1944 *Present:* **de Kretser and Jayetileke JJ.**

PEDURU FERNANDO *et al.*, Appellants, *and* MARY FERNANDO *et al.*, Respondents.

212—D. C. Negombo, 12,202.

Fidei commissum—*Gift to a person or his heirs, executors and administrators—And descendants from generation to generation—Perpetual* fidei commissum—*Acceptance of gift.*

Where a deed of gift contained the following clauses:—

(1) That owing to the affection we had towards our daughter, the deceased Lucia Fernando . . . . the wife of Peduru Fernando, we hereby gifted and set over unto Peduru, the husband of the said Lucia or his heirs, executors and administrators . . . .

(2) To have and to hold the said portion of garden unto the donee or his heirs, executors and administrators for ever . . . . and, after our death, the aforesaid portions of land shall be possessed by the said Peduru and his descendants without selling, mortgaging or alienating the same or letting on lease for a period exceeding three years from generation to generation and when their generations cease to exist the same shall devolve on the Roman Catholic Church . . . .

(3) And I the said Peduru Fernando thankfully accept the foregoing gift subject to the conditions mentioned.

Held, that the deed created a valid *fidei commissum* extending to four generations.

Held, further, that acceptance of the gift may be presumed from the statement in the deed that Peduru accepted the gift, coupled with the fact that Peduru dealt with the land as if he was the sole owner.

APPEAL from a judgment of the District Judge of Negombo.

N. E. Weerasooria, K.C. (with him *N. Nadarajah, K.C.*, and *S. R. Wijayatilaka*), for plaintiffs, appellants.

H. V. Perera, K.C. (with him *L. A. Rajapakse, K.C.*, and *J. A. L. Cooray*), for 4th to 9th defendants, respondents.

Cur. adv. vult.

December 18, 1944. JAYETILEKE J.—

This is an action for a partition of the land depicted in plan 2. The plaintiff alleged that the original owners of the land were Rapiel and his wife Maria, and that they gifted it to their son-in-law, Peduru, by deed No. 8,731, dated November 21, 1862 (P 1), subject to a *fidei commissum* which extended to the fourth degree of succession. The 4th to the 9th defendants alleged in their answer that the original owner was Peduru and that his heirs conveyed the entire land by 4 D 2 and 4 D 3 to their predecessor in title, Francisco Fernando. At the trial they did not seriously contest that the original owners of the land were Rapiel and Maria. The material portions of P 1 are in these terms:—

(1) That owing to the affection we had towards our daughter, the deceased Dehiwelege Lucia Fernando . . . . the wife of Dombawalage Peduru Fernando . . . . we the aforesaid hereby gifted and set over . . . . unto Peduru the husband of the said Lucia Fernando or his heirs, executors, and administrators . . . .

(2) To have and to hold the said portion of garden . . . . unto the donee or his heirs, executors and administrators for ever . . . . and after our death the aforesaid portions of land shall be possessed by the said Peduru Fernando and his descendants without selling, mortgaging or alienating the same or letting on lease for a period exceeding three years from generation to generation and when their generations cease to exist the same shall devolve on the Roman Catholic Church built by the Durawa people of Pitipane.

(3) And I the said Peduru Fernando thankfully accept the foregoing gift subject to the conditions mentioned therein.

The learned District Judge dismissed the plaintiff's action holding that P 1 had not been accepted and that it did not create a valid *fidei commissum*.

It is well settled law that no donation is complete and valid unless it is accepted by the donee. No particular form of acceptance is necessary and the acceptance may be by letter or messenger. In *Hendrick v. Sudritaratne* [1] Lascelles C.J. said:—

"There is I think a natural presumption in all these cases that the deed is accepted. Every instinct of human nature is in favour of that presumption, and I think that when a valuable gift has been offered and it is alleged it has not been accepted, some reason should be shown for the alleged non-acceptance of the deed".

