1938 *Present :* **Poyser S.P.J. and Maartensz J.**

ABEYWARDENE *et al. v.* TYRELL *et al.*

205—D. C. Colombo, 404.

Entail and Settlement Ordinance—Property gifted subject to* fidei commissum *—Application by donors to Court to exchange property for another—No direction by Court that the property given in exchange should be subject to same* fidei commissum*—Effect of Court's order—Ordinance No. 11 of 1876, s. 8.

By a deed of gift No. 2110, dated October 4, 1883, S. F. and his wife M. P., gifted to their minor daughters C. and J. a property called "The Priory", subject to a life-interest in favour of S. F. and, in case his wife survived him, a life-interest of half in favour of the wife; and also subject to a *fidei commissum* in favour of the lawful issue of C. and J.

On June 17, 1896, the donors applied to the District Court in case No. 116 under the Entail and Settlement Ordinance, No. 11 of 1876, for authority empowering C. and J.'s guardian *ad litem* to convey the property to themselves free of all conditions and restrictions and, in consideration thereof, empowering the donors to convey another property, viz., "Sirinivasa", to C. and J. subject to the condition that they shall not sell or mortgage, or otherwise alienate the same except with their consent and subject to a life-interest in their favour.

There was no provision in the prayer of the application for a *fidei commissum* in favour of the issue of the donees nor was there such a provision in the order made by the District Judge.

The Court allowed the application and the conveyances were executed.

***Held*, that upon the execution of the conveyance in favour of C. and J. the property "Sirinivasa" became subject to the same *fidei commissum* as that created by the deed of gift No. 2110, by virtue of section 8 of the Entail and Settlement Ordinance.**

THIS was an action for declaration of title to premises known as "Sirinivasa", situated in Edinburgh Crescent, Colombo. The facts are given in the headnote. The main questions argued in the case were (1) whether the Court had power to alter or vary the conditions contained in the deed of gift and whether the order in D. C. Colombo, 116, was made without jurisdiction, (2) whether there was a valid acceptance of the deed of gift No. 2110.

The learned District Judge held that the District Court had no jurisdiction to make the order in D. C. Colombo, 116, and dismissed the plaintiff's action on the ground that the order was a nullity and that the grantees under the subsequent deed No. 1398 did not hold the property conveyed to them subject to the *fidei commissum* created by deed No. 2110.

H. V. Perera, K.C. (with him *N. E. Weerasooria* and *D. W. Fernando*), for plaintiffs, appellant.—Section 4 and the subsequent sections of Ordinance No. 11 of 1876 are relevant. A similar situation arose in *Mirando v. Coudert*[1]. The petition to Court in D. C. Special Case No. 116 sets out that the property should go to the unborn issue. Condition of exchange should be distinguished from the condition attaching to the property after the exchange. The attaching of the *fidei commissum* is

[1] *(1916) 19 N. L. R. 90.*

automatic once the exchange takes place. Section 9 is complementary to section 8, and the effect of these sections is that "Priory" would be absolutely unencumbered. Immediately the exchange takes place, there is the automatic operation of section 8.

The District Judge has not appreciated the legal implications of the order in D. C. Special Case No. 116. One must interpret even a judicial proceeding according to law. What was asked for was an exchange of "Priory" for a property which was of even greater value. If the petitioners wanted "Sirinivasa" to be free from conditions, they would have stated so. Absence of jurisdiction is different from an erroneous exercise of jurisdiction. *Mirando v. Coudert* (*supra*) is exactly in point and goes very far indeed. See the judgment of Shaw J. at page 95. The order of the District Judge in the exchange proceedings cannot possibly be said to be a nullity.

[POYSER J.—The effect of the judgment is to destroy the *fidei commissum* ?]

Section 8 has been misunderstood by the District Judge. It definitely says, "shall become". It can become so, only on the exchange taking place.

