1944 *Present:* **Howard C.J. and Soertsz J.**

CAROLIS *et al.*, Appellants, *and* ALWIS, Respondent.

*151—D. C. Colombo, 2,423.*

*Fidei commissary gift—In favour of children and grandchildren of donee—Or in favour of brothers and sisters of donee—No acceptance on behalf of the fidei commissaries—Revocation by donor.*

Where a fidei commissary gift, in favour of the children and grandchildren, by representation, of the donee or in another event in favour of the brothers and sisters of the donee, some of whom were alive at the time and were minors, is not accepted on behalf of the fidei commissaries, the donor is entitled to revoke the gift with the concurrence of the donee.

In such a case acceptance by the immediate donee, who was a daughter of the donor, is not a sufficient acceptance on behalf of her brothers and sisters.

APPEAL from a judgment of the District Judge of Colombo.

*H. V. Perera, K.C.* (with him *N. Nadarajah, K.C.*, and *R. C. Fonseka*), for plaintiffs, appellants.

*N. E. Weerasooria, K.C.* (with him *E. B. Wikramanayake*), for defendant, respondent.

*Cur. adv. vult.*

February 29, 1944. SOERTSZ J.—

This is an extraordinary case. It would be positively Gilbertian but for the questions of law involved in it. It relates to a next friend who, having made solemn declaration that the Notary he had employed to draw up a deed of gift had grievously misunderstood his instructions and had driven him to the necessity of joining with the donee to execute an indenture in order to give proper effect to his real intention, now comes into Court to ask that the indenture be ignored as if it had never been written, and judgment given in accordance with the clause in the deed which the indenture had unequivocally repudiated. The learned trial judge could not see his way to grant this preposterous prayer, although he added to the piquancy of the plaintiff's case by expressing it as his opinion that, by resorting to the indenture, the third plaintiff had laboriously achieved nothing, for he found that in a correct interpretation, both the deed and the indenture yielded exactly the same result. The plaintiff now appeals, and for him it is contended that the law enables him to disown his real intention and to stand by what had never been his intention. This may sound surprising. But it is not entirely unknown for the law to produce results which may appear incomprehensible to the uninitiated. Is this such a case?

The relevant matters are few. On October 22, 1937, the third plaintiff purported to gift the properties with which this case is concerned to his daughter Edith Ruth who at the time was the wife of a Dr. Alwis. The main clauses in that deed were:—

I . . . . " donee shall not sell, mortgage, gift, dispose of by Will or in any other manner alienate or encumber the said premises

. . . but shall hold and possess the same . . . .during her natural life and after her death the said premises shall absolutely devolve on her lawful child, children or remoter issue, the child or children of any deceased child taking by representation ". . . . .

" if the said donee shall die without leaving any issue or if the said donee does not live with or deserts her husband . . . . or if in the event of her . . . . husband's death she shall contract a marriage or alliance legal or otherwise with any man who shall not belong to the community . . . . then in any or anyone of such cases, the said property shall thereupon go to and devolve on the lawful child or children or the remoter issue of any of the said party of the second part the child or children of any deceased child taking by representation . . . . and in the event of there being no such child, children or remoter issue, then on all my other children equal shares " . . . .

It will be observed that the first clause is identical in both documents. By itself, it creates no difficulty. It gives the properties to the donee subject to a fidei commissum in favour of her children and grandchildren by representation who were to succeed her on her death. So far as that clause goes, the donor appears to have contemplated a full, faithful, and fruitful life for his daughter the donee.

Clause 2, however, in both the deed and the indenture shows the donor in a less optimistic, indeed in a pessimistic mood. He contemplates three painful possibilities, in permutation as well as in combination—a childless life, an unfaithful life, a disreputable life. According to both the deed and the indenture, a childless life, otherwise uncomplicated, was to result in the properties going to her brothers and sisters at her death. But, desertion by her of her husband, or a marriage or alliance outside the donor's community leads to divergent results. According to the deed, in either event, and whether, at the time she incurs the disqualification, she is childless or not, her rights, interest, and estate devolve on her brothers and sisters, whereas according to the indenture in either of those events, if she has issue at the time, they are preferred to the brothers and sisters so far as the rights forfeited by the donee are concerned.

