1954 *Present :* Rose, C.J., and Gratiaen, J.

G. P. KODIKARA, Appellant, *and* S. A. FERNANDO, Respondent

S. C. 431—D. C. Negombo, 15,730 L

Contract—Stipulation in favour of third party—Validity thereof—Roman-Dutch Law.

Under Roman-Dutch law a stranger to a contract is entitled to claim the benefit of a stipulation made in his favour. This rule is subject only to the qualification that until the benefit stipulated for has been accepted by him he can be deprived of it by agreement between the contracting parties without reference to him.

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff appellant.

M. I. M. Haniffa, with *M. H. M. Naina Marikar*, for the defendant respondent.

Cur. adv. vult.

May 20, 1954. GRATIAEN, J.—

This action relates to a property which Lucia Fernando had donated to her grandson Joseph Fernando on 11th August 1945 subject to (1) a life-interest in herself and (2) a condition that the donee, "his heirs, executors, administrators *and assigns*" would sell the property to the plaintiff "or his heirs" for a consideration of Rs. 350 "at any time that he demands within a period of five years from the date hereof" (P2). Joseph Fernando accepted the gift and the condition attaching to it.

By a conveyance P3 dated 27th September 1945 Lucia and Joseph Fernando purported to sell the property to the defendant (who is Lucia's son) "to have and to hold the same *absolutely and for ever*". There can be no doubt that P3 operated effectively to transfer Lucia's life-interest as well as the right, title and interest which had previously passed to Joseph under P2. The question is whether or not the conveyance was subject to the original condition attaching to the grant in favour of Joseph and his "assigns".

On 24th April 1950 the plaintiff instituted this action against the defendant claiming that the defendant (as Joseph's successor-in-title) was under an obligation to sell the property to him for Rs. 350 in terms of the condition stipulated for his benefit in P2.

The defendant pleaded by way of defence that he was under no contractual obligation to sell the property to the plaintiff. As I understand the recorded submissions made on his behalf at the trial, it was argued that the stipulation in P2 was bad for want of mutuality, and that only Lucia (but not the plaintiff) had a remedy to enforce the contract against Joseph (but not against the defendant).

The rights and obligations of the parties under P2 and P3 were governed by the Roman-Dutch law, under which system a stranger to a contract is entitled to claim the benefit of a stipulation made in his favour provided that he accepts it within the prescribed period—*Mutual Life Insurance Co. of New York v. Hotz* [1]. This principle has been recognised by the Courts of this country —*Jinadasa v. Silva* [2] and *Marthelis Appuhamy v. Peiris* [3]. The rule enunciated in these cases is subject only to the qualification that, until the benefit stipulated for has been accepted by the third party, he can be deprived of it by agreement between the contracting parties without reference to him—*Van der Plank v. Otto* [4]. Watermeyer, C.J. states that the promisor can also be released unilaterally by the

[1] *(1911) S. A. A. D 556.*
[2] *(1932) 34 N. L. R. 344.*
[3] *(1946) 47 N. L. R. 78.*
[4] *(1912) S. A. A. D. at 353.*

promisee from his contractual obligation " at any time before the third party's inchoate right has been perfected by acceptance communicated to the promisor "—*C. I. R. v. Estate Crewe* [1].

Let us apply these rules to the present case. It is not disputed that the plaintiff had, at some stage within the five-year period available to him, accepted the benefit of the stipulation in his favour contained in the deed of donation P2. The precise date of acceptance was, however, not investigated in the lower Court because it was not material to any of the issues framed at the trial. *Prima facie*, therefore, the plaintiff is entitled to enforce performance of the obligation as against the defendant who is the successor-in-title of Joseph Fernando.

I appreciate that the defendant had also pleaded in his answer that the contract had been " rescinded by the parties ". This defence, however, was not put in issue at the trial and, even if the terms of the conveyance could fairly be regarded as incorporating (by necessary implication) a rescission of the earlier contract, the defendant has neither pleaded nor proved that such rescission took place before the plaintiff had communicated to Joseph Fernando his acceptance of the benefit of the stipulation made in his favour in P2.

We have been invited to send the case back for a re-trial on this additional issue. In my opinion, however, the defendant should be refused this indulgence. The action was instituted over four years ago, and must be decided on the issues which the parties were content to raise at the original trial. It would be most unsatisfactory to permit them to lead oral evidence at this stage concerning events which took place in 1945 between the dates of execution of the conveyances P2 and P3. Besides, there is no reason for supposing that Lucia would have stipulated for a valuable benefit in the plaintiff's favour unless there had been some contemporaneous agreement between all the parties for the insertion of the relevant clause in P2.

The learned District Judge dismissed the plaintiff's action because the conveyance P3 in favour of the defendant did not specifically incorporate the earlier condition contained in P2. In my opinion, this omission was not fatal to the plaintiff's claim which was in truth based on the earlier contractual obligation undertaken by Joseph Fernando on his own behalf and on behalf of his " assigns ". The conveyance P2 was duly registered and must be assumed to have been brought to the defendant's notice at the time of his purchase. In the result, the only valid defence which might have been available to the defendant was that of "rescission *before acceptance* ", but there is no material on the record which enables us to hold in the defendant's favour on this point.

I would allow the appeal with costs in both Courts, and enter a decree in favour of the plaintiff as prayed for in paragraphs (*a*) and (*b*) to the prayer to the plaint.

ROSE, C.J.—I agree.

Appeal allowed.

[1] *(1943) S. A. A. D. 656 at 674.*