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

RATNAYAKE, Appellant, *and* MARY NONA *et al.*, Respondents

S. C. 87—D. C. Negombo, 14,631

Donation—Subsequent birth of child to donor—Action for revocation of gift—Prescriptive period—Prescription Ordinance (Cap. 55), ss. 6, 10.

A donor's right to institute an action for the revocation of a deed of gift on the ground of the subsequent birth or legitimization of a child becomes prescribed three years after the time when the cause of action accrued. A claim of this nature falls within the ambit of section 10, and not section 6, of the Prescription Ordinance.

APPEAL from a judgment of the District Court, Negombo.

H. V. Perera, Q.C., with *H. W. Jayewardene*, for the defendant appellant.

N. E. Weerasooria, Q.C., with *Ivor Misso* and *A. Nagendra*, for the substituted plaintiffs respondents.

Cur. adv. vult.

June 13, 1952. GRATIAEN J.—

Under a notarial conveyance P1 dated 15th June, 1940, the original plaintiff, who was an elderly widower, had donated the property to which this action relates to his nephew the defendant. The donation was duly accepted, and the title to the property accordingly passed to the defendant.

The plaintiff was keeping a mistress (the 2nd substituted plaintiff) at the time of the transaction. On 22nd December, 1942, an illegitimate child (the 3rd substituted plaintiff) was born to this union. Very shortly thereafter he decided to regularise his association with the lady concerned, and he married her on 21st January, 1943. In consequence, the child became legitimated.

The plaintiff instituted the present action against the defendant on 26th November, 1947—i.e., more than 4 years after the date of his marriage—to have the deed of gift P1 " annulled and cancelled " by the Court. He claimed that the subsequent birth of the child entitled him to relief from the consequences of his former liberality. As an alternative ground for revocation he pleaded that the defendant had been guilty of " gross ingratitude ", but this allegation was not established at the trial and no longer arises for consideration.

Although the deed of gift expressly purported to be " absolute and irrevocable ", it is common ground that under the Roman Dutch Law a donor nevertheless retains—except in the case of remuneratory gifts, dowries, or donations *propter nuptias*—" the discretion and the right to revoke a gift on account of the subsequent birth of children " (*Voet 39–5–26*) or " when natural children have subsequently been legitimated ". (*Voet 39–5–27*).

The learned Judge entered judgment as prayed for in the plaint, and rejected the special defences whereby it was pleaded (*a*) that the cause of action to have a deed revoked on the ground of the subsequent birth of a child did not survive to the donor's legal representatives or heirs after his death, and (*b*) that in any event the action was prescribed.

In the view which I have taken it is unnecessary to answer the interesting question of law raised by the first plea, because in my opinion the learned Judge was not justified in holding that a claim of this nature falls within the ambit of Section 6 of the Prescription Ordinance (Cap. 55). It seems to me that an action to have a gift revoked on the ground of the subsequent birth of a child is based on a cause of action " not expressly provided for " in the Ordinance, and therefore becomes prescribed within 3 years from the time when the cause of action has accrued (Section 10).

The relevant words of Section 6 of the Prescription Ordinance are as follows :—

> "No action shall be maintainable upon any written promise, contract, bargain, or agreement . . . unless such action shall be brought within six years *from the date of the breach of such . . . written promise, contract or bargain.*"

Before deciding whether these words apply to the present proceedings, it is necessary to examine the precise nature of the common law remedy which is available to a donor in a revocatory action of this kind.

"The law, declaring what the paternal duty in regard to progeny still to be begotten is, takes for granted, contrary to the principles of strict law (which are in other respects applied to donations) this tacitly presumed condition, namely—'if no children shall subsequently have been born to the donor' . . ." (*Voet 39–5–30*). The presumption is not rebutted "unless the donor has expressly renounced his right to revoke for that reason" (*Voet 39–5–31*).

