DONA PODI NONA RANAWEERA MENIKE
v.
ROHINI SENANAYAKE

SUPREME COURT
FERNANDO, J.
AMERASINGHE, J. AND
KULATUNGA, J.
S.C. APPEAL NO 47/91
S.C. SPECIAL L.A. NO. 33/91
C.A. NO. 530/80 (F)
D.C. KULIYAPITIYA NO. 5741/L
5 JUNE 1992

Donation – Revocability – Donatio propter nuptias – When may a point be raised for the first time in appeal? – Definition of "gift" – Burden of proof – Ingratitude – Can a single Act constitute ingratitude?

Dona Podi Nona Ranaweera Menike (appellant) married Edmund Perera Senanayake and they had one child Rohini Senanayake (respondent). By Deed No. 3412 of 11 July 1967 Dona Podi Nona and her husband gifted Apaladeniya Estate to their only child, a daughter named Rohini (respondent) reserving to themselves their life interest. The gift was given on the occasion of and in consideration of the marriage of their daughter Rohini to one Yasaratne Perera who was a co-donee on the said deed. Rohini married Yasaratne Perera on 17 August 1967 but the marriage was subsequently dissolved by decree entered in D.C. Kurunegala Case No. 3629 on 30 July 1975.

On 10 April 1979 the respondent Rohini assaulted her parents. Dona Podi Nona and her husband filed the present action against the respondent Rohini and her ex-husband Yasaratne Perera seeking the revocation of the gift on the ground of gross ingratitude manifested by assault. The District Court gave judgment allowing the revocation but the Court of Appeal held that the transaction was a *donatio propter nuptias* and that since the contemplated marriage had taken place the gift was, as a matter of law, not revocable on account of ingratitude and set aside the judgment.

The point that a donation in consideration of marriage (*donatio propter nuptias*) cannot be revoked where the marriage has taken place was not taken up in the District Court.

Held:

(1) A matter that has not been raised before might, nevertheless, be a ground of appeal on which the appellate court might base its decision provided it is a pure question of law; or, if the point might have been put forward in the Court below under one of the issues raised, *and* the Court is satisfied (1) that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial, and (2) that no satisfactory explanation could have been offered by the other side, if an opportunity had been afforded it, of adducing evidence with regard to the point raised for the first time in appeal. The matter is not one depending simply on the issue whether the new point was one of law, on the one hand, or a question of fact or a mixed question of law and fact, on the other.

(2) What the parties may name a transaction to be or how they describe its purpose is not conclusive. In interpreting a deed the relevant question is what was the donor's intention or primary motive? In the case of a gift, the intention or primary motive should be the enrichment of the donee, *for the sake of enrichment.* The crucial test is whether the donor was moved or induced to give his property simply by the desire to enrich the donee: whether that which influenced his volition was *liberality.*

The question then is this, was the transfer of Apaladeniya Estate simply made to enrich the respondent and her prospective bridegroom for the sake of enriching them, so that it might be assumed that the property was unconditionally, unalterably and irreversibly given and, as it were abandoned, and put beyond hope of being ever called, or taken back or recovered by undoing and revoking the transaction?

(3) It is for the party seeking the assistance of a court for the revocation of a gift "properly so called" to prove on a balance of probabilities, that the transfer of the property was a pure act of disinterested benevolence and liberality. A donation must be clearly and distinctly proved and must not be presumed as long as some other construction is possible. Where the terms of the deed, *ex facie* show that it was a gift, the burden of adducing evidence to show that in fact in substance in reality a *donatio propter nuptias*, is on the person who claims that it was a special kind of gift.

(4) (a) Although a gift is generally irrevocable it is revocable

(i) if the donee failed to give effect to a direction as to its application (donatio sub mode), or
(ii) on the ground of the donee's ingratitude or
(iii) if at the time of the gift the donor was childless but afterwards became the father of a legitimate child by birth or legitimation.

A donor is entitled to revoke a donation on account of ingratitude.

(i) if the donee lays manus impias (impious hands) on the donor.
(ii) If he does him an atrocious injury
(iii) If he wilfully causes him great loss of property
(iv) If he makes an attempt on his life
(v) if he does not fulfil the conditions attached to the gift
(vi) other, equally grave causes.

(b) Other conveyances not made out of pure liberality like a conveyance *propter nuptias* are irrevocable on account of the donee's ingratitude or on account of the appearance of progeny by birth or legitimation.

(5) In form deed No. 3412 was a gift and therefore *ex facie* the conveyance was an act of liberality and not motivated by valuable consideration.

(6) A *donatio propter nuptias* is in one sense, made *in consideration of marriage* in that the transfer made is having regard to the fact that a marriage should be entered into. The property is given *because*, in the sense that *in order or so that* the marriage shall take place. It is the reason *why* the marriage takes place. It is that which brings about the promise of marriage or the wedding. The property is given, more or less, as something akin to a payment, something given in exchange, a *quid pro quo*, or reward or compensation. The transfer is prompted by the promise or performance of something by the donee, thereby making it a *donatio non mera* and not a pure act of liberality (*donatio mera*).

(7) In deed No. 3412 the reservation of the life interest showed that the conveyance was not *propter nuptias*. The enjoyment of the property was postponed. It was a case of *dies cedis sed not venit*. The conveyance here was a present by their parents to their only child simply to enrich her for the sake of enrichment on the joyful occasion of her marriage, which was an appropriate event for giving a present. It was not a requite or recompense, not part of the bargain or a sort of exchange, from the donee's point of view, the transfer of the property was not a condition of the marriage. It did not form the consideration or part of the consideration, in the sense of an inducement or a *quid pro quo* for the parties getting married. It was a gift pure and simple – a gift properly so called. In form and substance it was an ordinary gift and therefore revocable on the ground of ingratitude.

The principles that apply to a *donatio propter nuptias* cease to be applicable when a marriage in consideration of which a gift was made ceases to exist.

Whether it was an ordinary gift or a *donatio propter nuptias*, on dissolution of the marriage it becomes an ordinary gift revocable for ingratitude.

Slight acts of ingratitude are insufficient for revocation. What amounts to an act of ingratitude sufficient to warrant revocation must vary with the circumstances of each case. Ingratitude is a form of mind which has to be inferred from the donee's conduct. Such an attitude of mind will be indicated either by a single act or a series of acts. The donee-daughter by assaulting her donor-parents was guilty of the foul offence of ingratitude. Revocation is not however automatic. It requires a decision of the court.

Per Amerasinghe J. (*obiter*)

"A property which is liable to be returned upon an order for revocation on account of ingratitude, does not include the fruits of the property upto the time of joinder of issue . . . further, a property donated cannot be claimed for ingratitude if the donee, in good faith and without any intention to defraud the donor, had alienated the property by sale, donation, exchange, dowry or transfer on account of any law, cause whatsoever."

Cases referred to:

1. *The Tasmania* (1890) 15 App. Cas. 223.
2. *Appuhamy v. Nona* (1912) 15 NLR 311, 312.
3. *Manian v. Sanmugam* (1921) 22 NLR 249, 251.

4. *Attorney-General v. Punchirala* (1919) 21 NLR 51, 57.
5. *Attorney-General v. Croos* (1925) 26 NLR 451, 459.
6. *Fernando v. Abeygoonesekera* (1931) 34 NLR 163-164.
7. *Talagala v. Gangodawila Co-operative Stores Society Ltd.*(1947) 48 NLR 472, 473, 474.
8. *Arulampikai v. Thambu* (1944) 45 NLR 457, 461.
9. *Seetha v. Weerakoon* (1948) 49 NLR 425, 428, 429.
10. *Dassanayake v. Eastern Produce and Estates Co. Ltd.*[1986] 1 Sri LR 258, 262.
11. *Ceylon Ceramics Corporation v. G. G. Premadasa* [1986] 1 Sri LR 287, 290.
12. *Jayawickrama v. David Silva* (1973) 76 NLR 427, 430.
13. *In the Matter of an Application of A. K. Chellappa* (1916) 19 NLR 116, 119.
14. *In the Matter of an Application of Notary Abeyratne* (1920) 22 NLR 331.
15. *In the matter of the Application of V. Coomaraswamy* (1924) 27 NLR 62,63.
16. *Ponamperuma v. Goonesekera* (1921) 23 NLR 235, 238, 239.
17. *Jayasekera v. Wanigaratna* (1909) 12 NLR 364, 365, 366.
18. *In Re the Application of K. S. Veeravagu* (1921) 23 NLR 67, 68.
19. *In Re the Application of Goonesekera* (1923) 24 NLR 351
20. *Avis v. Verseput* (1943) AD 331, 345, 350, 351, 353, 365, 366, 367, 377, 382, 383.
21. *Heen Banda v. Sinniah* (1955) 57 NLR 134, 135, 136.
22. *Timoney and King v. King* (1920) AD 133, 139.
23. *Birrell v. Weddel* 1926 WLD 69, 75.
24. *Sakir v. Sakir* 19 Natal LR 135, 137.
25. *Peters v. Peters* 1915 NPD 485, 490.
26. *Smith's Trustees v. Smith* (1927) AD 482.
27. *Ex parte Executors Estate Everard* (1938) TPD 190, 199.
28. *Venter v. de Klerck* (1918) AD 89, 90.
29. *Van Reenen's Trustees v. Versfeld and others* 9 SC 161.
30. *Coronel's Curator v. Estate Coronel* (1941) AD 323, 343.
31. *Noorul Hatchika v. Noor Hameen* (1950) 51 NLR 134.
32. *Kay v. Kay* 1961 (4) SALR 257, 261.
33. *Heen Banda v. Sinniah* (1955) 57 NLR 134, 135, 136.
34. *Attorney-General v. Abraham Saibo* (1915) 18 NLR 417, 427.
35. *Salaman v. Obias* (1918) 21 NLR 410.

