1948 *Present :* **Canekeratne and Dias JJ.**

NAGALINGAM, Appellant, *and* THANABALASINGHAM, Respondent

*S. C. 1–2—D. C. Point Pedro, 2,198*

*Donation—Possession by donee—Acceptance—Revocation*—Jus accrescendi—*Application to deeds of gift—Intention of donor.*

There is a valid acceptance of a gift when the subject of a donation comes into the possession of the donee. A unilateral act of the donor cannot thereafter revoke the gift.

The principle of *jus accrescendi* applies to dispositions *inter vivos*. But it must be gathered from the document that the donor positively contemplated the predecease of a donee and intended that the specific share of that person should, in that event, go to his co-donees.

APPEAL from a judgment of the District Judge, Point Pedro.

*S. J. V. Chelvanayakam, K.C.*, with *C. Chellappah*, for plaintiff, appellant in No. 1 and respondent in No. 2.

*E. B. Wikramanayake, K.C.*, with *H. W. Tambiah*, for second, third, and fourth defendants, respondents in No. 1 and appellants in No. 2.

*Cur. adv. vult.*

October 13, 1948. CANEKERATNE J.—

These are appeals from a judgment in an action for partitioning a land " called Mungkodai and Mavattai " which comprises lots 1 and 2 in the plan marked Z. By deed No. 5,825 (marked P4), dated April 1, 1896, one Koolaiyar Arumugam and his wife, Walliammai, gifted, *inter alia*, this land to their eldest son, Arumugam Kandavanam, whom I shall refer to hereafter as Kandavanam. He married one Eledchumy, who was related to him, probably according to customary rites about 1903 : the marriage was registered on April 9, 1904 (2D20). Their eldest child, the second defendant, was born on October 14, 1904, two other children of the marriage are the third and fourth defendants. The plaintiff claimed a half share of the land and allotted the other half to his brother, the first defendant : they are the surviving sons of the donors. Their case was that the donors by deed P5, revoked the gift in favour of Kandavanam and by deed P6 gifted, *inter alia*, this land to Kandavanam subject to certain conditions. Both P5 and P6 were executed on the same day, July 6, 1908, and attested by the same notary, one K. Kanthavanam, two of the attesting witnesses in both were the same, the third attesting witness to P5 was one Kanthar Saravanamuttu, to P6 one Kanthar Vallipuram. The second to fourth defendants attack the genuineness of P5 and P6. The learned Judge came to the conclusion that P5 and P6 were executed by the parties named therein and that



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the second to fourth defendants as some of the heirs of A. Poopalasingham, another son of the donors, became entitled to one-ninth share. The plaintiff appeals from this judgment and contends that the whole property passed to him and the first defendant and that the order depriving him of costs of contest is wrong (S. C. No. 1). The second to fourth defendants in their appeal (S. C. No. 2) contend that the finding that P5 and P6 are genuine documents is wrong.

K. Kanthavanam's reputation as a notary was an unsavoury one: the deeds were executed at Kudathanai, a place about 7 miles, according to the plaintiff's witnesses, 10 miles according to the second defendant, from the residence of K. Arumugam. The plaintiff is a man who is undoubtedly fond of crooked ways and so bent on doing wrong that it is not surprising that the Judge did not accept his evidence. His witness Vallipuram is one who had taken part in three or four transactions that do not redound to his credit. The original of P6 handed to the donors was not forthcoming at the trial, the Judge was not impressed with the explanation offered by the plaintiff for its non-production. The impression left on reading the judgment is that the learned Judge would not have accepted the evidence of Vallipuram about the execution of P6 but for the presence of what appeared to him to be circumstances tending to show knowledge on the part of Kandavanam of P6. Had the case been heard by a Judge having a longer experience of men and matters in this part of the country it is a question whether he would have arrived at the same conclusion as the Judge who heard the case. It is unnecessary for the purposes of this appeal to decide the point whether the plaintiff has proved that P6 was executed by K. Arumugam.

The first question is whether P4 is a valid gift. A donor makes a gift with the intention that the thing would become the property of the donee: the offer must be accepted by him to whom it is made, for the concurrence of the donor and donee must take place in order to render the donation perfect, the obligatory effect of the gift depends upon its acceptance. The donor may deliver the thing, e.g., a ring or give the donee the means of immediately appropriating it, e.g., delivery of the deed, or place him in actual possession of the property. Acceptance may generally take place immediately or at some future time. The continuance of the consent to give at the time of the acceptance is necessary, for a donor is perfectly free to change his bare intention, he can thus withdraw or revoke the proffered gift [1]. Acceptance may be by a third person for the donee or by the donee, he may act himself or by or through another: the latter may be authorised by him to accept it or his acceptance may be ratified by the donee. Acceptance can be regarded as complete if made by any person having authority for that purpose from the donee, or even although the acceptance should take place without the knowledge of the latter, if he subsequently ratified it [2]. Minors may for the purpose of acceptance be divided—notwithstanding the dictum of Layard C.J. at p. 235 of *6 N. L. R.*—into two classes, those who are of tender years, e.g., who may be termed children and those who have sufficient intelligence—or, as Van der Keessel remarks, those who are infants and those who have attained puberty

