Present: Pereira J. and Ennis J.

1913.

WICKREMESINGHE *v.* WIJETUNGE *et al.*

206—D. C. Kandy, 21,829.

Donation—Delivery of deed—Acceptance.

Delivery of a deed is not essential for the validity of a donation under our law.

A donation may be accepted at any time during the lifetime of the donor, and where its fulfilment is postponed until after the donor's death, it may even be accepted after the donor's death.

Acceptance may be presumed from either the physical acceptance of a deed of donation delivered by the donee, or by the sale of the land donated by the donee.

PEREIRA J.—In my opinion the acceptance of a donation of land must be notarially attested as much as the making of such a donation, and the acceptance must be by the donee himself, or some person competent in law to represent the donee for the purpose of entering into contracts ..... But it has been held in a long series of decisions ..... that the acceptance of a gift by the donee may be effected in any one of the many ways laid down in the works on the Roman-Dutch law. The decisions, I think, have led to some confusion and uncertainty in the law, but I think that it would be inexpedient to question their correctness at this time of day, and that they should as far as practicable be followed.

APPEAL from a judgment of the District Judge of Kandy (F. R. Dias, Esq.).

This was an action by a father against his daughter and son-in-law for declaration of title to a land which he had by deed " gifted "

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to the daughter. The plaintiff alleged that the donation was not completed by delivery and acceptance, and that the land donated was in his possession till the ouster complained of. The District Judge held that the deed of gift was duly accepted and dismissed the action.

The plaintiff appealed.

F. M. de Saram, for the appellant.—The donation was not completed by delivery of the deed; and the deed was not accepted. There should have been acceptance at the time of execution. [Pereira J.—Should not the acceptance be on the face of the deed?] Yes. It is a contract affecting land. Counsel cited *Silva v. Silva;*[1] *Voet 39, 5, 2; Voet 39, 5, 19; Wellappu v. Mudalihami.*[2]

J. W. de Silva, for the respondent.—For the validity of a donation it is not necessary that there should be acceptance at the time of execution of the deed. Acceptance need not be on the face of the deed. The donee has sold the land; that is sufficient acceptance. There is evidence of delivery of the deed. Counsel cited *2 Nathan, sec. 1087; Voet 39, 5, 13; Affefudeen v. Periyatamby;*[3] *Tissera v. Tissera;*[4] *Tillekeratne v. Tennekoon;*[5] *Government Agent, Southern Province, v. Karolis.*[6]

F. M. de Saram, in reply.

Cur. adv. vult.

August 27, 1913. PEREIRA J.—

The main issue in this case is the second, namely, whether the execution of the document dated March 13, 1869, purporting to be a donation by the plaintiff to the first defendant, was completed by delivery, and whether the donation was accepted by the donee. As regards delivery of the deed, I am not prepared to say that it is essential under our law. As explained by Morice in his work on English and Roman-Dutch law (*2nd ed., p. 83*), while a deed in its English meaning acquires validity by being sealed and delivered to the party benefited by it, the deed of Roman-Dutch law, generally called a notarial deed, required no delivery for its validity. So that the only question involved in this case practically is whether the donation referred to above was duly accepted by the donee. I may at the very outset say that, in my own opinion, the acceptance of a donation of land must be notarially attested as much as the making of such a donation, and the acceptance must be by the donee himself or some person competent in law to represent the donee for the purpose of entering into contracts. In *Wellappu v. Mudalihami*,[2] Layard C.J., citing *Voet 39, 5, 12, 13*, observed:

[1] *(1908) 11 N. L. R. 161.*
[2] *(1903) 6 N. L. R. 233, 236.*
[3] *(1909) 12 N. L. R. 313.*
[4] *2 S. C. D. 36.*
[5] *Ram. (1843-45) 155.*
[6] *(1896) 2 N. L. R. 72.*

" The rule of law which requires acceptance by a competent person of a gift is based on the principle that a donation is a contract, and there must be two parties to every contract." Maasdorp, in his *Institutes of Cape Law* (*Vol. III., pp. 89, 92*), says: " A donation is an agreement whereby a person without being under any obligation to do so gives something to another without receiving or stipulating anything in return . . . . . Acceptance by the donee or by some one duly authorized on his behalf is an essential ingredient in the constitution of a valid donation, the consent of both parties being required in donation as in all other contracts." If, then, donation is a contract entered into by two parties, it is essential that the execution of the contract by the parties should be effected in the manner required by the law for the time being. Whatever form acceptance of a donation by the donee might have taken under the Roman-Dutch law, our Ordinance No. 7 of 1840 provides (section 2) that a contract for the transfer of land shall be in writing, and signed by the party (or parties) making the same in the presence of a licensed notary and two or more witnesses; and so it is clear that a donation of land to be valid under our law must be executed by both the parties to the contract in the manner indicated above. But it has been held in a long series of decisions that in the case of a donation of land, while the donor's part of the contract should be executed as required by Ordinance No. 7 of 1840, the execution of the donee's part of the contract may follow the Roman-Dutch law; in other words, that the acceptance of a gift by the donee may be effected in any one of the many ways laid down in the works on the Roman-Dutch law.

The decisions, I think, have led to some confusion and uncertainty in the law, but I think that it would be inexpedient to question their correctness at this time of day, and that they should as far as practicable be followed.

Counsel for the appellant has cited the case of *Silva v. Silva*[1] in support of his contention that, even under the Roman-Dutch law, in the case of a donation to a minor, there should be a present acceptance of the gift by a natural or legal guardian of the minor, and not an acceptance at some future indefinite time by the minor himself after he has attained majority. The substantive decision in the case is that an uncle of a minor is not a competent party to act for him in accepting a donation, and the *dictum* relied on by the appellant's counsel is no more than mere *obiter*, and I confess I have failed to find any authority in support of it. In the case cited above of *Wellappu v. Mudalihami*,[2] Layard C.J. observed: " To perfect a deed of gift in favour of a minor there must be an acceptance by some one capable of accepting on behalf of the minor or by the minor upon attaining the age of majority." And it is, I think, clear from what appears in *Voet 39, 5, 13; Grotius 3,*

[1] *(1908) 11 N. L. R. 161.*

[2] *(1903) 6 N. L. R. 233, 236.*

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2, 12; and *Maasdorp's Institutes, vol III., p. 99,* that under the Roman-Dutch law a donation may be accepted at any time during the lifetime of the donor, and where its fulfilment is postponed until after the donor's death, it may even be accepted after the donor's death.

In the present case the evidence shows that there were at least two distinct acts of acceptance by the first defendant of the donation in question. It appears that on the wedding day of the first defendant the plaintiff delivered over to her the deed of donation, and then she accepted the same. Although, as I have observed, the delivery of the deed was not essential to complete the transaction, it has significance here as a token of acceptance of the gift. Moreover, the first defendant sold a half of three of the lands gifted to her husband before the commencement of the present action. That also was clearly an act of acceptance of the donation. For these reasons I see no grounds for interfering with the judgment appealed from, and I would affirm it with costs.

ENNIS J.—

I agree. I am, however, not prepared, without further consideration, to assent to the opinion that section 2 of Ordinance No. 7 of 1840 requires both parties to sign a deed of gift.

Affirmed.