36. *Wataraka Investment Co. Ltd. v. Commissioner of Stamps* (1932) 34 NLR 266, 272, 273.
37. *Lipton v. Buchanan* (1904) 8 NLR 49 affirmed in 10 NLR 158.
38. *Muttu Carpen Chetty v. Capper* (1888) 1 CL Rep 11.
39. *Jayawickrema v. Amarasuriya* (1918) 20 NLR 289.
40. *Abeysekera v. Gunasekera* (1918) 5 CWR 242.
41. *Edward v. de Silva* (1945) 46 NLR 510, 512.
42. *Conradie v. Rossouw* (1919) AD 279.
43. *Public Trustee v. Udurawana* (1949) 51 NLR 193, 197.
44. *Dunlop v. Selfridge* (1915) AC 874.
45. *Kanapathipillai v. Subramaniam* (1959) 62 NLR 461.
46. *Collins v. Godefroy* (1831)1 B & AD 950.
47. *England v. Davidson* (1840) 11 A & E 856.
48. *Ward v. Byham* (1956) 1 WLR 496.
49. *Williams v. Williams* (1957) 1 All ER 305.
50. *Latchime v. Jamison* (1913) 16 NLR 286.
51. *Commissioner of Inland Revenue v. Estate Greenacre* (1936) NPD 225, 231, 232.
52. *Pillans v. Porter's Executors* 5 SC 420, 424.
53. *Theodoris Fernando v. Rosalin Fernando* (1901) 5 NLR 280, 285.
54. *Obeysekera Hamine et al v. Jayatilleke Hamine* (1905) 1 Balasingham 162, 164, 165.
55. *Wijetunga v. Atapattu* (1933) 35 NLR 124.
56. *Appuhamy v. Mudalihamy* (1866), 1863-88 Ramanathan 226.
57. *John Sinno v. Weerawardene et al* (1922) 24 NLR 277.
58. *Van Duyn v. Visser* 1963 (1) SALR 445.
59. *Ratnayake v. Mary Nona* (1952) 54 NLR 197, 200.
60. *Constantine Steamship Line v. Imperial Smelting Co.* (1942) AC 154.
61. *Hirji Mulji v. Cheong Yue Steamship Co* (1926) AC 510.
62. *Horatala v. Sanchi* (1925) 26 NLR 426, 427.
63. *Manuelpillai v. Nallamma* (1951) 52 NLR 221, 225.
64. *Sansoni v. Foenander* (1872) 1872, 75, 76 Ramanathan 32, Vanderstraaten Reports 144.
65. *Hamine v. Goonewardene* (1914) 17 NLR 507.
66. *Sinnacuddy v. Vethattai* (1935) 4 CLW 133.

67. *Sivarasapillai v. Anthonypillai* (1937) 40 NLR 47.
68. *Krishnaswamy v. Thillaiyampalam* (1957) 59 NLR 265, 269.

APPEAL from judgment of the Court of Appeal.

P. A. D. Samarasekera P.C. with *Daya Guruge* for 2nd Plaintiff-appellant.

N. R. M. Daluwatte P.C. with *Manohara de Silva* and *Pradeep Kirtisinghe* for 1st defendant-respondent.

Cur. adv. vult.

21st August, 1992.

AMERASINGHE, J.

This is an action concerning the revocability of a gift of a land called Apaladeniya Estate belonging to Ranaviraratne Arachchige Dona Podi Nona Ranaweera Menike (hereinafter, sometimes, simply referred to as the "appellant").

The appellant was married to Mallawa Arachchige Edmund Perera Senanayake. The appellant and her husband had one child, Mallawa Arachchige Rohini Senanayake, (hereinafter, sometimes, simply referred to as the "respondent").

A marriage had been arranged between the respondent and Panduwawala Kankanamalage Yasaratne Perera. I shall refer to him, sometimes, simply as "Perera". On 11 July 1967, by Deed No. 3412, drawn and attested by C. D. C. W. Senaratne, Proctor and Notary Public, – a fact which we shall see, later on, is of some importance – the appellant and her husband, reserving to themselves a life interest, donated Apaladeniya Estate to their daughter, the respondent, and to Perera. The deed, *inter alia,* stated as follows:

No. 3412
DEED OF GIFT Rs. 50,000/-

Whereas a marriage has been arranged and is intended shortly to take place between Mallawa Aratchchige Rohini Senanayake . . . the only child of the said donors; and Panduwala Kankanamalage Yasaratne Perera . . .

And Whereas the donors have decided to donate the premises . . . on the occasion of and in consideration of the said marriage . . . the gift or donation to take effect on the marriage of the donees but to be subject to the life interest (of the donors). . .

Now know Ye and these presents witness that the said donors in consideration of the marriage of the donees do hereby give grant convey transfer assign set over and assure unto the said donees, subject to the life interest of the said donors as hereinbefore recited, as a gift to take effect on the marriage of the donees, (Apaladeniya Estate) . . . to have and to hold the said premises hereby gifted and assigned or intended so to be . . .for ever from the marriage of the donees, subject only to the life interest of the (donors). . .

And know all Ye by these presents that the said donees. . . . do hereby gratefully and thankfully accept the above gift or donation made to them by these presents . . . . .

The Marriage between the respondent and Perera took place on 17 August 1967. The marriage, however, was dissolved, after legal proceedings in D.C. Kurunegala Case No. 3629, on 30 July 1975. On 10 April 1979, the respondent assaulted her parents. The appellant (and her husband) filed action seeking the revocation of the deed of gift on the ground of gross ingratitude manifested by the assault. The District Court allowed the revocation of the gift on the ground of gross ingratitude. When the matter came up for hearing in the Court of Appeal, it was argued that the transaction was a *donatio propter nuptias*, and that, since the contemplated marriage had taken place, the gift was, as a matter of law, not revocable on account of ingratitude. The Court of Appeal agreed with this submission, and, on 24 January 1991, it set aside the order of the District Court. Special leave to appeal to this Court from the order of the Court of Appeal was granted on 29 July 1991.

Johannes Voet, *Commentarius ad Pandectas*, (xxiii.1.1), begins his commentary on Betrothals (*De Sponsalibus*) with the following words:

> *Si quae juris nostri portio naturalis fit, si quae usu hominum frequenta, quae tamen simul togatos in foro saepissime exercet, atque magnis inter se animis committit, est certe ea, qui de nuptiis, earumque praeambulonibus sponsalibus, comitibus, dotibus pactisque dotalibus, ac denique quam Plurimis momenti maximi effectibus tractatio instituitur.*

Mr. Justice Percival Gane (Selective Voet, 1957) translated that passage as follows:

> If there is any essential portion of our law, any portion which is freely employed in the usage of mankind, but which nevertheless at the same time very often gives such ado to the gowned gentlemen in the Courts, and sets them fighting with great mutual spirit, it is surely that portion in which is undertaken the treatment of marriage, of the betrothals which walk before it, of the dowries and dotal agreements which accompany it, and finally of its very many and weighty effect.

However, reported decisions in Sri Lanka on the subject of what Voet (xxiii.1.1) referred to as "dowries and dotal agreements", based on the Roman Dutch Law, which we have to apply in this case, are not many; and, there are none, it seems, on the question of the revocability of a conveyance of property given on the occasion of a marriage which has been subsequently dissolved. (There are, of course, several reported decisions on the interpretation of marriage settlements in the context of specific statutes, like the Stamps Ordinance, to which the principles of English Law have been applied, as well as decisions on the revocability of gifts under *Kandyan Law*, which have no direct relevance to the matter before us.)

Learned Counsel for the the appellant, Mr. Samarasekera, P.C., submitted that the Court of Appeal was in error for the following reasons:

(1) If the matter of revocability was to be decided on a question of law, that question should, in terms of Section 75 of the Civil Procedure Code, have been set out in detail in the answer filed in the District Court. In terms of Explanation 2 to Section 150 of the Civil Procedure Code, a Party cannot be allowed at the trial to make a case materially different from that which he has placed on record for his opponent to meet. In appeal, in terms of the Scheme of Chapter LXI of the Civil Procedure Code, a party cannot be taken by surprise by an entirely new position being taken up which had not been raised before.

(2) If the Court of Appeal was right in assuming that it could decide a case on the basis of a question that had not been raised earlier, because it was a question of law, yet it was not entitled to do so in this case, where the question was not a pure question of law, but a mixed question of law and fact. Since the question had not been raised earlier, the appellant had no opportunity of adducing evidence in support of her contention that the gift was not made propter nuptias, but rather, that it was a pure act of liberality and generosity. A decision that the conveyance was irrevocable without the benefit of evidence on that matter was unjustifiable, since the characteristic quality of revocability, attached to certain kinds of gifts, depended on the nature of the gift established by the facts.

(3) The co-donee, Perera, who had been made a party to the revocation proceedings, had not objected to the revocation, although, if the transaction was a donatio propter nuptias, it was he, as the person who might have been induced by the gift to enter into marriage, and not the respondent, who was entitled to complain of the revocation.

(4) Assuming that a donatio nuptias had taken place, and assuming that such a gift is generally irrevocable, if the marriage had taken place and during the subsistence of the marriage, yet, in this case, the nature of the gift altered upon the dissolution of the marriage and became revocable. Then, by reason of the donee-daughter's ingratitude, manifested by her laying of impious hands on her donor-parents, the donor-appellant qualified to seek the assistance of the

Court to revoke the donation. The effect of the dissolution of the marriage on the question of revocability had not been considered by the Court of Appeal.