That, in my judgment, is the correct meaning of the two clauses. I cannot agree with the interpretation the learned trial judge has given of clause 2 in the deed as meaning that the desertion by the donee of her husband, or the forbidden marriage or alliance would result in conferring the donee's rights on her brothers and sisters only if the donee herself is childless. In other words, the learned Judge reads into clause 2 of the deed the condition *si sine liberis decesserit.* There is no justification whatever for doing that in this case. Such a condition is read into testamentary *fidei commissa* in exceptional cases as explained by the Privy Council in *Galliers v. Kycroft*[1], and that is done " from a conjecture of dutiful conduct " and on an assumption that in those cases, if it were possible to make inquiry, " it would be found that less had been written than spoken ". That is the explanation of the great Papinian given in

[1] *3 Bal. Rep. 74.*

support of a response made by him justifying the introduction, in that case, of the condition "*si sine liberis*" recommended by him. But such a condition is never read into a *donatio inter vivos*, (see *Ahamadu Lebbe v. Sularigamma*[1]) for a donatio in the view of the Roman Dutch law, is a contract and the contracting parties are deemed to have written no less than was spoken. The provision made in clause 2 of the deed is both understandable and reasonable. Read with clause 1 it makes the donee's children, if any, the *fidei commissaries* who will take ultimately, on the death of the donee, but makes her brothers and sisters the beneficiaries in the event of her estate terminating before her death.

For these reasons, I reach the conclusion that if clause 2 of the deed stood, the plaintiffs would succeed to the extent of a declaration in their favour for the lifetime of the donee.

But there is the indenture to be considered. Clause 2 of that instrument provides in clear terms that children of the donee shall be preferred to her brothers and sisters whenever her estate is terminated, whether by death or by forfeiture, and if the indenture is valid, the plaintiffs must fail. This indenture is challenged on the ground that it amounts to a revocation of a completed donation behind the back of the plaintiffs who are contingent beneficiaries. The question for decision, then, is whether the deed constituted a donation completed by acceptance or not as far as the 1st and 2nd plaintiffs are concerned, for as it is clear law that a donation, once it has been accepted, cannot be revoked except for a few definite reasons which have no application in this case. It is equally clear law that till it has been completed by acceptance a donation is revocable. It is also well settled that in the case of *fidei commissary* donations there must be acceptance by the *fiduciaries* as well as by the *fidei commissarii* and, as a rule, but for one or, perhaps, two exceptions, the acceptance must be in the lifetime of the donor. (*2 Burge 148; 7 N. L. R. 123; 17 N. L. R. 279.*)

The only acceptance there was, in this instance, is the acceptance by the donee, appearing on the face of the deed. That acceptance was in these terms:—

> "I the said Edith Ruth Alwis (*nee* Don Carolis) do hereby gratefully and thankfully accept the said gift subject to the conditions and restrictions aforesaid".

At that time, the donee's children, if any had been born, would, obviously, be minors. So were her brother and sister, the first and second plaintiffs. The donee was, in no sense, their natural guardian; nor was she their legal guardian; nor had she a mandate to accept for them. And, indeed, she did not profess to accept for them. And yet, it is contended that when she accepted in the form in which she did accept the gift, she was doing better than she or the donor knew, for it is claimed, that, when the donor made the gift and the donee accepted it in that form subject to the conditions, the legal effect was the same as if the donor had entrusted the gift to her to be given over to certain persons, and it is said, that according to Perezius, the result is that the obligation is completed on the part of the donor, and is not revoked

[1] *3 C. W. R. 208.*

by his death (8.54.23). This view of Perezius is contrary to what must be regarded as the higher authority of Voet and of the Digest. Nathan sums up the law on the point as follows:—

"Acceptance of a gift *inter vivos* must likewise take place in the donor's lifetime. If A, intending to donate to B, gives money to C to convey to B, and dies before the conveyance of the money, the gift, failing acceptance, is invalid. The acceptance of a donation on behalf of an absentee may be made by a notary on his behalf. In *de Kock v. Vanderwall's Executors*[1], it was said: 'one of the necessary ingredients of a valid donation is acceptance by the donee or someone duly authorised on his behalf. According to Voet an unauthorised acceptance by a notary or other similar official would bind the donor on such acceptance being ratified by the donee. It is not quite clear whether such acceptance could, in Voet's opinion, be effected after the death of the donor. In a previous passage of the same section he had explained that the acceptance should take place during the lifetime of the donor. This is clearly laid down in the Digest (30. 5. 2. 6.) where it is said that if a person, with the intention of making a donation to me, gives money to another to bring to me that does not become my property because the donation has not been completed."