R. L. Pereira, K.C. (with him *E. F. N. Gratiaen* and *F. C. de Saram*), for defendants and substituted defendants, respondents.—It is necessary to have a clear idea of what the application in D. C. Special Case No. 116 was and how it was granted. It may have been assumed that the *fidei commissum* was invalid for want of proper acceptance. It may have also been assumed that section 8 would not apply as it refers to property "exchanged", *i.e.*, *already* exchanged. The petition was to exchange (at a future date) the "Priory" for "Sirinivasa". What the Court allowed was not the application that was actually made. The application was for a "*change*" in the conditions under which the property was held. There is no mention of "exchange" which is the word used in so many sections of the Ordinance. Further, even the respondents to the application consented to the proposed *change*. The idea of the donors was to give the two daughters two separate properties, whereas previously, according to the deed, the property was to be held "in common". The Court itself wanted "Sirinivasa" to be transferred in advance independently. The Ordinance does not in any way authorize a *change* to be effected in the terms of the *fidei commissum*. The Court did not order an exchange at all. The Court's order was null and void because the Court had no jurisdiction to make it.

What actually happened was "Priory" was reconveyed to Cecilia immediately and another property to Jane.

The District Judge was wrong in holding that there was a valid acceptance of the fideicommissary deed of gift. The brother-in-law is neither a natural nor a legal guardian of the minors. See *Silva v. Silva* [1]; *Avichchi Chetty et al. v. Fonseka et al.* [2]; *Fernando v. Weerakoon* [3]; *Fernando et al. v. Cannangara et al.* [4]; *Wickremesinghe v. Wijetunge* [5]; *Nonai et al v. Appuhamy* [6]; *Fernando et al. v. Alwis et al.* [7] In *Abdul Cader v. Uduma Lebbe* [8],

[1] (*1908*) *11 N. L. R. 161.*
[2] (*1905*) *3 A. C. R. 4.*
[3] (*1903*) *6 N. L. R. 212.*
[4] (*1897*) *3 N. L. R. 6.*
[5] (*1913*) *16 N. L. R. 413.*
[6] (*1919*) *21 N. L. R. 165.*
[7] (*1935*) *37 N. L. R. 201 at 220.*
[8] *33 N. L. R. 44.*

however, there is a passage at page 45 that acceptance by a brother-in-law is valid. Though this is an isolated judgment, it has been followed by the District Judge. The later judgment in *Fernando et al. v. Alwis et al.* (*supra*) at page 221 is a more considered one and is a correct statement of the law.

Was there a ratification because the donees were parties to the application of 1896 in proceedings No. 116? We have to be guided by the application itself. Cecilia really, far from ratifying, condemned the *fidei commissum* and wanted an absolute interest. See *Fernando et al. v. Alwis et al.* (*supra*) at p. 224, where it was held that a deed of renunciation is not a proof of acceptance. The application can in no way be construed as an acceptance.

The order in proceedings No. 116 was not an order sanctioning an exchange. There is no order that "Sirinivasa" *must* be transferred. It merely says that on petitioner's transferring "Sirinivasa", respondents are authorized to transfer "Priory".

H. V. Perera, K.C., in reply.—The order made in proceedings No. 116 was entirely in accordance with the terms of the application. Court had to protect the interests of fideicommissaries. It had to satisfy itself about the worth of the property to be exchanged. Under these circumstances, Court's function was to authorize the transfer of *fidei commissum* property provided only that the property given in exchange was of sufficient worth.

On the question of acceptance, the law favours the acceptance of gifts to minors. Where a gift is accepted by a member of the family on the request of the donors, there is a valid acceptance. This request can be presumed from the fact that the application of 1896 was based on the footing that there had been a perfected gift. Even if such a request was absent, there is ample evidence that the acceptance of the gift by the brother-in-law was ratified by the donees. *Abdul Cader v. Uduma Lebbe* (*supra*) is in appellant's favour. *Fernando et al. v. Alwis et al.* (*supra*) is not irreconcilable, because the donor in this case was the legal guardian and therefore could have got anybody to accept the gift.

Cur. adv. vult.