Learned Counsel for the respondent, Mr. Daluwatte, P.C., supported the decision of the Court of Appeal on the following grounds:

(1) Although the Court of Appeal decided the matter on the basis of an argument that had not been adduced earlier, the new submission related to a question of pure law, which, therefore, could have been raised at any time.

(2) In any event, the point was one that might have been raised at the trial under issue No. 2 framed by the donor-plaintiff, and the Court of Appeal had all the requisite material in the record for deciding that point. The question of the nature of the gift in this case had to be ascertained from the words in the deed of conveyance itself, and not by reference to extrinsic evidence. Other evidence was inadmissible and would not have been of avail, and its absence could not have prejudiced the appellant.

(3) A conveyance on account of liberality is revocable, but not one for "valuable consideration". A gift "in consideration of marriage" is a conveyance for valuable consideration". It is given in the discharge of an obligation owed by a parent to a child so that the donee may be able to shoulder the burdens of marriage. And so, a donatio propter nuptias is not made out of pure liberality, but on account of "cause". As a result of, or in consideration, of the marriage gift, a change of status took place. The "consideration" in this case brought about the alteration of civil status. Since the marriage took place, consequent upon the making of the gift propter nuptias, the contract was complete and irrevocable, and the subsequent dissolution of the marriage did not make the conveyance revocable.

(4) A gift in consideration of marriage is an incentive to both the bride and bridegroom, and, therefore, the fact that the revocation was not opposed by the appellant's co-donee, is without significance.

(5) The alleged assault had not been established. In any event, it was a case of "slight ingratitude" and, therefore, revocation was not warranted. A single blow or a single act of ingratitude is insufficient to warrant revocation.

A matter that has not been raised before might, nevertheless, be a ground of appeal on which an appellate court might base its decision, provided it is a pure question of law; or, if the point might have been put forward in the court below under one of the issues raised, *and* the court is satisfied (1) that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial, and (2) that no satisfactory explanation could have been offered by the other side, if an opportunity had been afforded it, of adducing evidence with regard to the point raised for the first time in appeal. The opinion expressed on this matter by Lord Herschell in *The Tasmania* [1], has consistently formed the basis of our law on this question. (See *Appuhamy v. Nona* [2], *Manian v. Sanmugam* [3], *Attorney-General v. Punchirala* [4], *Attorney-General v. Croos* [5], *Fernando v. Abeygoonesekera* [6], *Talagala v. Gangodawila Co-operative Stores Society Ltd.* [7], *Arulampikai v. Thambu* [8], *Seetha v. Weerakoon* [9], *Dassanayake v. Eastern Produce and Estates Co. Ltd.* [10], *Ceylon Ceramics Corporation v. G. G. Premadasa* [11]. Therefore, the question before us is not, with great respect, as it appears to have been supposed in *Jayawickrama v. David Silva* [12], and by the Court of Appeal in this case, and by learned counsel in the matter before us, to be one depending simply on the issue whether the new point raised was one of law, on the one hand, or a question of fact or a mixed question of law and fact, on the other.

Mr. Daluwatte quickly appreciated the difficulty of insisting that the novel point raised in the Court of Appeal was a *pure* question of law. He argued, instead, that the submission relating to revocability might have been put forward in the District Court under the second issue raised by the plaintiff, namely, whether on account of the alleged assault by the donee, the donor was entitled to revoke the gift given by deed No. 3412? I will assume this to be so. However, were all the facts bearing upon the new contention before the Court of Appeal? Was the donor prejudiced by having no opportunity to adduce evidence to explain that the transaction

was not a *donatio propter nuptias?* Mr. Daluwatte submitted that the nature of the transaction was, in terms of the Evidence Ordinance, only ascertainable by considering the terms of the deed itself. And, since no prejudice could be caused by the lack of other evidence, no objection to the raising of the question on the ground of novelty should, he said, be sustained.

Although Mr. Daluwatte raised them, I do not need to, and therefore, do not consider either the large question of the admissibility, in general, of extrinsic evidence to contradict, vary, add to or subtract from the terms of written agreements, or the equally broad question whether extrinsic evidence might be adduced for the purpose of showing the meaning or supplying the defects of an *ex facie* ambiguous or defective deed. It was neither the appellant's case, nor that of the respondent, that the deed in the case before us was ambiguous or defective. Nor did either party seek to contradict, vary, add to, or subtract from its terms. Mr Daluwatte said that the Court of Appeal had properly done so, and invited us also to decide the question of the nature of the deed solely by reference to its terms. I am quite content to do so, for I think, that such an approach does, in the circumstances of this case, lead me to a just result.

However, if we should only look at the Deed, how should I consider its terms? I should like to refer to certain decisions relating to the interpretation of Deeds, which I think, are helpful in deciding the matter before me. The emphasis in the following passages is mine.

In the matter of an Application of A. K. Chellappa [13], the question was this: What was the character of the conveyance for the purposes of the Stamp Ordinance? The deed had said that the conveyance by the parents to their daughter was a "settlement by way of *mudusam*. De Sampayo, J. (at p. 119) explained that

> "*mudusam* Property in Jaffna law is distinguished on the one hand from dowry and on the other hand from acquired property. It signifies inherited property, and the word can only be regarded as employed here to indicate that the donee was to hold the subject of the gift as inherited property, and not a dowry or acquired property. It does not by any means satisfy the definition of "settlement" in the Stamp Ordinance".

The affidavits submitted to clarify the nature of the transaction were not convincing. His Lordship said:

> "I think that a notary or party who wishes to brings an instrument within a particular description **for the purpose of regulating the stamps** must see that the instrument itself discloses its nature."

In that case Wood Renton, C.J. said:

> "There must, I think, be something in the instrument itself to show that it is a settlement **within the meaning of the statutory definition. The mere use of the term "settlement" cannot make it one. Nor can any inference in favour of the appellant's contention properly be drawn from the term mudusam. I am inclined to think that the notary had inserted the word "settlement" in the deed with a view to evade the stamp duty with which the instrument was properly chargeable. But, be that as it may, the instrument itself is simply a deed of donation.** No authority was cited to us in support of the proposition, and in the absence of authority, I decline to hold that an instrument of this nature can be changed from a deed of gift into a settlement by extrinsic evidence . . .

In the matter of an Application of Notary Abeyratne [14], where the question was whether the deed was properly stamped in terms of the Stamps Ordinance, the Court held that the decision in *Chellappa* was correct and applicable, the extrinsic evidence adduced, in any event, being "insufficient".

Following the decisions in *In re A. K. Chellappa* [13], and *In re Abeyratne* [14], (both of which were cases relating to the interpretation of the Stamps Ordinance), Bertram C.J. in *In the Matter of the Application of v. Coomaraswamy* [15], said:

> "In determining this question we have to look at the terms of the document itself. We are precluded from making any inquiry into the circumstances under which it was given, and considering any evidence *aliunde* as to the nature and the purpose of the deed . . .

> We have, therefore, to ask ourselves whether upon the face of the document it is in substance a deed of gift. For that purpose it does not matter what it may be called. We have to determine from what appears within the four corners of the document its essential nature."

In *Ponnamperuma v. Goonesekera* [16], De Sampayo, J., it seems was somewhat more flexible in his approach than Bertram, C.J. had been in *Coomaraswamy*, and not altogether averse to going beyond the four corners of the deed in ascertaining its nature. His Lordship said at p. 239 as follows:

> It is to be noted that the promise and the actual gift was not to the fifth defendant but to Karonchihamy, so that an element of this kind of donation is absent. Moreover, neither the informal writing nor the deed shows that the gift was given as an inducement for the marriage. They do not even call it a dowry. Lastly, it was revoked with the concurrence of the donee herself, and not at the instance of Juvanis Silva alone. Both in form and substance it is an ordinary gift, though the promise may have been given on the occasion of the marriage between the first defendant and Karonchihamy. I should say that the nature of the gift, if it is to be claimed as being of a special kind, should be disclosed in the instrument itself. But even if extrinsic oral evidence is admissible, I think the evidence falls far short of what is necessary. The only evidence on the point is that of the fifth defendant, and all that he says is: "I am married to a niece of plaintiff's vendor Juwanis in 1904. Juvanis agreed to give as dowry half of Bamboragewatta." In my opinion the gift cannot be considered as a donation *propter nuptias* in the true sense of the expression."

The Court of Appeal had before it (at pages 198-212 of the Brief) the terms of Deed No. 3412. What was the nature of the transaction according to its terms? It is described in the *caption* of that document as a "*Deed of Gift*". Is the descriptive heading in the deed, calling it a "deed of gift", not, *Prima facie*, indicative of its nature? It is also described in the *body* of the document as a "*gift or donation*". Moreover, in that document, the givers describe themselves as "*donors*", the recipients are described as "*donees*" who accept the land as "*a gift or donation*".

The property is given "*as a gift* to take effect on the marriage of the donees", and the property is said to be "*gifted* and assigned". The "donees" accept the gift '*gratefully and thankfully*'. Does this not indicate that the property was being received as a consequence of an act of liberality rather than as something obtained as a matter of right? In the circumstances, may we not, with justification, say, as Wood Renton, C.J. did in *Chellappa* (*supra*), that the "instrument was simply a deed of donation" and not a marriage settlement? Should we not, as De Sampayo, J. did in *Ponnamperuma v. Goonesekera*, (*supra*), note that the donors "do not even call it a dowry" and conclude that the "gift cannot be considered as a donation *propter nuptias* in the true sense of the expression"? Having regard to the words used, should we, not conclude that the transaction was a "gift", as Mr. Samarasekera contends, and not, as Mr. Daluwatte submits, a "dowry"? I think it was a gift at least in *form*. Might we also conclude, as the Court did in *Ponnamperuma* (*supra*), that it was a gift *in substance*?