Voet explains that "it must not be imagined that a donation is invalidated on account of the subsequent birth of children by the mere operation of law, and that the donor is again forthwith made the owner of the donated property; but rather that this cancellation must be sued for by him, and the donated property must be reclaimed by him by a personal action (*condictio*)". (*39–3–35*). The personal action is called into existence on the subsequent birth of the child, which is described as "a purely accidental happening giving occasion for the cancellation". In other words, the cause of action arises as soon as the child is born, and the donor may "repent of his liberality" in order that he may fulfil "his obligations of paternal duty". (*Voet 39–5–31*). When the equitable jurisdiction of the Court to grant *restitutio in integrum* is invoked "by means of the *querula*" (*Voet 39–5–35*), it is left to the discretion of the Judge to determine whether the gift should be cancelled having regard to all the circumstances which were relevant "at the time when the gift was made". (*Voet 39–5–32*). In other words, the donor must prove that "the conditions are suitable for the revocation of the gift" (*Voet 39–5–35*). It is the Court's decree and not the mere wish of the donor that operates to invalidate the gift.

Mr. Weerasuriya has argued that Section 6 of the Prescription Ordinance applies because the relief claimed is for the enforcement of a "tacit condition of the written agreement". I do not doubt that an action for the enforcement of an implied term or condition of a written agreement may in certain circumstances be regarded as an action to enforce the written agreement itself. *Dawbarn v. Ryall* [1]. But this does not conclude the question. Even if that be the true theoretical explanation of the basis of a revocatory action with which we are now concerned, the language of Section 6, as I read it, seems appropriate only to proceedings for the enforcement of a right which flows directly from the breach of an express or implied corresponding obligation imposed by the contract on the other party to "the written promise, contract, bargain or agreement." The Section is inapplicable where,

[1] (*1914*) *17 N. L. R. 372.*

as has happened in this case, the cause of action proceeds not from such a breach but from some fortuitous supervening circumstance which the law, on equitable considerations, regards as having destroyed the original foundation of the donation so as to call for a judicial determination of its future operation.

The " tacit condition " suggested by Voet as the theoretical explanation of a revocatory action can, in a sense, be equated to a contractual *resolutive condition* which, if subsequently fulfilled, invalidates the contract which was valid at its inception (*Voet 18–5–1*). As *Wessells* explained in *The Law of Contract in South Africa* [1], " a contract subject to a resolutive or resolutory condition creates a legal bond between the parties, but in such a way that if the condition is fulfilled the legal bond is broken, and the parties are restored as much as possible to their former condition. By the fulfilment of the resolutive condition, the contract ceases to exist."

But is there any need in the present context to discover some logical explanation for the remedy which the Roman Dutch Law recognises in revocatory actions ? As in the well-known " frustration " cases in commercial transactions, some may explain the remedy by speaking of the disappearance of the assumed foundation of the basis of the contract, others by reading an implied term into the written instrument. *Constantine Steamship Line v. Imperial Smelting Co.*[2]. Lord Sumner would perhaps describe it as " a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands". *Hirji Mulji v. Cheong Yue Steamship Co.*[3]. Suffice it to say in the words of Lord Simon that, " whichever way it is put, the legal consequence is the same."

Section 6 of the Prescription Ordinance does not apply for the simple reason that the cause of action involves no " breach " of any obligation by the donee, for it would be facetious indeed to impute any " blame " to him for the happy event which had taken place in the donor's household. In fact, no obligation to restore the property could arise unless and until a decree for cancellation had been pronounced. The decisions of this Court in *Government Agent, Western Province v. Pallainappa Chetty*[4] and *Ponnamperuma v. Gunasekere*[5] are distinguishable because they were concerned only with deeds of gift which expressly empowered the donor to revoke the gift *by his own act* and without the intervention of the Court. In such an event, the donee's repudiation of the right of revocation would clearly have constituted a " *breach* " of the contract giving rise to a cause of action contemplated by Section 6. In this case there was no such breach, and Section 10 of the Ordinance applies because no special provision has been made for a cause of action of this kind. If that be the correct view, it was conceded in argument before us that the action was prescribed. I would therefore set aside the judgment appealed from and dismiss the plaintiff's action with costs in both Courts.

GUNASEKARA J.—I agree.

Appeal allowed.

[1] *Vol. 1, pages 432 and 437.*
[2] *(1942) A. C. 154.*
[3] *(1926) A. C. at page 510.*
[4] *(1908) 11 N. L. R. 151.*
[5] *(1921) 23 N. L. R. 235.*