1956 *Present :* de Silva, J., and Sansoni, J.

V. V. M. PACKIRMUHAIYADEEN *et al.*, Appellants,
and A. M. ASIAUMMA *et al.*, Respondents

S. C. 285—D. C. Batticaloa, 715/L

Donation—Minor as donee—Acceptance by donee's elder brother—Validity.

Where a donation executed by a father in favour of his minor son was accepted by the donee's elder brother on behalf of the minor donee—

Held, that there was no valid acceptance on behalf of the minor donee.

Fideicommissum—No acceptance by fideicommissaries—Validity.

Where a fideicommissary deed of gift makes a settlement in favour of a family as a class, acceptance by the immediate donee enures to the benefit of all the fideicommissaries. But if the fideicommissaries are particular members of a family (e.g., the brothers of the donee), their failure to accept the donation on their own behalf renders the deed invalid so far as they are concerned.

APPEAL from a judgment of the District Court, Batticaloa.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy* and *E. B. Vanniatamby*, for the defendants appellants.

S. Nadesan, Q.C., with *C. Shanmuganayagam*, for the plaintiffs respondents.

Cur. adv. vult.

May 18, 1956. SANSONI, J.—

This appeal raises two questions of law regarding the acceptance of a deed which admittedly contained a fideicommissum. The deed in question was executed by Abdul Careem Marikar Udayar in favour of his minor son Abdul Samadu. It dealt with thirteen lands and the relevant clauses read,

". . . . . he will have the right to lease, mortgage, transfer, donate or dowry the said properties according to his wish, I or my heirs will have no right for any reason whatever to revoke this or claim right to the said properties.

[1] *40 N. L. R. 235.*

"I further declare that should the said M. Mohamadu Abdul Samadu the grantee of this die issueless without executing any deed in respect of the said properties or any part or portion thereof the said properties should devolve on my children M. Mohamadu Abdul Majeed, M. Mohamadu Abdul Hameedu and M. Mohamadu Abdul Salam and their respective children in equal shares and that should any of them die issueless they should devolve on the survivors of them and the children".

Following these clauses there is a clause in the following terms,

"And as the said M. Mohamadu Abdul Samadu the grantee of this deed is a minor, I, Muhaiadeen Abdulkareem Marikar Udayar Mohamadu Abdul Majeedu of Kattankudyiruppu, his brother, do hereby accept this gladly on his behalf and set my signature hereto".

Abdul Majeedu who purported to accept the donation was presumably a major. There was no proof of acceptance by any of the three fideicommissaries, and it will be noted that the acceptance by one of them, Abdul Majeedu, was not on his own behalf but on behalf of the minor donee.

The donor and the donee both died in 1939. This action was brought by the only child of the fideicommissary Abdul Majeedu claiming to be entitled to 1/3 share of the lands in question. In order to succeed he had to prove both acceptance by the fiduciary and by the fideicommissaries. I take it to be settled law that acceptance by both these parties is necessary to render the gift valid so far as the fideicommissaries are concerned. See *Soysa v. Mohideen* [1], *Fernando v. Alwis* [2], *Carolis v. Alwis* [3]. The only opinions to the contrary are to be found in *Asiathumma v. Alimanchy* [4] and *Dharmalingam Chetty v. Yoosoof* [5], but I do not think those opinions can now be considered sound.

The two questions that now arise for decision are,

(1) Whether there was a valid acceptance on behalf of the fiduciary donee.

(2) Whether the failure of the fideicommissaries to accept the donation on their own behalf renders the deed invalid, so far as they are concerned.

To deal with the first question, it is clear that the major brother was neither the natural nor the legal guardian of his minor brother. There have been cases where acceptance by a major brother on behalf of his minor brother has been held to be sufficient. See *Lewishamy v. de Silva* [6], where Middleton, J. followed *Francisca v. Costa* [7], a case in which acceptance by the grandmother of a donee was considered sufficient. But the reason given in those two cases was that the father, who was the donor, permitted acceptance by those persons. I do not think that such a reason would be upheld today. Subsequent cases such as *Babaihamy v. Marcinahamy* [8] and *Bindua v. Unlly* [9] have upheld the acceptance by such persons who are neither legal nor natural guardians only where possession of the property by the donees was subsequently proved. See

[1] *(1914) 17 N. L. R. at 289.*
[2] *(1935) 37 N. L. R. at 227.*
[3] *(1944) 45 N. L. R. 158.*
[4] *(1905) 1 A. C. R. 53.*
[5] *(1937) 17 C. L. Rec. 229.*
[6] *(1906) 3 Bal. 43.*
[7] *(1889) 8 S. S. C. 190.*
[8] *(1908) 11 N. L. R. 232.*
[9] *(1910) 13 N. L. R. 259.*

Fernando v. Alwis [1]. The recent decision of the Privy Council in *Nagalingam v. Thanabalasingham* [2] makes it clear that acceptance on behalf of a minor by such a person as an uncle is not a valid acceptance even where the donor was the father and the donee was his minor son. Sir Lionel Leach in that case said " a maternal uncle is not a natural guardian ; in the strict sense he is not even the member of the same family. Without appointment by lawful authority Kanthar Sinnathamby (the uncle) could not act for Kandavanam (the minor donee) and it is not suggested that any such appointment existed ".