It has been laid down in several decisions that we ought to ascertain the "real", "actual", "essential" nature of a transaction, what it was "in substance", what it was "in fact", regardless of the labels and technical phrases or words, the parties, or their notary, might have chosen to employ. For one thing, the parties may deliberately use inaccurate terms with ulterior purposes, such as evading the provisions of the Stamps Ordinance, as, for instance, Wood Renton, C.J. found in *Chellappa (supra)*. Further, the nature of a document is a question of law to be determined by a court; and in doing so, a court does not permit itself to be misled by the terminology used in the document.

In *Jayasekera v. Wanigaratna* [17], Hutchinson C.J. observed: "The fact of the deed being called a "deed of gift" cannot make any difference if it is clearly proved what the real nature of it was." *In Re the Application of K. S. Veeravagu* [18], although the deed of conveyance from the parents to their daughter described it as a "dowry deed", and although in the operative portion it purported to convey the lands "by way of dowry in consideration of the marriage" of the daughter, it was held that it was in fact a deed of gift. De Sampayo, J. observed that "The donee had already been given in marriage, but as, under the customary law prevailing in Jaffna, a dowry may be given at, before, or after the marriage, the fact of the marriage being prior to the deed would not make it any the less a dowry, if in fact, it was one."

Veeravagu (supra) was followed with approval by Schneider, J. *In Re the Application of Goonesekera* [19]. In that case, counsel contended that the deed under consideration was executed by a Muhammadan husband in favour of his wife after the consummation of the marriage for the mahar, which under the Muhammadan law, a husband is under an obligation to pay to the bride, and that, therefore, the consideration for the deed was a debt due. As such, it was for a pecuniary consideration and was a transfer. Schneider, J. rejected that submission, observing that ". . . the instrument must be looked into, and the actual consideration for the transaction gathered from it. It is of no importance what the parties to it may call or describe the transaction . . . The real consideration for the deed in question is not money or its equivalent paid by the wife to the husband, but that with which the husband dowers the wife in consideration of her marriage. . ."

Veeravagu (*supra*) and *Goonesekera* (*supra*) were followed with approval by Bertram, C.J. and Jayewardene, J. *In the matter of the Application of V. Coomaraswamy* [15]. The document in that case stated that "in consideration" of the sum of Rs. 1500 agreed to be given by the father to his daughter as "dowry money", he transferred certain mortgage bonds to her. Bertram, C.J. said that the Court had to determine the "essential nature" of the document and whether it was "in substance a deed of gift" and "for that purpose it does not matter what it may be called."

The view that, what the parties may name a transaction to be, or how they describe its purpose, is not conclusive, was also shared by De Sampayo, J. in *Ponnamperuma v. Goonesekera* (*supra*). In that case an uncle had conveyed property to his niece, describing the transaction as a *donatio mortis causa*. De Sampayo, J. at p. 238, however, observed that what the donor and his notary meant in so naming the gift was "not apparent", and decided that it was "obvious" that it was a gift *inter vivos*.

Whether the transaction in this case was a "gift" or not would depend on whether the legal criteria for ascertaining whether there is a "gift" are satisfied. A "gift" or, as it is sometimes called, a "donation", is, technically, in its narrower sense, a giving or promising of a thing without compulsion or legal obligation or stipulation for anything in return, freely, out of sheer liberality or beneficence. (Voet, *Commentarius ad*

Pandectas, 39.5.1; Grotius, *Inleidinge tot de Hollandsche Rechtsgeleedheid*, 3.2.1.2; Van Leeuwen, Het Roomsch Hollandsche Recht, Vol. 2, p. 236 and *Censura Forensis*, 1.4.12.1; Vander Linden, *Rechtsgeleerd, Practicaal en Koopmans Handboek*, p. 213; Maasdorp, *Institutes of South African Law*, 8th Ed. Vol. III, p. 52; Nathan, *The Common Law of South Africa*, Vol. 1, 2nd Ed. p. 1153 and p. 1163). The relevant question is: What was the donor's intention or primary motive? (Windscheid (op. cit)). In the case of a *gift*, the intention or primary motive should be the enrichment of the donee, *for the sake of enrichment.* Savigny (*System des heutingen romischen Rechts*, Vol. 4 paragraph 142) points out that an essential element of a donation is the disinterested *voluntas* on the part of the giver who must be moved solely by the *utilitas* or *commodum* of the receiver, and not his own advantage. The crucial test is whether the donor was moved or induced to give his property *simply by the desire to enrich the donee;* whether that which influenced his volition, was liberality. (See per Tindall, J.A., in *Avis v. Verseput* [20], citing *Voet, Commentarius ad Pandectas,* Van Leeuwen, *Censura Forensis*, Ulirk Huber in *Praelectiones ad Inst.* 2.6.4 and *Heedensdaegsche Rechtsgeleertheyt).* A motive – *bestimmungstrund* – for a gift may be one of several things; it may, for instance, be vanity, publicity, the force of public opinion, duress, personal advancement or some other selfish aim, or affection or charity. (See per Watermeyer, A.C.J. in *Avis v. Verseput* [20], at p. 353, and at p. 382 per Fischer, A.J.A. in the same case). A motive of this kind, it has been said, may *explain the reasons for forming an intention to enrich someone else.* (Windscheid, *Lehrbuch des Pandektenrechts*, Vol. 2. paragraph 365). However, if a transfer of property is to be regarded as a "gift" the person to whom something is given must be given that thing *with the intention of enriching the donee, for enrichment's sake*, whatever the remote, explanatory purposes lurking in the background for doing so may be. (Windscheid,op.cit;J. E. Goudsmit, *Pandekten-systeem,* Vol. 1 paragraph 68; *Avis v. Verseput, supra,* at pp. 382-383 per Fischer, A.J. A.). I do not wish to enter into the difficult, albeit interesting, philosophical debate on "*intention v. motive*". I believe the requisite state of mind for deciding whether there was a gift in this case is clear enough.

The question for us is this: Was the transfer of Apaladeniya Estate simply made to enrich the respondent and her prospective bridegroom for the sake of enriching them, so that it might be assumed that the

property was unconditionally, unalterably and irreversibly given and, as it were abandoned, and put beyond hope of being ever called, or taken back or recovered by undoing and revoking the transaction? Voet says (xxxix.5.5) that "to donate is nothing else than to sacrifice and to abandon" (*donare vero nihil aliud est, quam jactare & perdere*) and he says (xxxix.5.3) that when something is given as a gift, it is given so that "in no event is it to come back to himself". (*Nullo cause ad se reverti*) Cf. also *Heen Banda v. Sinniah* [21]. Or was the true purpose, was the primary motive or intention, in transferring Apaladeniya Estate to induce, prompt and bring about the marriage? Was the property given because of the promise of marriage or on condition that the marriage took place – so that the donor could, with justification, have "changed his mind" (Voet xxxix. 5.22. and xxxix. 5.35) and taken steps to reverse, put an end to, undo, and revoke the transaction, if the marriage did not take place?

Although a gift, in the narrow, technical and "proper" sense, had to be an act of pure liberality, certain types of transactions which were moved or induced by other considerations, such as a conveyance on account of marriage (*donatio propter nuptias*) or in connection with a betrothal (*sponsalita largitas*) were, nevertheless, called gifts. Judges and jurists, no less than the man in the street, have, over a long period of time, described dowries and conveyances on the occasion of marriage as "gifts". Although in *Ponnamperuma* (*supra*) De Sampayo, J. distinguished between a gift and a *donatio propter nuptias*, yet in *Veeravagu* (*supra*) His Lordship at p. 68 said that "A dowry, though it may be given in consideration of marriage, is nevertheless a gift." On the other hand, Hutchinson, C.J. in *Jayasekera v. Wanigaratna* (*supra*) at pp. 365-366 observed the distinction between a "pure gift" and a "dowry". (I have, later on, more fully quoted the statement of Hutchinson, C.J.). Because the word *donatio*, in the Roman and Roman-Dutch law, was used both in a narrow, technical, sense and in a wide, popular, sense, it became necessary to attach qualifying words and phrases to distinguish between the ways in which the term *donatio* was used to ensure that the special rules applicable to "gifts", in the narrower, technical, sense, would be applied in appropriate cases. Some writers (e.g. see Mackeldey, *Systema Juris Romani*, pars. 466) distinguish between a pure act of generosity (*donatio mera*) and one that is prompted

by the performance of something by the donee (*donatio non mera*). Huber (*Hed. Rechts.* III.14) seems to have taken a similar view. He distinguished between donations arising from liberality, pure and simple, which were described as *eygentlyke* – genuine – on the one hand, and quasi – donations – oneygentiyke – arising from some inducing reason (*die om bewegende reeden geschiedt*), on the other. Gifts to encourage and promote marriage (*voorzetten van houwelyk*) were regarded by Huber as quasi-donations.

Although Voet seems to have had some difficulty with regard to gifts made in recompense of benefits or services which a donor neither was, nor believed himself, legally bound to remunerate – *donatio remuneratoria* –, Voet (xxxix. 5.3) entertained no doubt that conveyances made on account of marriage, or in connection with a betrothal, when they are called "gifts", are "improperly so called" – *impropriae*; and he distinguished them from a "sheer donation" between betrothed persons – *distincta omnino a simplici inter sponsum & sponsam donatione.* We are not concerned with remuneratory gifts in this case, and fortunately so, for the authorities were hopelessly divided on whether remuneratory gifts were technically qualified to be treated as donations or not. Earlier (xxxix. 5.1). Voet distinguished between a gift (*donum*) and a duty-gift (*munus*). A gift, he said, is the name given to a

> "thing furnished of one's accord without any need of right or duty, and as to which there is no blame if they are not furnished, while some praise generally goes with them if they are furnished. But a duty-gift is properly one which we undertake of need, by law or custom or at the command of one who has the power to give such a direction. Instances are a birthday present and a wedding present."