In the present case there is the statement in the deed that Peduru accepted the gift. There is also evidence that four years later Peduru dealt with the land on the footing that he was the sole owner.

In *Wickremesekera v. Wijetunge*[2] it was held that acceptance can be presumed from the sale of the land donated by the donee.

In the absence of any evidence to the contrary it seems to me that the inference is irresistible that Peduru accepted the gift. Mr. H. V. Perera sought to support the judgment on the ground that there was an ambiguity in P 1 as to the person or persons to whom the land was donated. He contended that a gift to A or his heirs is invalid.

[1] *3 C. A. C. 80.* [2] *3 C. A. C. 413.*

In interpreting a deed the rule is that effect should be given if possible, to every word contained therein but too much regard must not be had to the natural and proper signification of words to prevent the simple intention of the parties from taking effect. (Beal's Cardinal Rules of Legal Interpretation; 3rd Edition, pages 60, 165.) There are certain words in P 1 which seem to me to indicate that the donors intended to gift the property to Peduru and not to his heirs. The words I refer to are:

(*a*) " Donee or his heirs ".

(*b*) " I the said Peduru Fernando thankfully accept the foregoing gift ".

(*c*) " After our death the aforesaid portions shall be possessed by Peduru Fernando or his heirs and his descendants ".

If the intention of the donor was to gift the property to Peduru or his heirs the *habendum* clause should read " and after our death the aforesaid portions of land shall be possessed by the said Peduru Fernando or his heirs and his or their descendants ". The words " or his heirs, executors and administrators " can in my opinion be explained away without doing violence to the language used and in a manner that gives effect to the obvious intention of the donors. They are words which are frequently used by Sinhalese Notaries to donate a gift of *plena proprietas*. The prohibition against alienation indicates that the donors did not intend to invest Peduru with *plena proprietas*. Having regard to the context in which the words " or their heirs, executors and administrators " appear it seems to me that they can be rejected. (See Norton on Deeds, 2nd Edition, page 330.) Even if these words cannot be treated as superfluous I fail to see why the gift should be held to be invalid. The words " or his heirs " are in their plain primary meaning substitutionary and may have been inserted with a view to guard against the failure of the deed by lapse.

The only other question is whether the deed creates a valid *fidei commissum* extending to four generations. The restraint against alienation coupled with the provision that the property shall be possessed by Peduru and his descendants " from generation to generation ", and the provision that in the event of the failure of descendants the property shall devolve on the Church, leave no doubt in my mind that the donors intended to create a perpetual *fidei commissum*. In D. C., Negombo, 16,035 [1] another deed of gift executed by Rapiel and Maria on November 21, 1862, came up for consideration. The language in that deed is similar to that of P 1 except that in the translation that was furnished to the court the word " and " was erroneously substituted for the word " or ". In the course of the judgment delivered by de Sampayo J. he said—

> " The deed of gift is one of the class of deeds which has been recently considered by the court, namely, where the transfer is in favour of the grantee, his heirs, executors, administrators and assigns but a condition against alienation is imposed with a designation of the persons who are to take after the grantees it is unnecessary to repeat out reasons for

[1] *1 S. C. M. 28. 7. 1915.*

holding in 217 D. C., Colombo, 38,578, Supreme Court Minutes July 16, 1915, after an examination of all the authorities that a transfer in the above form does not invalidate a *fidei commissum* which is otherwise well created. There is not the slightest doubt that, apart from the form of the grant, the present deed creates a good *fidei commissum* in favour of the descendants of Maria Salome Fernando and ultimately in favour of a certain Church at Pitipane ".

For the reasons given above I would set aside the judgment of the learned District Judge and send the case back for a decree to be entered in terms of these findings. The District Judge will inquire into any claims for improvements and any other matter that may arise incidentally before entering the decree. The appellant is entitled to the costs of the appeal and the costs of contest.

DE KRETSER J.—I agree.

Appeal allowed.