[1] *Van Leeuwen, Cens. For. 1-4-12-16.* [2] *Voet 39-5-13.*

(*Th. 485*). One who may be said to be a child is taken to lack all mental capacity or power to form a decision and so can enter into no transaction whatsoever, his guardian, whether natural or appointed, acts for him without consulting him, and with complete authority [1]. Such a child can hardly accept a gift. One of the second class is deemed capable of thinking for himself, has *intellectus*, but since he is yet inexperienced and likely to act rashly, the necessary *auctoritas* of his guardian must generally be interposed to make the transaction absolutely binding. Such a minor, however, can take the benefit of a contract and thus he can himself accept a gift [2]. In three cases *Avichchi Chetty v. Fonseka* [3], *de Silva v. de Silva* [4] and *Cornelis v. Dharmawardene* [5], acceptance of a gift by an uncle was considered insufficient. In the first of these cases a natural guardian, of the donees, who was not a donor, was said to be alive and the donees were persons falling within the former class (*e.g.*, children of the ages of four and one), nothing can be gathered as regards the age of the donees in the second and third cases. There can hardly be any doubt that Arumugam and his wife intended to transfer certain lands to their three sons, Kandavanam, the plaintiff, and Poopalasingham. To effect this purpose they went to the office of a notary, they got three deeds of gift prepared by Notary Eramalingar Arumugam and executed the deeds on the same day, one P4 in favour of Kandavanam, the other two in favour of the other two sons. All three were accepted by the maternal uncle of the donees. The plaintiff and Poopalasingham entered into possession of the lands given to them by these deeds and one is still presumably possessing them. There is a natural presumption that the gift was accepted. Every instinct of human nature is in favour of that presumption [6]. It is in every case a question of fact whether or not there are sufficient indications of the acceptance of a gift [7].

It was not disputed at the argument that Kandavanam entered into possession of some of the lands referred to in P4, the parties were not agreed as to the time. An action for partitioning the land known as Kuddatarai (No. 5 in P4) was brought on November 30, 1899, by K. Arumugam as first plaintiff and Kandavanam as second plaintiff. Para. 3 of the plaint states that by deed No. 5,825, dated April 1, 1896, Arumugam conveyed to the second plaintiff an undivided one-third share in the land reserving to himself a right of life interest over the same. By the decree dated July 1, 1901, lot 2 in plan dated April 23, 1901, was allotted to Kandavanam subject to the life interest of the first plaintiff. By P4, the donors reserved a life interest in the lands numbered 3, 4, 5, 6, 7, 8 and 9 therein, and a life interest in half the land numbered one therein, Kandavanam was entitled to take the rents and profits of the land numbered two therein (Kochchantthai) and of a half share of the land numbered one therein (Mungkodai and Mavattai). If the father remained in

[1] *Voet 26-8-4.*
[2] *Babaihamy v. Marcinahamy (1908) 11 N. L. R. 232.*
[3] *3 A. C. R. 4.*
[4] *3 A. C. R. 179 ; 11 N. L. R. 161 .*
[5] *2 A. C. R. Supp. XIII.*
[6] *Hendrick v. Sudritaratne (1912) 3 C. A. C. 80.*
[7] *Bindua v. Untty (1910) 13 N. L. R. 259 : and Hendrick v. Sudritaratne (1912) 3 C. A. C. 80.*

possession of the land after P4, his possession of a half share was for and on behalf of his son Kandavanam: one must conclude that he was not in wrongful possession of that share [1]. There is no evidence led in the case to show that Arumugam did not perform his duty as a father and guardian of the son. What he did at the end of November, 1899, is a clear index to his mind. By this time he recognised the validity of the gift to Kandavanam, who had attained majority, in respect of some lands at any rate. His position in the action was that land No. 5 (in P4) had become the property of the donee by P4: if the title to a land in respect of which he had the right of possession was recognised by him to have passed to the donee, much more would the title to lands wherein the right of possession was not in him or not in him entirely have passed to the donee. Acceptance of a gift by an unauthorised person may afterwards be ratified by the donee [2]. Kandavanam was about 18 years of age at the time of the execution of the deed (see 2D20). If he was present on this occasion he could have authorised his uncle to accept the gift, if he was absent it would be competent to him later to adopt what the uncle had done. The gift became valid by the time the action of 1899 was brought, or the gift of the properties referred to in items one and two, at any rate, of P4 was rendered valid when the donee got possession thereof which might be presumed to be shortly after the gift or at least before November 30, 1899. There is a valid acceptance when the subject of a donation comes into the possession of the donee [3]. It is clear that P5 which is called a deed of revocation was the unilateral act of the donors, it was not executed by Kandavanam and it cannot affect the title that Kandavanam had acquired to the lands years before. It is only in 1907 when Arumugam's feelings against the family to which his daughter-in-law belonged before her marriage had become embittered that he thought of finding an excuse for "revoking" the gift: most of the reasons he gives seem obviously inconsistent with the facts.