It is for the party seeking the assistance of a court for the revocation of a gift, "properly so called", to prove, on a balance of probabilities, that the transfer of the property was a pure act of disinterested benevolence and liberality. (See *Timoney and King v. King*[22], *Birrell v. Weddell*[23], *Sakir v. Sakir*[24], *Peters v. Peters*[25], *Smith's Trustees v. Smith*[26], *Avis v. Verseput* (*supra*) at 345 and 377; *Ex parte Executors Estate Everard*[27], *Kay v. Kay*[32], (*supra*);

Maasdorp, op. cit. p. 601. Voet (xxxix. 5.5) says that "a donation is not presumed in doubt so long as another inference can be drawn. Thus he who sets it up, even by way of defence, ought to prove it, for the reason that no one is believed to be readily willing to sacrifice what is his and to donate is nothing else than to sacrifice and to abandon." A donation must be clearly and distinctly proved and must not be presumed as long as some other construction is possible. (*Venter v. de Klerck*[28], *Timoney and King v. King*[22], *Avis v. Verseput* [20]). It cannot be gathered from loose expressions of a desire to bestow a gift, but must be manifest from the acts and language of the donor. (*Van Reenen's Trustees v. Versfeld and Others* [29] *Avis v. Verseput*, (*supra*); Voet 39.5.5; Grotius, 3.2.4; Maasdorp p. 54).

A determination of the question whether a transaction is a gift or not is important for several reasons. A "gift", in the narrower, technical sense, and therefore, as some jurists would say, a gift "properly so called", was, generally, subject to compliance with certain formalities for its validity. Since, *inter alia*, it was deemed to be desirable to restrain generous, impulsive liberality of the moment (cf. *Coronel's Curator v. Estate Coronel* [30], *Avis v. Verseput*, (*supra*), at p. 365), compliance with certain formalities were insisted upon in the formation of a valid contract of donation. This was expected to give the donor time for reflection, so as to put him on his guard with regard to the prudence of depleting his assets, and also to give him the opportunity of considering the propriety of adversely affecting the interests of his heirs. Whether we should regard the gift in this case as arising from pure liberality and, therefore, whether we should regard it as being *eygentlyke* – "genuine" – and classify it as a species of donation "properly so called" (*ad propriae donationis species*), does not matter with regard to *the formalities relating to the making up of a valid contract.* The transaction in this case related to *immovable property.* As such, it was a matter governed by the Prevention of Frauds Ordinance. That it might have been a *donatio propter nuptias* or not, makes no difference, (See *Noorul Hatchika v. Noor Hameen*)[31]. The transaction in the case before us, as we have seen at the outset, was executed by a notary. It was, therefore, made in compliance with our law on the subject. And so, the condition of a valid contract that the requisite forms or modes of agreement (if any) should be observed, was satisfied in this case.

Another consequence of deciding that a conveyance of property was a "gift" in the narrower, technical sense, and therefore, "properly so called", was this: Although a gift is *generally* irrevocable (Grotius, *Inleidinge* 3.2.16) Nathan, (op. cit. 1163)), it is revocable (1) if the donee failed to give effect to a direction as to its application (*donatio sub modo*); (2) on the ground of the donee's ingratitude; or (3) if at the time of the gift the donor was childless, but afterwards became the father of a legitimate child by birth or legitimation. (R. W. Lee, *Introduction to Roman Dutch Law*, 5th Ed. 289). On the other hand, conveyances that were not made out of pure liberality were irrevocable, even if the donee was guilty of ingratitude or subsequently had legitimate children. (See per Tindall, JA and Watermeyer, ACJ in *Avis v. Verseput* (*supra*) followed with approval per Ramsbottom, JA in *Kay v. Kay* [32]. See also *Heen Banda v. Sinniah* [33]. A conveyance *propter nuptias*, not being an act of pure liberality, and, therefore, technically, in the narrower sense, not being a "gift" (at any rate, not a "gift" *properly so called*), is irrevocable on account of a donee's ingratitude or on account of the appearance of progeny, by birth or legitimation. (Voet, xxxix. 5.25 and 34; Lee, ibid.; Nathan, (op. cit. 1164).

Mr. Daluwatte argued that, in terms of the deed of conveyance, the recital of the fact that a marriage had been arranged and was to take place shortly, in the context of the statements in that deed that the donation was to "take effect on the marriage", and that the donees were to have and to hold the property "from the marriage of the donees", meant that the phrase "in consideration of" the marriage of the donees necessarily implied that the conveyance was in fact made in the discharge of a parental obligation to give a dowry. This was, he submitted, the "valuable consideration" of the contract of donation. It showed, he said, that there was "cause". In the circumstances, the conveyance was not a mere act of liberality. It was not a pure gift that was revocable, but a *donatio propter nuptias* which was a transaction for "valuable consideration". The existence of "valuable consideration" meant that, once the contemplated marriage had taken place, the transaction became unalterable and irreversible. The donor could no longer change her mind. The transaction could not be undone. It could not be revoked. The property was beyond recall and recovery. A subsequent dissolution

of the marriage had no effect. It was of no avail. The related, but distinguishable, concepts of "consideration", *justa causa*, "intention", and "motive", it seems are, in one way or another, found in Mr. Daluwatte's argument.

Mr. Daluwatte referred us to Holland's *Jurisprudence* in support of his submissions. In that work, (1910, Eleventh Ed. pp. 285-286), in describing contracts whose object is "alienation", Holland stated as follows:

> An alienatory contract may be a mere act of liberality on one side, or each party may intend by means of it to secure some advantage for himself. In the former case it is a contract to give; in the latter, a contract to exchange. . .
>
> . . . In Roman Law and the derived systems, ungrateful conduct on the part of the beneficiary would be ground for a rescission of the gift . . .
>
> Gifts in contemplation of marriage, which is, in the language of English law, a "valuable" consideration, are not considered to be mere liberalities. The rules therefore which regulate the presents made to the husband by means of the Roman 'dos', and the presents made to the wife by means of an English jointure, or marriage settlement, are not those which would regulate merely "voluntary" agreements.

The English concept of "consideration" may be relevant in considering certain contracts, such as transactions relating to the sale of goods (*Attorney-General v. Abraham saibo* [34], or in construing certain statutes such as the Registration of Documents Ordinance – e.g., see *Salaman v. Obias* [35], and the Stamps Ordinance – e.g., see *Waharaka Investment Co. Ltd. v. Commissioner of Stamps* [36], see also Weeramantry, *The Law of Contracts*, at pp. 44-48 and 200-221). However, there is no dispute that in the matter before us, the applicable rules are those of the Roman Dutch Law – what Holland called a "derived system" from the Roman Law – and not the English Law; and, therefore, the question whether there was "valuable consideration" in order to make, and which made, the

contract valid and enforceable, is, strictly speaking, irrelevant for our purposes. Indeed, according to Holland (op. cit. 280, citing *Lipton v. Buchanan*[37], what we required in "Ceylon" (as Sri Lanka was then known) was supposed to be no more than this: that an agreement, in order to be binding, should be founded on a *redelijke oorzaak*, a *causa legitima* – some reasonable and permissible ground for the consent of the parties. Voet (2.14.9) said that a promise would be binding if it had been given *serio et deliberatio animo.* The usefulness at all of the concept of *causa* in our law, in respect of contracts governed by the Roman-Dutch Law, has been seriously doubted. (E.g. R. W. Lee, *Introduction to Roman Dutch Law* at p. 224 and Appendix F; Weeramantry (op. cit. at pp. 254-255). In any event, in our law relating to contracts of the kind before us, *causa* is not the equivalent of "valuable consideration". It is not a *quid pro quo.* In general, what is required is that a promise should be seriously and deliberately made. The view that, for the validity of transactions to which the Roman-Dutch Law is applicable, the English law requirement of "valuable consideration" is unnecessary, despite some earlier erroneous decisions (e.g. see D.C. Colombo 53 775 (1871) Vander Straaten 192; C.R. Negombo 33605, (1889) 3 SCC 70), has been consistently recognised by our Courts before and after *Lipton*[37], (cited by Holland and affirmed in review in 10 NLR 158). E.g. See *Muttu Carpen Chetty v. Capper*[38]; *Jayawickrema v. Amarasuriya*[39]; *Abeysekera v. Gunasekera*[40]; *Edward v. de Silva*[41]; following *Conradie v. Rossouw*[42]; *Public Trustee v. Udurawana*[43]. One might, in the circumstances, be pardoned for being somewhat surprised that we see again in this case, to which the English Law has no application, what Lord Dunedin, in *Dunlop v. Selfridge*[44], described as, a "budding affection . . . for the doctrine of consideration."

In any event, it must be understood that whether the words used in a deed indicate the existence of "valuable consideration" or not, depends on the construction to be properly placed on that, particular, deed. Thus in *Kanapathipillai v. Subramaniam*[45] where a father had gifted two lands to his son "for and in consideration of love and affection", the fact that the deed went on to state that the transfer was subject to the son discharging a debt owed by the donor did not mean that it was a transfer for "valuable consideration". Sansoni, J.

(H. N. G. Fernando, J. agreeing) held at p. 463 that, although the donor would undoubtedly benefit to a certain extent, yet the transfer was for "the consideration recited in the deed", namely, "love and affection", and not "a transfer for valuable consideration." I have already explained that in *form*, the deed in the case before us was a gift and, therefore, the conveyance was *ex facie* an act of liberality and not motivated by "valuable consideration". Whether, having regard to its terms, it was also in *substance* a gift, is a matter I shall refer to later on.