February 23, 1938. MAARTENSZ J.—

The plaintiffs in this case appeal from a judgment of the District Judge of Colombo dismissing their action for declaration of title to a parcel of land described in the schedule to the plaint as lot No. 2 of the premises called and known as "Sirinivasa" bearing assessment No. 8, situated in Edinburgh Crescent, Colombo.

The appeal raises certain questions under the Entail and Settlement Ordinance, No. 11 of 1876, which arise in this way:

Siman Fernando and his wife Maria Perera by deed No. 2110 dated October 4, 1883, gifted to their daughters, Cecilia and Jane Fernando, two contiguous allotments of land (referred to in the deed as lots 4 and 5) forming one property situated in Maradana Ward No. 8 of the Municipal Council, Colombo (hereafter referred to as the "Priory"), subject to (*a*) a life-interest in the entire property in favour of Siman Fernando and

in the event of Maria Perera surviving her husband, subject to a life-interest in her favour in half the property ; (*b*) a *fidei commissum* in favour of the lawful issues of the donees, and if one of the donees died without issue, in favour of the issue of the surviving donee subject to the same conditions and restrictions.

The donees were minors and the acceptance of the gift on their behalf is in the following terms :

"And these presents further witness that Mututantrige John Jacob Coorey also of Horetuduwa aforesaid doth hereby on behalf of the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando, who are minors jointly with Mututantrige Alfred Thomas Fernando and Mututantrige James Fernando, brothers of the said minor donees accept the gift and grant of the said premises subject to the respective conditions aforesaid".

On June 17, 1896, the donors filed in the District Court of Colombo a petition and affidavit entitled "In the matter of an application under the Entail and Settlement Ordinance, 1876".

The donees were made respondents to this petition, and as Jane Fernando was still a minor, James Fernando her brother was also made a respondent for the purpose of having him appointed guardian *ad litem* of the minor respondent.

The petitioners set out the terms of the deed of gift No. 2110 in their petition and averred that they desired to make better provision for their unmarried daughters by giving to them the several allotments of land (described in schedule B to the petition) and all that house and buildings bearing No. 8 called and known as "Sirinivasa", situated at Edinburgh Crescent, Flower road, and Greenpath, Cinnamon Gardens, "in lieu of and instead of the said premises called the "Priory".

The terms on which the gift was to be made are set out in the body and in the prayer of the petition.

The prayer reads as follows :—

"Wherefore the petitioners pray under the provisions of the Ordinance No. 11 of 1876, that this Court may be pleased—

(1) to authorize and empower the first respondent and the third respondent as guardian *ad litem* of the second respondent to convey and assign unto the first petitioner the said premises called and known as the "Priory" free from all conditions and restrictions and to authorize and empower the said first respondent and the third respondent as guardian as aforesaid to execute the necessary deed of conveyance in favour of the first petitioner absolutely and free from all conditions and restrictions.

(2) In consideration thereof to authorize and empower the petitioners to transfer and assign unto the first and second respondents the said allotments of land and the said buildings called "Sirinivasa" (fully described in the said schedule B) subject to the conditions that they shall not sell, mortgage, or otherwise alienate the same except with the consent of the peti-

tioners or the survivor of them and subject to a life-interest in favour of the first petitioner and a condition that after first petitioner's death second petitioner should be entitled to enjoy half of the rents thereof".

There is no provision in paragraph 2 of the prayer for a *fidei commissum* in favour of the issue of the donees, nor is there such a provision in the order made by the District Judge which is as follows :—

"It is hereby adjudged and ordered that James Fernando of Horetuduwa be and he is hereby appointed guardian of Jane Fernando (the second respondent) in this matter to represent her in these proceedings.