Now if there was any force in the argument that an elder brother or a grandmother or an uncle could accept a donation on behalf of a minor merely because the father, who was the donor, permitted such acceptance, the Privy Council would undoubtedly have held that there was a valid acceptance in that case. I am therefore of opinion that there was no valid acceptance on behalf of the minor donee in the present case. I might add that we are not dealing in this case with the question whether a father who is a donor can authorise another person by a special mandate to accept the gift. There is no evidence in the record on which such a plea could have been raised. It is therefore not necessary to consider such a case as had to be considered by Gratiaen, J. and Pulle, J. in *Mohaideen v. Maricair* [3].

With regard to the second question that arises for decision, there is a well-known exception to the rule that fideicommissaries must accept the gift in order to render it effective in their favour. That exception is to be found in Perezius ad Cod. (8.55.12) where that authority said that in the case of the settlement of property in a family the acceptance of the first donee enures to the benefit of, and is considered an acceptance by, all the beneficiaries. That exception was first applied by this Court in *Perera v. Marikar* [4] which, as Wijeyewardene, J. pointed out in *Wijetunge v. Rossie* [5] is a judgment of the Full Court and therefore binding on this Court. But the exception must be confined to fideicommissa in favour of the donee and his family, within which term would come a fideicommissum in favour of the donee's descendants. De Sampayo, A.J. referred to this question in *Soysa v. Mohideen* [6] and held that in such a case acceptance by the immediate donee was a sufficient acceptance on behalf of the descendants (where they are the beneficiaries), and acceptance by the immediate donee would also be sufficient where the property was to remain in the family. Lascelles, C.J. in the same case expressed himself in similar terms.

I should like to refer to some of the dicta of the judges in a recent decision of the Appellate Division of the Supreme Court of South Africa where this exception was considered—*Crookes v. Watson* [7]. Centlivres, C.J. said,

" The reason given by Perezius for the exception which he mentions must not be read out of its context. He first states the general rule viz. : that acceptance is necessary before a beneficiary is entitled to claim the benefit conferred on him and he then mentions a number of exceptions. In respect of the exception I am now dealing with he

[1] *(1935) 37 N. L. R. 201.*
[2] *(1952) 54 N. L. R. 121.*
[3] *(1952) 54 N. L. R. 174.*
[4] *(1884) 6 S. C. C. 138.*
[5] *(1946) 47 N. L. R. 371.*
[6] *(1914) 17 N. L. R. 279.*
[7] *(1956) 1 S. A. L. R. (A. D.) 277.*

> says that it would be absurd for the making of an irrevocable fideicommissum that the acceptance of infants and people as yet unborn should be required. That statement is made after he has made it clear that the first beneficiary, who was a fiduciary, in the usual acceptation of that word (i.e. a fiduciary who has a beneficial interest) has accepted. In other words, where there is a settlement in favour of a family and the first member of the family accepts, his acceptance enures for the benefit of all succeeding members of the family."

Again, Van den Heever, J. A. expressed the opinion that in this exception the family concerned is treated as "a persona in itself, acting through one of its members in accepting". Steyn, J. A. said in regard to the Perezius rule, "that in the absence of a provision to the effect that the settled property is to remain in the settler's family, the rule does not apply". I have cited these dicta because they emphasise the essential condition that the fideicommissum must be for the benefit of the family as a class, and not of individual members of a family.

When we look at the deed now under consideration in the light of these dicta, it becomes clear that the deed in no sense creates a fideicommissum in favour of the donee's family or of the donee's descendants. It is a deed which, like many a deed containing a fideicommissum, creates a fideicommissum in favour of three designated individuals who happen to be members of the same family as the donee. Such fideicommissaries must, according to the general rule, accept the gift if it is to be valid in their favour. In no sense can they claim the benefit of the Perezius exception which relates only to a fideicommissum in favour of a family as such and not particular members of a family, or in favour of the descendants of the donee and not particular descendants.

Mr. Nadesan for the respondents further submitted, if I understood him correctly, that a family fideicommissum or a "fideicommissum in favorem familiae" brings within its beneficiaries a very large group. Voet 36.1.27. says,

> "A fideicommissum can also be left to the family; and Justinian has laid down that in such a case under the term family are included not only parents and children and all relatives, but also the son-in-law and daughter-in-law to supply the place of those who have died, where the marriage has been dissolved by the death of son or daughter. But Sande points out at some length that by civil law adopted children alumni and freed men were included under the term familia when there is any question of some fideicommissum being left to the family and in that connection he puts the question whether women or their issue are included in the family. In section 12 he has collected the authorities who have laid down at greater length what is included under "family"; genus, stirps, linea, parentela, domus, cippus, and the like. Now there is also a bequest to the family when the testator forbids the alienation of a thing out of the family or directs that it should not go out of his line of descent or out of his 'blood'".

He sought to argue from this that since collaterals are also included in a family and the deed in question constitutes a fideicommissum in favour of the donee's brothers, acceptance by the donee is enough. I do not

agree. Voet was dealing with a particular type of fideicommissum and he was explaining who would come under the term "family" in such a case. That does not mean that every time a fideicommissum is created in favour of particular individuals who are some of the members of a family as so defined, acceptance by the fiduciary donee renders acceptance by the particular fideicommissaries unnecessary.

The learned trial judge held that there had been a valid acceptance of the gift by the minor donee through his brother, and that such acceptance rendered acceptance by the fiduciaries unnecessary. For the reasons I have given I think that both findings were wrong and that this action should have been dismissed.

The appeal is therefore allowed with costs in both Courts.

DE SILVA, J.—I agree.

Appeal allowed.