Mr. Daluwatte suggested that the giving of a dowry was a discharge of a 'duty' on the part of the donor and that the discharge of that 'duty' was the "valuable consideration" in the contract of donation before us. Possibly, in certain circumstances, in Roman Law, a father might have been compelled, even against his wish, to give a dowry to his daughter. (See D. xxiii. 2.19; Voet xxiii.3.8). I know of no such *legal* duty on a parent today in Sri Lanka. Moreover, the discharge of a legal duty cannot be properly regarded as "valuable consideration". (E.g. See *Collins v. Godefroy*[46]; *England v. Davidson*[47]; *Ward v. Byham*[48]; *Williams v. Williams*[49]; A. L. Goodhart, *Performance of an Existing duty as Consideration*, 72 LQR 490; Weeramantry, op. cit. p. 231).

If Mr. Daluwatte meant to suggest that the promise to convey Apaladeniya Estate was in pursuance of the donor's *moral* obligations, that too would not be "valuable consideration", for moral consideration is not "valuable consideration". (E.g. see *Latchime v. Jamison*[50]). In fact, as Lord Wright has pointed out (*Ought the Doctrine of Consideration be abolished from the Common Law?*, (1936) 49 Harvard Law Review 1225 at p. 1235), they are contradictory notions. The conveyance in this case may not have been a *donum*, but rather a *munus* – a duty-gift. (See Voet xxxix. 5.1; *Avis v. Verseput*[20]; *Commissioner of Inland Revenue v. Estate Greenacre*[51], at 231). But that is another matter.

If we should at all be inquiring into the matter from the point of view of "valuable consideration", as Mr. Daluwatte seems to suggest we should, ought we then not to be asking ourselves *What was the consideration moving from the donee in return for the gift* ? (cf. Weeramantry, op. cit. p. 236 et seq.); What was the *quid pro quo* for Apaladeniya Estate?; rather than asking ourselves: What was the consideration *moving from the donor* ? Although the existence of

"valuable consideration" is not essential for the *validity* of the contract before us, ascertaining whether the donor transferred the property on account of something promised or performed in return, would, I think, clarify the donor's intention and help us decide whether the conveyance was or was not in substance the pure act of liberality it appears to be in form. Was it the marriage or promise of marriage on the part of the donee that led the donor to transfer Apaladeniya Estate? Was the marriage the consideration for, – in the sense of the *quid pro quo*, the reason for, that which brought about, a condition precedent to, – the transfer? And, in turn, was the transfer the consideration for,– in the sense of the *quid pro quo*, the reason for, that which brought about, a condition precedent to, – the marriage? (Cf. *Jayasekera v. Wanigaratna* [17]).

Mr. Daluwatte submitted that the gift was given to the donees to enable them to shoulder the burdens of marriage, and, therefore, the transaction was a *donatio propter nuptias*. Voet (xxxix. 5.25) followed by analogy in *Pillans v. Porter's Executors* [52]. See also *Commissioner of Inland Revenue v. Estate Greenacre* [51], said that a dowry or donation *propter nuptias* is "improperly" called a gift, since an "onerous" rather than "lucrative" title is given for the "shouldering of the burdens of marriage" to a prospective bridegroom who would otherwise not have been likely to "take to wife an undowered woman".

Easing the burdens of a child's marriage may be a desirable and commendable purpose. However, doing something about it, may or may not be an act of pure liberality. If, a conveyance of property is made *as an incentive* to take on the responsibilities of marriage by easing its financial burdens, which the parties may otherwise be unable, or find difficult, to bear, it might, perhaps, in the light of such explanatory circumstances, be more easily regarded as a *donatio propter nuptias*, rather than as a pure gift – an act of mere generosity and liberality. Yet, in the end, if the transaction is said to be a *donatio propter nuptias*, it must be established by sufficient evidence that the donor made the gift because the marriage, in terms of the donee's promise, would take place. A transfer *donatio nuptias* is not absolute and unqualified. It is conditional. The gift is *propter nuptias* because

there is *the promise of marriage or marriage by the donee in return for the gift.* The "consideration for" the gift is the promise of marriage or marriage by the donee.

And so, a *donatio propter nuptias* is, in one sense, made *in consideration of marriage* in that the transfer made is having regard to the fact that a marriage shall be entered into. The property is given *because*, in the sense that *in order or so that*, the marriage shall take place. It is the reason *why* the marriage takes place. It is that which *brings about* the promise of marriage or the wedding. The property is given, more or less, as something akin to a payment, something given in exchange, a *quid pro quo*, or reward or compensation. The transfer is *prompted* by the promise or performance of something by the donee, thereby making it a *donatio non mera*, and not a pure act of liberality (*donatio mera*). In the case of a *donatio propter nuptias*, the property may also be said to have been given *in consideration of marriage*, but in the sense that it is given merely by reason of, or on account of, or having regard to the fact or circumstance of, or motivated by, or on the occasion of, the marriage. Perhaps the distinction between a *donatio propter nuptias* and an ordinary gift given on the occasion of a marriage might become somewhat clearer if I might say this: People do not marry because of the wedding presents – the gifts – they might receive; nor are wedding presents given to bring about the marriage. A wedding present is a pure act of liberality, unconditionally given, without any sense of compulsion or obligation, with no hope of recall or recovery if the marriage does not take place. A *donatio propter nuptias* is not.

There are some reported decisions of our Courts that support the view that a conveyance in consideration of marriage is not an act of pure liberality. The reasoning appears to be this: where something is given because the recipient has promised to marry or married, because the transfer is prompted, or brought about by the fact that the promise of marriage would not otherwise be given or the marriage would not otherwise take place, the transfer is not a pure act of liberality.

In *Theodoris Fernando v. Rosalin Fernando*[53], a father had agreed with his intended son-in-law that, in consideration of his marriage with his daughter, he would, at such marriage, make over and convey

certain lands to his daughter. The marriage took place, but the father died before the marriage. The girl's mother, as executrix, conveyed the promised properties. In deciding whether the conveyance was in fraud of creditors, Lawrie, A.C.J. at p. 285 said :

> Certainly if a land be conveyed before marriage by a bridegroom to his bride or to marriage settlement trustees, or if the parents of the bride convey land to her and to the bridegroom or to the trustees in consideration of the marriage, then the conveyance would be for valuable causes.

Moncrieff, J. appears to have shared the view that the gift given in that case, in consideration of marriage was for valuable consideration, and, therefore, could not be set aside. The views expressed by Lawrie, A.C.J. and Moncrieff, J., however, were *obiter,* since the fact of insolvency was not established.

In *Jayasekera v. Wanigaratna* [17], a father executed a deed in favour of his daughter "on the day of her marriage as dowry". The question for decision was whether that deed, being one for valuable consideration, gained priority over an anterior deed by prior registration (in terms of the Registration of Documents Ordinance, which incorporated English rules and let in English concepts in its construction, cf. Weeramantry, *The Law of Contracts*, at p. 50) Hutchinson, CJ. at pp. 365-366 said :

> **". . . a conveyance of land by a father to, or for the benefit of, his daughter by way of dowry on her marriage is *prima facie*, a conveyance for valuable consideration.** It is possible, of course, and it is a thing which is done every day, for the parents or friends of a bride to give her a present on the day of her marriage, a pure gift, which does not form the consideration or any part of the consideration for the bridegroom marrying her. But that is *not* dowry. And in this country, as in most others, the dowry is almost always the consideration or part of the consideration for the man taking the woman as his wife. **The fact of the deed being called a "deed of gift" cannot make any difference, if it is clearly proved what the real nature of it was."**

The emphasis is mine.

The circumstances must be considered in deciding whether a conveyance was on the one hand, an act of sheer liberality, whether it was as Hutchinson, C.J. said, "a present on the day of her marriage, a pure gift which does not form the consideration or any part of the consideration for the bridegroom marrying her", or, on the other, whether it was a gift in consideration of marriage, in the sense that it was a transaction prompted by, or as Voet says (xxxix. 5.34), entered into "so that a suitor or a girl might be tempted to a marriage which would not have ensued at all" . . . *ut ad matrimonium,alioquin haud secuturum, procus aut puella invitaretur* . . . Was the transfer of Apaladeniya Estate, as De Sampayo, J. said in *Ponnamperuma* (*supra*) an "inducement" for the marriage? Was it an inducing reason – *die om bewegende reeden geschiedt* – as Huber (ibid.) might have put it ? Was the transfer that which made marriage attractive and led the respondent on to take Perera's hand in marriage? Was the gift a condition of the marriage? Could it be said that the marriage would not have "ensued at all" but for the transfer? What was the understanding?