It is hereby further ordered and decreed that upon the petitioners transferring and assigning unto the first and second respondents Cecilia Fernando and Jane Fernando the allotments of land (fully described in schedule B to the said petition of the petitioner) situated at Edinburgh Crescent, Flower road, and Greenpath, Colombo, and the buildings thereon called and known as "Sirinivasa" bearing assessment No. 8 subject to the conditions following, that is to say, viz., that they the first and second respondents shall not sell, mortgage, or otherwise alienate the said premises except with the consent of the petitioners or the survivor of them and that the first petitioner shall during his lifetime be entitled to take, use, enjoy, and appropriate to his own use the rents, issues, and profits of the said premises and that after his death and in the event of the second petitioner surviving him she shall during her lifetime be entitled to take, use, enjoy, and appropriate to her own use one just half of the said rents, issues, and profits, the other half thereof being taken, used, enjoyed, and appropriated by the first and second respondents, that the said Cecilia Fernando and James Fernando as guardian of the said Jane Fernando do and they are hereby authorized and empowered to convey and assign unto the said Mututantrige Siman Fernando the first petitioner the aforesaid lands and premises called and known as the "Priory" (fully described in schedule A in the said petition) absolutely and free from all conditions and restrictions contained in deed No. 2110, dated October 4, 1883, and that the said Cecilia Fernando and James Fernando as guardian as aforesaid do and they are hereby empowered and authorized to execute and deliver the necessary deed of conveyance of the said premises in favour of the said Mututantrige Siman Fernando absolutely and clear of all conditions and restrictions".

In pursuance of this order Siman Fernando and his wife Maria Perera by deed No. 1398 (P 4) dated June 23, 1896, conveyed "Sirinivasa" to Cecilia and Jane Fernando subject to the condition that they shall not sell, mortgage, or otherwise alienate the premises except with the consent of Siman Fernando and Maria Perera or the survivor of them and subject to a life-interest in favour of Siman Fernando in the whole property and in half in favour of Maria Perera if she survived her husband.

The deed recites the terms on which the "Priory" was gifted to the donees by deed No. 2110; the terms of the order made by the District Judge in Special Case No. 116 of the District Court of Colombo; and the

consideration for the grant is stated thus: "Now know ye and these presents witness that the said Mututantrige Siman Fernando and Colomba Patabendige Maria Perera in consideration of the premises and in pursuance of the said order of Court do and each of them doth hereby grant, convey, assign, set over and assure unto the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando, their heirs, executors, administrators, and assigns by way of gift . . . . ."

On the same date by deed No. 1399 (P 3) Cecilia and James Fernando as guardian *ad litem* of Jane Fernando conveyed the "Priory" to Siman Fernando and Maria Perera absolutely "freed and clear from all and every the restrictions and conditions contained in the said deed of gift No. 2110 of October 4, 1883".

The deed contained the same recitals as deed No. 1398 with the addition of the recital that deed No. 1398 had been executed.

The consideration for the conveyance is the deed of conveyance No. 1398.

The deed of gift No. 1398 contained no *fidei commissum* for the benefit of the issue of the grantees, and on the footing that the grantees acquired absolute title to "Sirinivasa" subject to the life-interest reserved to the grantors and the prohibition against alienation without the consent of the grantors, Cecilia Fernando by deed No. 1401, also executed on June 23, 1896, sold her undivided moiety of "Sirinivasa" to Siman Fernando for a sum of Rs. 45,000.

By an indenture No. 2180 (P 6) dated June 13, 1900, Siman Fernando and Jane Fernando effected a partition of the property by which the eastern portion of the property marked A, B and C in the plan dated June 20, 1900 (the date must be incorrect) made by Juan de Silva, was conveyed to Jane by Siman Fernando and the western portion marked D and E in the same plan was conveyed by Jane Fernando to Siman Fernando. By deed No. 3129 (P 7) dated November 30, 1905, Jane conveyed her share of "Sirinivasa" to Siman Fernando with the consent of Maria Perera.

By deed dated December 6, 1907 (P 8) Siman Fernando sold the property to his son James Fernando.

James Fernando died on March 17, 1911. His last will and codicil were proved in case No. 3,927 of the District Court of Colombo and the executors transferred by deed No. 1382, dated July 12, 1924, *inter alia*, the property in question to the Colonial Secretary of Ceylon and Government Agent of the Western Province as trustees of the Sri Chandrasekere Fund. Jane Fernando died on May 6, 1933. The plaintiffs, who are her children, claim that by the operation of section 8 of the Entail and Settlement Ordinance, 1876, the premises described in deed No. 1398, became subject to the *fidei commissum* created by deed No. 2110 and that the defendants, since the death of Jane Fernando, are in wrongful possession of the land described in the schedule to the plaint. The plaintiffs accordingly prayed for declaration of title to the said premises and for possession and damages.