Be that as it may in regard to the sufficiency of acceptance after the death of the donor, we are in this case considering the question of the capacity of a living donor to revoke a gift made by him before it has been accepted by the beneficiaries concerned. In view of Voet's opinion and of the passage cited by Nathan from the Digest a stronger case appears to be made out for a living donor being able to recall his messenger before he has reached his destination, in other words, to revoke the gift. Perezius does not deal with such a case, and the view of Perezius even if it be accepted in preference to that of Voet and of the Digest, in regard to the position resulting on the death of a donor who had offered a gift entrusting it to be delivered, it would be fallacious to deduce from the view the proposition that a living donor may not repent of his offer and withdraw it before it has been accepted.

The other contention advanced on behalf of the appellants was that the donation in this case although given immediately to one person, contemplates her family, that is to say that it is a gift which in the words of Perezius is:

"*donatio uni facta concernat favorem familiae in qua vult rem donatam manere donator*"

It is argued that the donation here is of that kind and that the acceptance by the immediate donee is a sufficient acceptance on behalf of the descendants as well. Perezius (8.55.12) is relied upon in support. He says—

"if the gift made to one person is made in favour of a family . . . . by no pact can it be revoked in respect of after-comers for it is sufficient in order that it may be considered a perpetual donation that the first donee has accepted it so that there is no need of a subsequent acceptance."

[1] *9 C. T. R. 500.*

For the argument put forward on this authority, three decisions of our Court were called in aid, namely, *John Perera v. Avoo Lebbe Marikar*[1], *Soysa v. Mohideen*[2], and *Ayan Perumal v. Meeyan*[3]. Before going on to examine these cases I would point out that although the two earlier cases are referred to in the Reports as decisions given by a Full Bench, they are not so in fact. The earliest case came up before two Judges, and on their not being able to agree, it went up before two other Judges. On that occasion, too, there was disagreement. Clarence J. took one view and Burnside C.J. another. But for some reason which is not clear, Clarence J's judgment appears to have prevailed. Perhaps on this point it agreed with the opinion of the two Judges who first considered the point. The second case of *Soysa v. Mohideen* (*supra*) is a judgment of a Divisional Bench on a question of compensation, but *not* on the point that has arisen here. In regard to that question, it is a decision of two judges. So was the third case, a decision of two Judges. In the first named case a father conveyed certain property by post-nuptial settlement to his married daughter subject to the condition that she should enjoy the same for her life and that after her death it should be enjoyed "by her heirs and descendants in perpetuity." The daughter accepted the gift. Later, she having as yet no issue, the father made a Will by which he devised the property to the daughter *absolutely*. After his death, a son, who was the plaintiff in that case, was born, and the question of the revocation of the gift arose. Clarence J. following Perezius held that—

> "where a gift is made to somebody in favour of a family in which the giver wishes the property to remain, the giver is not to be allowed to revoke the limitation to the after-comers."

It will be observed at once that the deed in that case was literally, a donation that the donor intended should remain in the family *in perpetuity*. In the case before us no such intention is expressed or can reasonably be inferred. Incidentally, I would permit myself the observation that one feels inclined to share Burnside C.J's impatience of "the abstract propositions" of the "ponderous Dutch commentator" when one is called upon to apply such propositions to cases as they arise in all their Protean shapes and forms. Perezius seeks to justify his proposition with the argument that—

> "it would be absurd, in order to make a *fidei commissum* irrevocable to require the acceptance of infants and persons not yet born",

but that absurdity would apply to all *fidei commissary* donations, not only to those intended to remain in a family, and yet it is clearly established by overwhelming authority that, as a rule, acceptance by or on behalf of both *fiduciary* and *fidei commissary* donees is essential to complete a gift. The donees *in esse* or *in utero* must accept, themselves or by competent agents. Those entirely *in futuro*, when the time comes. It would, indeed, be absurd if the unborn are to be bound by the contracts of the living without any choice of their own; if they should be bound even by gifts that had become onerous with the lapse of time. There are