A Court cannot profess to be able to divine what was in a donor's mind. That is an inference to be drawn on a balance of probabilities *from the proved facts*. (Cf. per Tindall, JA, in *Avis v. Verseput*, (*supra*) at p. 366). If, as Mr. Daluwatte submits, and if as the Court of Appeal concluded, the conveyance was a *donatio propter nuptias*, there must be admissible evidence from which it might be deduced that the conveyance was made to encourage or promote the marriage – *voorzetten van howelyk* –, that it was to "tempt" the marriage, from which circumstances it might be inferred that it was *on account of the promise of marriage*, or that it was *on the condition of the marriage taking place*, that the transfer was made. There must be evidence from which it could be concluded that the transfer was *prompted* or "brought about" by the marriage or the promise of marriage. *Ex facie*, as a matter of *form*, the conveyance, as we have seen, was a gift. However, if, as Mr Daluwatte urged, it was *in substance a donatio propter nuptias*, in that the conveyance was prompted and brought about by the promise, or the fact, of the marriage taking place and, therefore, it was a *donatio non mera*, and,

consequently, *a transaction arising from some inducing reason – die om bewegende reeden geschiedt* – because it was given to encourage and promote the marriage – *voorzetten van houwelyk* – by helping, as Mr. Daluwatte explained, to relieve its burdens, and, therefore, it was not a "gift" in the narrower, technical sense, – *eygentlyke* – a "genuine", "properly so called", gift – but rather a quasi-donation – *oneygentlyke* –, "gift" improperly so called – *donatio impropria* –, there must be admissible evidence leading the Court to such a conclusion. The deed does not say, to use the words of Middleton, J. in *Obeysekera Hamine et al. v. Jayatilleke Hamine*[54], "that if the promisee will marry [Perera] or someone else that the properties will be conveyed".

Mr. Samarasekera complained that, since the question of revocability on the ground that the transaction had been a *donatio propter nuptias* had been raised for the first time in the Court of Appeal, he did not have the opportunity of showing that the transaction was not a *donatio propter nuptias*. As we have seen, the *onus* of showing that the transaction was a gift is on the person who seeks to revoke it. Yet, where, as in the case before us, the terms of the deed, *ex facie*, show that it was a gift, in my view, the burden of adducing evidence to show that it was in fact, in substance, in reality, a *donatio propter nuptias*, is on the person who claims that it was a special kind of gift. De Sampayo, J. observed in *Ponnamperuma, (supra)* that "the nature of the gift, if it is to be claimed as being of a special kind, should be disclosed in the instrument itself". If, as His Lordship seemed, however, to have been prepared to consider, there was extrinsic evidence to the contrary, it should, as His Lordship said in that case, not fall "short of what is necessary." If the donee's position was that, although *ex facie* the deed was a deed of gift, it was in fact a *donatio nuptias*, a gift of a "special kind", as De Sampayo, J. put it, obviously, it was not for Mr Samarasekera's client, the donor-appellant, but for Mr. Daluwatte's client, the donee-respondent, to show that she took Perera's hand in marriage because her parents transferred Apaladeniya Estate in return for her doing so. If I might use the words of Middleton, J. in *Obeysekera Hamine* (*supra*), "she has not gone into the box to prove that".

In *Obeysekera Hamine et al. v. Jayatilleke Hamine*[54], the step-daughter of the defendant, (the first plaintiff), and the husband of the

step-daughter, (the second plaintiff), sued the defendant for the specific performance of an agreement signed by the defendant by which she undertook, after she had taken out letters of administration to her deceased husband's estate, to convey to the step-daughter, by way of dowry, certain specified properties of her deceased husband, on "the joyful occasion of her marriage." Grenier, J. (at p. 164) said :

> "It was argued that the promise as embodied in the agreement was a *nudum pactum*, and cannot therefore be enforced. It is unnecessary to deal with this large question on this appeal, because I think that the agreement simply amounted to a declaration, and nothing more, that the defendant would at some future time give certain lands to the 1st plaintiff by way of dowry out of property belonging to her deceased father's estate. I am inclined to take the view put forward by Counsel for the appellant that the object with which this document was drawn out was to show that the 1st plaintiff would not be dowerless, but that after the defendant had duly administered her husband' s estate she would convey to the 1st plaintiff certain lands out of that estate. The 2nd plaintiff was no party to this agreement, and it cannot be said that he was induced to marry the 1st plaintiff in the belief that the defendant would convey certain lands to his wife in consideration of his marrying her."

Middleton, J. at p. 165 said :

> "The consideration or rather *justa causa* in Roman-Dutch Law 8 NLR p. 49 if any must proceed from the promisee, the first plaintiff. Leake on Contracts p. 480 (4 ed.). She has not gone into the box to prove that she married the second plaintiff because the document A, was signed by her stepmother.
>
> In my view therefore no *justa causa* proceeding from the promisee has been proved which would make this a valid agreement for the breach of which *id quod interest* or damages might be exacted. The document promises to convey the various properties as dowry by reason of the joyful occasion of the promisee's marriage.

It does not promise that if the promisee will marry the second plaintiff or someone else that the properties will be conveyed.

For this reason I am inclined to the view that the defendant cannot be made liable in damages."

And so, it is the donee, and not the donor, who might have been prejudiced, if at all, by the lack of extrinsic evidence in the matter before us, assuming, of course, that such evidence was admissible. The Court of Appeal did not resort to extrinsic evidence in concluding that the transfer was a *donatio propter nuptias* and Mr. Daluwatte, who appeared for the donee, insists that such evidence is inadmissible.

Mr. Samarasekera drew our attention to the fact that the prospective son-in-law, Perera, had not contested the revocation. It was he, who might have been induced to marry. His failure to resist the action for revocation was, Mr. Samarasekera said, indicative of the fact that the gift was not induced by the promise of marriage. The fact that the transfer of the property was induced or prompted by the marriage is no doubt important in deciding whether it was a *donatio propter nuptias*. However, I do not agree that the disinterest of the prospective son-in-law concludes the matter in the case before us. The dictum of de Sampayo J. in *Ponnamperuma v. Goonesekera* (*supra*) that, because the gift in that case was not to the prospective bridegroom but to his wife, "one element of this kind of donation is absent", does not assist the appellant in the case before us. Nor does the observation of Grenier, J. in *Obeysekera Hamine* (*supra*) that, since the second plaintiff in that case was no party to the agreement, it could not be said that he was induced by the gift to marry the first plaintiff. The transfer in the case before us was not to the prospective son-in-law alone, but to both the daughter and prospective son-in-law of the donor. I agree with Mr. Daluwatte that, the inducement may well have been offered to both parties. Certainly, an incentive may be offered to the man or to the girl. (Cf Voet, xxxix.5.34 - *vide supra*). And there is nothing to prevent it from being offered to both of them. Shouldering the burdens of marriage might well have been seen as a shared responsibility of both the daughter and her husband. Or was it an inducement offered to the appellant-daughter alone? It has not

been established that the respondent – the daughter – was induced by the gift of Apaladeniya Estate, because it might have ensured her ability, as Mr. Daluwatte suggested, to "shoulder the burdens of marriage". Perhaps, the respondent was reluctant to marry Perera because she feared she might cease to live in her accustomed comfortable circumstances? Did the respondent agree to marry Perera because the transfer of Apaladeniya Estate would sufficiently meet her requirement that she should continue to live in comfort? But then, was the prospective bridegroom impecunious, or at least unable to support his wife in the life-style she was accustomed to? Or was the property transferred, as it was in *Wijetunga v. Atapattu*[55], merely to "win over" one or both of the donees? There was no evidence on such matters either in the deed or in other part of the record before the Court of Appeal. What were the circumstances from which the Court inferred that it was the promise of marriage or the marriage – the donee's consideration – that moved the appellant to make the gift? What was the basis upon which the Court of Appeal might have properly concluded that the conveyance was a gift *propter nuptias*?

As we have seen, having regard to certain words and phrases used, *ex facie*, the deed appears to be a deed of gift. We might further consider its terms to ascertain whether it was a *donatio propter nuptias*. The deed states that a marriage had been arranged and that it was to take place shortly and that the donors had decided to "donate" the property "on the occasion of and in consideration of the marriage."

According to the deed, the subject-matter of the transaction was a valuable land. Therefore, unlike ordinary wedding presents, or gifts of flowers and consumables and the like given by betrothed persons to each other, it cannot be assumed that the transfer was intended as an absolute, pure, act of liberality, where the thing given was more or less abandoned with no hope of recovery if the marriage did not take place. (See Voet xxxix. 5.3 and 5. Cf. *Heen Banda v. Sinniah*[21]).

On the other hand, the deed refers to the fact that it was a gift to their "only child". Does this not suggest that the act was one of liberality rather than one moved and prompted by other considerations?

However, the gift was not to take effect immediately. It was to "take effect on the marriage of the donees" and they were to have the property "for ever", but "from the marriage". This would suggest that the transfer was conditional upon the marriage. Moreover the transfer was subject to the life interest of the parent – donors. Ordinarily, a *donatio propria*, a gift properly so called, is made with the intention that the thing gifted shall at once become the property of the recipient. (Voet 39.5.4; Maasdorp, p. 53; Nathan p. 1155).

But then, if, as Mr. Daluwatte argued, the motive of the donor was to induce the marriage by lightening its burdens, and that it should, therefore, be inferred that the change of civil status was the consideration for the gift, why did the appellant-donor make the gift subject to a life interest for herself and her co-donor husband? Admittedly, the gift was to "take effect on the marriage" and "from the marriage", but this merely meant that the title to Apaladeniya Estate was vested on the marriage taking place. The transfer was subject to a life interest. The enjoyment of the property was postponed. It was a case of *dies cedit sed non venit.* How could the marriage be made attractive by a reduction of its burdens when the right to enjoy the property and take its fruits, when the right to remain in full and undisturbed possession and enjoy the produce and profits of the Estate, remained, even after the marriage, exclusively and undisturbed in the donors who had reserved to themselves a life interest – an interest, incidentally, which the appellant-donor yet enjoys, many years after the occasion of the marriage? The reservation of a life interest showed that the conveyance was not *propter nuptias.*

In terms of the deed before us, I am of the view that the conveyance was a present, albeit a valuable gift, by parents to their only child, simply to enrich her for the sake of enrichment, having regard to the fact that she was getting married, that is to say in consideration of her marriage, taking into account the fact that, in the words of the donor in *Obeysekera Hamine*, "the joyful occasion of her marriage" was an appropriate event for giving a present. It was given as an act of liberality. However the generous parents did not act impulsively and recklessly without sufficient regard for their own situation and, therefore, the gift was made subject to a life interest.

