we read of the minor and the grandmother having entered into and having remained in possession independently of the father, the donor. There, too, there was express acceptance by the grandmother for herself and for the minor.

The last case of a donation to a minor is not in point, for there the donation was not by the parents, but by the grandparents, and the property donated came into the possession of the minor's parents. The Chief Justice (Bonser) held, and I agreed with him, that we ought to presume that the parents entered into possession on behalf of the children.

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In the present case, the donation to minor children was clearly to put the property beyond the reach of creditors. I do not say that that was fraudulent—it may be that there was enough left to satisfy all the donor's debts; but this we know, that he has not satisfied their debts by voluntary payments, and that his creditors seized the lands gifted to the minors. There was no acceptance of the gift on the face of the deed itself; there was no acceptance by a public person or by any one authorized to act for the minors; no possession followed; there are in fact no circumstances from which acceptance can be presumed.

The donation not having been accepted was still revocable by the donor. The lands gifted have not been put beyond the reach of his creditors.