[1] *(1884) S. C. C. 138.* [2] *(1914) 17 N. L. R. 279.*
[3] *(1917) 4 C. W. R. 182.*

difficulties that would and do arise in connection with this matter of acceptance but those result from the fact that *fidei commissa* which originally were testamentary were allowed to be introduced into donations *inter vivos*. In the former case, the beneficiaries had the safeguards of the right of adiating or not and they were assisted by " benefit of inventory " and of the " *Saptium deliberandi* ". In the latter case, the only safeguard the law could provide was the requirement of acceptance on the part of each and every party concerned as donee or beneficiary to make the donation complete and binding.

Clarence J's Judgment in the case just discussed was followed in *Soysa v. Mohideen*. The facts of that case were that a donor gifted property to four persons, three nephews and a niece subject to the condition that they should not alienate the property but that, on their deaths, it should devolve on their issue and if any of them should die without issue his or her share should go to the others and their issue. The donees accepted the gift subject to the condition. Two of the donees died without issue and the donor cancelled the gift he had made and regifted the property to the two surviving donees on the first deed absolutely. Later sons of one of these two donees of the latter absolute gift claimed a half share of the land against those two donees' lessees. It was held that the revocation of the first deed was invalid, the Court having taken the view that it was a gift in favour of the family and that the acceptance by the fiduciary donees enured to the benefit of the plaintiffs.

Lascelles C.J. in the course of his judgment made the following observation :—

> " As a general rule, in order that a *fidei commissum* created by gift should be valid, the donation must be accepted by the *fidei commissary* as well as by the fiduciaries (2 Burge 148; de Silva *v.* Thomas Appu 7 N. L. R. 123). But this rule is not without exception. The guardian may accept for an infant or if the child is *in utero* the acceptance may be made by the person under whose authority he will be placed at birth (Walter Pereira 606). In the present case it is material that the plaintiffs, who now sue as minors cannot have been in esse at the date of the *fidei commissum* in their favour ".

The implication of the concluding part of that observation as I understand it is that in the case of donees or *fidei commissaries in esse* or *in utero* at the date of the deed acceptance by them or by the guardian as the case may be, or by the person under whose authority they would fall at birth would be necessary to complete the gift, but that no acceptance other than acceptance by a member of the family was necessary in the case of the plaintiffs because they were not *in esse* or *in utero* at the time of the gift. If that reasoning is sound the view taken by Lascelles C.J. is against the plaintiffs before us. They were indubitably *in esse* at the time of the gift, and therefore there should have been acceptance by their guardian to make the gift complete. But the view indicated by Lascelles C.J. in the passages I have quoted receives no support from the references made by him. The authorities cited by Walter Pereira and other authorities lay down that acceptance by the *fidei commissary* of the donation is necessary, the exception being in regard

to infants and those *in utero* for whom some person may accept. There can however be no vicarious acceptance on behalf of those neither *in esse* nor *in utero* exeept in the one case of a donation clearly in favour of a family. De Sampayo J. in coming to the same conclusion dealt with this question in a different way. He said:—

> " There is no doubt that under the Roman Dutch law even a *fidei commissum* gift may be revoked by the donor before acceptance. I think that in the case of a gift to a person subject to a *fidei commissum* in favour of his descendants, the Roman Dutch law recognises an exception and regards the acceptance of the immediate donees as a sufficient acceptance on behalf of the descendants as well. This would undoubtedly be so if the *fidei commissaries* are minors or *in utero*. I think the law is the same in the case of an unborn generation ".

It is clear that de Sampayo took the view that a gift in favour of the family needed no other acceptance than by the donee either on behalf of those *in esse*, *in utero* or in future. The learned Judge then quotes from Perezius and continues:—

> " It was urged on behalf of the appellants . . . . that the exception to the rule of personal acceptance there allowed (*i.e.*, by Perezius) must be confined to the case of *fidei commissum* in favour of a family which includes other people besides children and descendants. But, no such distinction is drawn and the reasoning applies even more strongly to a *fidei commissum* in favour of a family in the narrowest sense of a man's own children and descendants. Perezius means to lay down generally that the acceptance by the immediate donee *who is the head of the family* is valid acceptance on behalf of all those who follow him and that then the donation is considered *perpetua* or at once complete on behalf of all the succeeding beneficiaries ".

