1952 *Present :* **Gratiaen J. and Pulle J.**

MOHAIDEEN, Appellant, *and* MARICAIR *et al.*, Respondents

S. C. 107 Inty.—D.C. Batticaloa, 597

Donation—Gift by father to his minor child—Acceptance.

Under Roman-Dutch law, a father, when he makes a donation to his minor child, can authorise some other person by " a special mandate " to accept the gift on the child's behalf.

[1] *(1929) 31 N. L. R. 241.*

APPEAL from a judgment of the District Court, Batticaloa.

H. V. Perera, Q.C., with *C. T. Olegasegarem*, for the petitioner appellant.

N. E. Weerasooria, Q.C., with *M. A. M. Hussain*, for the respondents.

Cur. adv. vult.

July 18, 1952. GRATIAEN J.—

By a notarial conveyance No. 11082 dated 7th March, 1944, the 1st respondent purported to donate certain lands to his minor daughter Pathumma reserving to himself a life-interest in the properties. Pathumma married the petitioner shortly afterwards, and on her death he applied for letters of administration in respect of her estate claiming, *inter alia*, that the immovable property in question formed part of her estate subject to the life-interest reserved therein. The 1st respondent objected to the inclusion of the property on the ground that the gift was inoperative as it had not been validly accepted by or on behalf of Pathumma during her lifetime. The learned Judge upheld this objection, and the present appeal is from his decision on this issue.

Although the parties to the transaction under consideration are Muslims, it is common ground that the validity or otherwise of the gift must in the circumstances of this case be decided in accordance with the principles of the Roman-Dutch Law.

The 1st respondent has given evidence explaining the procedure adopted by him in having the gift accepted on the face of the deed by an uncle of Pathumma named Ibralevvai on her behalf. "I took Ibralevvai", he said, "to the notary's office, to sign the deed as a witness. Later the notary wanted a guardian to accept the donation on behalf of my daughter . . . . and I asked him to make Ibralevvai the guardian and to draw up the deed". Ibralevvai accordingly, at the express request and with the full concurrence of the 1st respondent who was the donor as well as the natural guardian of the donee, formally accepted the gift in the following terms :—

> "As the said . . . . Pathumma is at present a minor, I Packirthamby Ibralevvai, her uncle, do hereby thankfully accept this donation subject to the life-interest mentioned above for and on her behalf."

It is abundantly clear from the admitted facts that the 1st respondent genuinely desired to gift the property to his minor daughter and had taken such steps as were considered necessary, on the advice of a notary public, to divest himself of the title in her favour under a conveyance which was expressed to be absolute and irrevocable. Can he now be heard to attack the validity of the transaction on the ground that the person whom he had himself selected to accept the gift on her behalf was disqualified from so doing because he was not in truth her natural guardian ?

The Roman-Dutch Law relating to donations by a father in favour of his minor children takes a more liberal view than the early Roman Law

which had refused to recognise a son or daughter who was still *in familia* as having any existence independently of the *paterfamilias*. The historical development of the subject in South Africa has been fully discussed by de Viliers C.J. in *Slabber's Trustee v. Neezer's Executor*[1] where, after consideration of the relevant authorities, he concludes as follows :—

> " In regard to donations proper as distinguished from remuneratory donations, the conclusions to be deduced from the latest authorities are these. They require registration in the Deeds Office if they exceed the sum of £500 in value, and they are invalid and revocable to the extent of such excess, unless so registered. A donation by a father to his minor child is completed by such registration whatever the amount may be. An unregistered donation by a father to his minor child is not deemed to be complete without clear proof of acceptance by the child, or by the father on behalf of the child. Acceptance by the child alone is sufficient if he has reached the age of puberty ; but if he is under that age, the gift must be accepted by the Court, the Master *or the father in his behalf*. Whether the minor be under or above the age of puberty, the complete acceptance by the father would be sufficient ; but such acceptance would be incomplete as such without *some act done by the father to prove his intention to divest himself of the property*, such as delivery to a third person, transfer in the Deeds Office, or, in the case of a cession of action, notice to the debtor of such cession to the child. "

It seems to me that these principles are perfectly capable of sensible adaptation to suit modern conditions in this country, and that the real test in each case is whether the father has " proved his intention to divest himself of the property " in favour of his child " with some kind of solemnity indicating to all concerned the exact nature of the transaction. " *De Kock v. Van de Wall*[2]. The Roman-Dutch Law does not regard it as incongruous that the donor, *qua* parent of the donee, should formally accept his own gift on the child's behalf. *A fortiori*, he could authorise some other person by " a special mandate " to accept the gift. *Voet 39–5–13*. In the present case, he was instrumental in procuring the necessary acceptance by Pathumma's uncle " in such an open and public manner as to make it binding on the father and irrevocable by him. " *Maasdorp's Institutes*[3]. The property was formally conveyed and the deed was duly registered in accordance with the law affecting title to land in Ceylon ; and he unambiguously manifested his intention to complete the gift which in consequence became irrevocable as far as he was concerned. *Vide* also *footnote (a) at page 17 of Krause's translation of Voet on Donations*. The case is not complicated by other considerations which may possibly arise if a transaction of this kind is attacked by a creditor of the donor.

In *Francisco v. Costa*[4] Clarence J. upheld the validity of a gift by parents to their minor child where, upon execution of the conveyance, they " allowed the child's grandmother to accept on her behalf ". This

[1] *(1895) 12 S. C. 163.*
[2] *(1899) 16 S. C. 463.*
[3] *(5th Ed.) 3, 69.*
[4] *(1889) 8 S. C. C. 189.*

ruling was followed with approval by Middleton J. in *Lewishamy v. de Silva*[1]. It is true that in both these cases the property was in fact subsequently possessed on the minor's behalf, but I am not convinced that this further step is always essential to clothe a parent's gift to his child with validity. Such a requirement would certainly be highly artificial where a parent has reserved to himself the enjoyment of the property during his life-time.

In my opinion the 1st respondent is precluded from challenging the validity of the donation. I would accordingly allow the appeal and enter a declaration that the property conveyed to Pathumma by deed No. 11082 dated 7th March, 1944, attested by N. S. Rasiah, Notary Public, forms part of her estate. The petitioner is entitled to his costs of appeal and of the contest in the court below.

PULLE J.—I agree.

Appeal allowed.