The pleas set up in defence are formulated in the 14 issues upon which the parties went to trial. The main contentions arising from these issues are: (*a*) that the Court had no power to alter or vary the conditions

contained in the deed of gift No. 2110 and that the order of June 18, 1896, was made without jurisdiction and was therefore a nullity ; (b) that there was not a valid acceptance of the deed of gift No. 2110 and the *fidei commissum* which it purported to create could not attach to the property conveyed by deed No. 1398.

The learned District Judge held that the District Court had no jurisdiction to make the order made in case No. 116 (Special) as the order purported to alter, change or modify the terms upon which a property subject to a *fidei commissum* is to be held and dismissed the plaintiffs' action on the ground that the order was a nullity and the grantees under the deed No. 1398, did not hold the property conveyed to them by the deed subject to the *fidei commissum* created by deed No. 2110.

The appellants contended that the application made in Special Case No. 116 to exchange "The Priory", which was subject to a *fidei commissum*, for the property referred to as "Sirinivasa", was an application which the District Court had jurisdiction under the provisions of section 4 of the Entail and Settlement Ordinance, 1876, to entertain and give effect to if so advised. This jurisdiction, it was argued, was not ousted by reason of the fact that the Court made a mistake in the terms upon which the exchange was allowed and it was further argued that the order authorizing the conveyance of "The Priory" to Siman Fernando and Maria Perera free from all conditions and restrictions was an order which the Court had power to make, and the deed No. 1399 (P 3) executed in pursuance of that order by the persons authorized to execute it conferred on the grantees a title free from the *fidei commissum* created by deed No. 2110.

In support of these propositions we were referred to the case of *Mirando v. Coudert* [1]. The land in dispute in that case was gifted to Isabel Mirando subject to certain conditions. The donee and her husband after the death of the donor applied to the District Court for an order, under the provisions of the Entail and Settlement Ordinance, declaring the prohibition against alienation contained in the deed of gift to be null and void, and authorizing the sale of the premises and the appropriation by the applicants of the proceeds of sale to their use and benefit. A decree was entered in terms of the application and the property was sold by the applicants to the Archbishop of Colombo, the predecessor in title of the defendant.

The plaintiff, one of the five children of Isabel Mirando, brought this action after her death claiming a declaration of title to one-fifth on the footing that the deed of gift created a *fidei commissum* in favour of the descendants of Isabel Mirando and that the sale by her husband under the authority of the District Court was invalid as against her children.

The Supreme Court held that the deed of gift created a *fidei commissum*, with regard to the question "what is the effect of the sale by Isabel Mirando and her husband authorized by the District Court in 1888 ?" Shaw J. said, "That there were irregularities in obtaining the order, and

[1] *(1916) 19 N. L. R. 90.*

that the decree was erroneous and in part unauthorized by the Ordinance under which it was made, I feel no doubt. A guardian *ad litem* should have been appointed to represent the infant children, whose interests were clearly adverse to their parents, the applicants and the declaration that the prohibition against alienation contained in the deed of gift was void and inoperative was wrong, and was not authorized by the Ordinance, which is for the purpose of enabling the Court to authorize sales and other alienations when an entail exists. The order for sale, however, is authorized by the Ordinance, and, that order having been made, it is, in my opinion, in the nature of a judgment *in rem*, and valid as against all the world until it is set aside". Ennis J. inclined to the view that a purchaser at a sale ordered by the Court under the Ordinance "would not be bound to look beyond the order of the Court, or to examine the proceedings, or challenge the discretion of the Court before he could safely purchase". The Ordinance does not appear to authorize an application to the Court for a declaration that the conditions attaching to a gift do not create a *fidei commissum*, and the objection to the jurisdiction had more force than in this case.