If I may respectfully say so, it appears to me that Perezius is here referring to those perpetual *fidei commissa* so common in Roman Dutch law. The old case of *John Perera v. Avoo Lebbe Marikar* as I have observed, dealt with such a *fidei commissum*—" after her (the donee's) death the property shall be enjoyed by her heirs or descendants in *perpetuity* " and, in my view, the application of the rule laid down in that case to the facts in the case of *Soysa v. Mohideen* where the *fidei commissaries* were only the donees children and grandchildren by representation was an unjustifiable extension of the rule. Indeed, Lascelles C.J. appears to have had some misgiving on this point for he said:—

> " Whatever room there might have been for doubt, if the matter had been *res integra*, the question is concluded so far as we are concerned, by the judgment of the Full Court in *John Perera v. Avoo Lebbe Marikar* ".

I have already pointed out that that was not a Full Bench ruling; and that even if it had been, the two cases dealt with entirely different kinds of *fidei commissa*.

In regard to de Sampayo J's view that the passage cited from Perezius (8.55.12) " applies even more strongly to a *fidei commissum* in favour of

a family *in the narrowest sense* ", if it is carried to its logical conclusion, it surely must mean that in *fidei commissa* in favour of the members of a family, acceptance by the immediate donee, if he is *the head of the family*, is sufficient once and for all, and that all the elaborate rules of law in regard to acceptance on behalf of minors by the natural or legal guardian and on behalf of those *in utero* by those who will " be in authority " over them at birth, would be unnecessary except in simple donations. And who is to be reckoned the head of the family? And what would be the position if the gift is to a " family in the narrowest sense ", and the immediate donee is not the head of the family ? Mr. H. V. Perera appreciated this difficulty and strove to eliminate those words from the judgment. It is true that those words " the head of the family " do not occur in Perezius, but the fact remains that they formed part of the *ratio decidendi* of de Sampayo J's judgment.

To sum up, in regard to these two cases of *John Perera v. Avoo Lebbe Marikar* and *Mohideen v. Soysa*, the position is that even if we were to regard ourselves bound by them, they are clearly distinguishable from the case before us. The earlier case dealt with a " perpetual " *fidei commissum* and in the later case, Lascelles C.J. appears to have taken the view he did because he considered himself bound by the ruling in the earlier case and also drew what, I have respectfully submitted, was an erroneous inference from the requirement of acceptance on behalf of minors and those *in utero*, while de Sampayo J. based his decision on what, for brevity, may be described as " the head of the family " theory. The present case is one of a *fidei commissum* in favour *only* of the donee's children or grandchildren by representation, or, in another event, of her brothers and sisters some of whom, at least, were alive at the time. The donee was, in no sense, the head of the family either in regard to her brother and sister, or even in regard to her children, her father and the children's father being alive at the time.

The third case the appellants relied on was the ruling given in the case of *Ayan Perumal v. Meeyan*[1]. That case too is clearly distinguishable in that there was an acceptance by the father of one minor, the immediate donee, who was also the grandfather of the other two minor beneficiaries and the acceptor was given a mandate to collect rents and after deducting payments incurred on account of the properties gifted, to pay the balance to the beneficiaries " in the proportion in which they are, shall, or may be entitled ". There was evidence that he did so enter into possession and carry out the mandate. That was a wholly different case and has hardly any application to the facts of this case.

I would, therefore, hold that the acceptance by Edith Ruth was an acceptance, both expressly and impliedly, an acceptance for herself, and had no further force or effect in law; that she and the donor the only parties in the deed having joined to re-execute it in the manner stated, there was a revocation of the benefit conferred on the 1st and 2nd plaintiffs by clause 2 of the deed; and that that was a revocation

[1] *4 C. W. R. 182.*

the donor was competent to make with only the donee's concurrence, inasmuch as there had been no acceptance on behalf of the 1st and 2nd plaintiffs, of the benefit sought to be conferred on them.

I would dismiss the appeal with costs.

HOWARD C.J.—I agree.

*Appeal dismissed.*