Counsel for the plaintiff appellant contended on the authority principally of *Carry v. Carry* [4], that the rule of *jus accrescendi* applied in this case and that on the death of Poopalasingham, the other two donees in P6 became entitled to the entire property. It is desirable to say a few words on this question, as it was contended with confidence that this case applied, although it is not necessary for the decision of this case. There a property had been conveyed to one Menatchi by a deed of gift and she held it as a fiduciary subject to the condition that "upon the death" of M. the gift in favour of Henry, Patrick, Emmaline and Thomas should take effect, these were the children of the donor and Menatchi. Henry predeceased the mother. Thomas and the mother instituted an action against Patrick and Emmaline. The action which was one for partition would undoubtedly have failed unless she succeeded in convincing the Court that Henry was entitled to a fourth share in the land at the time of his death and she acquired it by inheritance or that

[1] *Government Agent, S. P. v. Karolis (1896) 2 N. L. R. at p. 73.*
[2] *3 Maasdorp, Institutes (1st Ed.) 93; Voet 39-5- 13.*
[3] *11 N. L. R. 232 (supra).*
*Senanayake v. Dissanayake, (1908) 12 N. L. R. 1.*
[4] *(1917) 4 C.W.R. 50.*

her son's interest lapsed and her fiduciary interest became full dominium in respect of a fourth share. She failed to convince the Court of the soundness of either proposition and it was decided that the property cannot be said to "belong in common" to Menatchi and her children within section 2 of the Ordinance (No. 10 of 1863). But in repelling the second contention of the plaintiffs it was observed that the principle of *jus accrescendi* applied to property given by a deed of gift too. The Court could have arrived at the decision dismissing the action without any resort to this principle. A fiduciary, as a general rule, becomes the absolute owner of the property left subject to a *fidei commissum*. This is a rule which applies really to a *fidei commissum* created by a testamentary document, for in such a case there is a presumption that the testator intended the fidei commissary legatee to have no transmissible interest unless he survives the fiduciary, and if there is no such person, the fiduciary would hold the property free of the burden of the *fidei commissum* imposed by the testator: there is no person to whom he can deliver the property. This applies where there is no person of the class of fidei commissary alive, for as Voet says, if none of those to whom restitution had to be made survive, the fiduciary is taken to be relieved from the burden of the *fidei commissum* (7–1–13). In the case of a *fidei commissum* created by a deed it is difficult to realise a fiduciary holding the property free of the *fidei commissum* for the contingent interest of the fidei commissary was, as a rule, transmitted to his heirs. For some time till about 1916 the principle of *jus accrescendi* appears to have been applied in Ceylon to all dispositions whether created *inter vivos* or by last will. But in 1917, it was argued that the principle applied only in the case of testamentary dispositions (*Carry v. Carry* [1]); the same view was again propounded unsuccessfully in 1918 in *Usoof v. Rahimath* [2]. Finally the question was again raised in *Carlinahamy v. Juanis* [3], where a Divisional Bench reviewed the authorities and modified very considerably the previous view, thus: In the case of a gift the law will not presume merely from the conjunction of two or more persons in the same liberality, that in the event of one of these predeceasing the vesting of the liberality, his share was intended to accrue to the others. Such a result can only arise from operative words which either expressly or by implication have this effect. One must be able to gather such an intention from the language used by the donor, or really by the draftsman employed by him. If one can gather from it that the donor positively contemplated the predecease of a donee and intended that the specific share of that person should in that event go to his co-donees, there would be no difficulty: one is then really construing the language used in the document.

The appeal of the second, third and fouth defendants is allowed with costs in both Courts: the appeal of the plaintiff is dismissed.

DIAS J.—I agree.

*Appeal of second to fourth defendants allowed.*

*Appeal of plaintiff dismissed.*

[1] *(1917) 4 C. W. R. 50.*

[2] *(1918) 20 N. L. R. 225.*

[3] *(1924) 26 N. L. R. 129.*