The respondents contended that the view taken by Ennis J. would not apply in this case as the transferee was himself a party to the application and would be affected by all the defects in the proceedings.

It was also argued that what we had to consider was not whether the Court had jurisdiction to order an exchange of the property but whether it had jurisdiction to order that the property given in exchange should be free from the bond of *fidei commissum*. It was contended that as it had no jurisdiction to make such an order the whole of the order was bad for want of jurisdiction.

Another line of argument was that the application made in Special Case No. 116 was not an application to exchange the property called "The Priory" for the property referred to as "Sirinivasa", but an application made with the object of donating property to Jane and Cecilia Fernando free from the bond of *fidei commissum* and of releasing "The Priory" from the bond created by the deed No. 2110. It was pointed out that the word "exchange" was carefully omitted from the application. I am unable to accede to this argument. The application purports to be made under the provisions of the Entail and Settlement Ordinance, and whatever may have been the intentions of the petitioners and respondents, the application is in terms an application to the Court to authorize the grant of "Sirinivasa" in exchange for "The Priory".

As regards the order made in D. C. Special Case No. 116, I am unable to agree with the District Judge that it is a nullity and of no effect for want of jurisdiction. There can be no doubt that the District Judge had jurisdiction to entertain the application and authorize an exchange of "The Priory" for "Sirinivasa". He also had jurisdiction to authorize the transfer of "The Priory" to Siman Fernando and Maria Perera free from the *fidei commissum* created by deed No. 2110 and the transfer by them of "Sirinivasa" to Cecilia Fernando and Jane Fernando. The defect in his order, if it is a defect, is that he did not direct that

"Sirinivasa" should be conveyed to the donees subject to a *fidei commissum* in favour of the lawful issue of the donees. I have said "'if' it is a defect" because there is no direction that "Sirinivasa" should vest in the donees free from the *fidei commissum* which attached to "The Priory". It need not necessarily be implied from the omission of such a direction in the order.

There might have been some force in the argument that the order was defective if the attaching of the *fidei commissum* to "Sirinivasa" depended on the form of the order made by the District Judge; but that is not the case. The governing section (section 8) enacts as follows:

> "Any property taken in exchange for any property exchanged under the provisions of this Ordinance shall become subject to the same entail, *fidei commissum*, or settlement, as the property for which it was given in exchange was subject to at the time of such exchange".

In my opinion "Sirinivasa", in terms of this section, became subject automatically to the *fidei commissum* to which "The Priory" was subject upon the necessary deeds being executed, although the prohibition against alienation and the *fidei commissum* for the benefit of the lawful issue of. Cecilia and Jane Fernando were not embodied in the deed No. 1398.

I agree with the District Judge for the reasons stated by him that section 8 applies to a first exchange of property subject to a *fidei commissum* as well as to any subsequent exchange of property.

As regards the acceptance of the donation made by the deed of gift No. 2110 by John J. Coorey, who was a brother-in-law of the donees, the District Judge relied on a dictum of mine in the case of *Abdul Cader v. Uduma Lebbe*[1], which reads thus: "The deed of gift was accepted on behalf of the donees, who were minors, by their brother-in-law, and I am of opinion that there was a sufficient acceptance of the deed to render the donation valid".

It does not appear from the report whether the question of acceptance was argued nor is there in my judgment a statement of the circumstances in which the gift was accepted by the brother-in-law of the donees. It is possible that the dictum should be restricted to the facts of that case. It is not necessary to decide in this case whether a gift can be accepted by a brother-in-law of the minor donees, for there is ample evidence that the acceptance of the gift by John J. Coorey was ratified by the donees.

I am of opinion accordingly that the appeal must be allowed and judgment entered for plaintiffs as prayed for with costs except as to damages. The plaintiffs will be entitled to damages as agreed on, which was Rs. 3,000 a year.

The appellants will be entitled to the costs of appeal.

POYSER S.P.J.—I agree.

Appeal allowed.

[1] *(1931) 33 N. L. R. 44.*