Having regard to its extraordinarily valuable nature, it was somewhat different from an ordinary wedding present. But like all other wedding presents, customarily given, it was not something given to induce or prompt or bring about the marriage. (Cf. per De Sampayo, J. in *Ponnamperuma* (*supra*). The donor was not moved to give the gift by the promise of marriage or by the act of marriage. (Cf. *Wijetunge v. Attapattu* (*supra*)). It was not given to requite or recompense. It was not a part of a bargain or a sort of exchange. Looking at it from the donee's point of view, the transfer of the property was not a condition of the marriage. It did not form the consideration or part of the consideration, in the sense of an inducement or a *quid pro quo*, for the parties getting married. (Cf. per Middleton, J. in *Obeysekera Hamine*; per Hutchinson C.J. in *Jayasekera* (*supra*); Cf. also *Kanapathipillai v. Subramaniam* [45]). As such, it was a gift pure and simple – a gift properly so called. To use De Sampayo's words in *Ponnamperuma* (*supra*), "both in form and substance it is an ordinary gift"; and, therefore, it is revocable on the ground of ingratitude. In my view, on the material before it, the Court of Appeal could not have properly concluded that the conveyance was, to use the words of De Sampayo, J. in *Ponnamperuma* (*supra*) " a donation *propter nuptias* in the true sense of the expression"; and, therefore, for the reasons I have explained, it should not have been decided that the deed was irrevocable, despite proof of the donee's ingratitude.

Assuming, *arguendo*, that there was a *donatio propter nuptias*, what was the effect of the dissolution of the marriage? The Court of Appeal did not consider this aspect of the matter, but, following Professor Lee's statement of the law (op. cit. p. 289) that revocation was not possible in the case of a "marriage settlement", *inter alia*, on the ground of ingratitude, it held that the gift in this case was irrevocable.

Professor Lee based his view on Voet 39.5.25 and 34 and on *Avis v. Verseput* (*supra*). *Avis v. Verseput* was not concerned with a *donatio propter nuptias* : It was a case relating to the subject of *remuneratory donations*. As far as the passages in Voet (upon which he based his conclusions) are concerned, Professor Lee overlooked the fact that Voet dealt with gifts in the event of the dissolution of marriage on an exceptional basis. Voet regarded a dowry or a

donatio propter nuptias as a gift "improperly so called", and said that, like a remuneratory gift, a dowry or a *donatio propter nuptias*, must be reckoned "rather as onerous than as lucrative titles, since they are given for shouldering the burdens of marriage, and the man would not have been likely to take to wife an undowered woman", (*non etiam revocationi donatorum locus est ob causam ingratitudinis, quoties donatio remuneratoria facta fuit . . . Nes aliud statutendum de dote aut propter nuptias donatione; cum & hae minus propriae donationes sint, magisque onerosis quam lucrativus titulis accenseantur, indotam ducturus non fuisset; sive a patre sive ab extraneo dos data fit).* However, Voet then qualified what he said. He said:

> *Si tamen soluto matrimonio dos aut propter nuptias donatio ad ingratam aut ingratum reversa fit, magis est, ut tunc actione hac revocatoria recte conveniatur, quippe jam magis ex lucrativa quam onerosa causa possidens id, quod stante matrimonio dotale fuerat.* Nevertheless if a dowry or donation on account of marriage has gone back to an ungrateful man or woman on dissolution of the marriage, the position is rather that he or she is then correctly sued in this revocatory action, inasmuch as he or she now possesses on a lucrative rather than on an onerous cause something which was dotal while the marriage lasted. (Gane, Vol. 6 p. 117).

Thereafter, Voet goes on to explain why the written answer of the Emperors, appearing in the Code (V.12.24), concerning a gift by a patron to the husband of his freedwoman, is not at variance with this view. Later (xxxix. 5.34), Voet affirms the position that a *dos* or *donatio propter nuptias* is not revocable for ingratitude except if the marriage has been dissolved and the property has gone back to the person in whose favour it has been given, for then it is understood to be in his or her hands, not on an onerous basis, but on the basis of a lucrative title. Voet said:

> "*Et quod ante de dote vel propter nuptias donatione ob ingratitudinem revocanda vel non revocanda dictum num. 25. id simili modo in hac quaestione de revocando propter liberos postea susceptos recipiendum est, revocationi scilicet locum*

non esse, nisi postquam dos aut propter nuptias donatio soluto matrimonio ad conjugem, cujus contemplatione a tertio data erat, reversa fuerit, ut intelligatur non ex oneroso sed lucrativo titulo jam penes eum eamve esse. What has been said above in section 25 as to a dowry or donation on account of marriage being revocable or not revocable for ingratitude must be accepted in like manner on this question of revoking on account of children being raised up afterwards. That is to say there is no room for revocation except after a dowry or donation on account of marriage has gone back on dissolution of the marriage to the spouse with reference to whom it has been given by a third party, so that it is understood to be now in his or her hands not on an onerous but on a lucrative title." (Gane, Vol. 6 p. 127).

In discussing the thorny question of the need for registration as a condition of the validity of a transaction, (which, as we have seen does not concern us on account of the applicability of the provisions of the Prevention of Frauds Ordinance to this case), Voet distinguishes between remuneratory gifts, on the one hand, and a donation *propter nuptias*, on the other. He said (xxxix. 5.17): "Remuneratory donations are irrevocable, but this donation on account of marriage is revocable, and is liable to have to be returned when the marriage is dissolved. It therefore seemed good that the need to register it should be laid upon the husband in the interest of the woman, so that it might be clear and could be proved what and how much had been donated and must be given back "if perchance the original documents should be lost, as may easily happen," according to the words of the Emperor . . . " (Gane, Vol. 6, p. 107).

dum donationes remuneratoriae irrevocabiles sunt, haec vero propter nuptias revocabilis & matrimonio socuto obnoxia restitutioni; ut proinde visum fuerit, in gratiam mulieris imponi marito insinuationem ejus; quo appareret ac probari posset, quid quantumque donatum ac reddendum fit. si forte, principalia instrumenta pereant, quod facile est, *ut ait imperator . . .*

Voet, who, as Watermeyer, ACJ, observed in *Avis v. Verseput*, (*supra*), at p. 351 fin., "treats the subject of donation more fully than

most of the other recognized Roman-Dutch authorities", makes it quite clear that the dissolution of a marriage alters the character of a dotal gift, the donee after the dissolution having a "lucrative" rather than an "onerous" title. The property is dotal in character *stante matrimonio*, while the marriage lasts, but not thereafter. The principles that apply to a *donatio propter nuptias* cease to be applicable when a marriage, in consideration of which a gift was made, ceases to exist. The bottom of the transaction as it were falls off.

Nathan (*Common Law of South Africa*), 2nd Ed., Vol. ii, p. 1164) does not cite these passages from Voet, but states as follows :

> There can, according to Voet and Grotius, be no revocation on account of ingratitude in the case of a *donatio remuneratoria*, which is more an exchange than a gift. In the same way, says Voet, neither a dos nor a *donatio propter nuptias* can be revoked (see *Pillans v. Porter's Executors*[52]), on the ground of ingratitude, by a parent or third party (*extraneus*); although he is of opinion that on the termination of the marriage, when the *dos* or *donatio* reverts to the spouse in whose favour it was given, the donor may claim it on the ground of ingratitude.

Mr. Daluwatte argued that a dowry is given to lighten the burdens of marriage and make it more attractive. However, then, if the marriage ceases to exist, surely, the need to relieve its burdens does not continue? Would such a situation, *mutatis mutandis*, not be analogous to a case where a marriage does not take place at all, requiring the return of the things given *propter nuptias*? (See *Appuhamy v. Mudalihamy*[56]; *John Sinno v. Weerawardene et al.*[57]; *Heenbanda v. Sinniah*[21], *Wijetunge v. Atapattu*[55]; *Van Duyn v. Visser*[58]; Maasdorp p. 54).

I should also like to invite attention to certain observations of Gratiaen, J. in *Ratnayake v. Mary Nona* [59]. That was a case in which revocation was sought, not on the basis of ingratitude, but on the basis of the legitimation of a child of the donor after the making of the gift. A gift is revocable if children are born or legitimated after the gift, because a gift is subject to the tacit condition that the donor will be without progeny. Gratiaen, J. at p. 200 said :

The "tacit condition" suggested by Voet as the theoretical explanation of a revocatory action can, in a sense, be equated to a contractual *resolutive condition* which, if subsequently fulfilled, invalidates the contract which was valid at its inception (Voet, 18.5.1.). As Wessels explained in *The Law of Contract in South Africa*, Vol. 1 p. 432 and p. 437, "a contract subject to a resolutive and resolutory condition creates a legal bond between the parties, but in such a way that if the condition is fulfilled, the legal bond is broken, and the parties are restored as much as possible to their former condition. By the fulfilment of the resolutive condition, the contract ceases to exist."

But is there any need in the present context to discover some logical explanation for the remedy which the Roman Dutch Law recognizes in revocatory actions? As in the well-known "frustration" cases in commercial transactions, some may explain the remedy by speaking of the disappearance of the assumed foundation of the basis of the contract, others by reading an implied term into the written instrument. *Constantine Steamship Line v. Imperial Smelting Co.*[60]. Lord Sumner would perhaps describe it as "a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands." *Hirji Mulji v. Cheong Yue Steamship Co.*[61]. Suffice it to say in the words of Lord Simon that "whichever way it is put, the legal consequence is the same."

The point does not arise in this case, but for the sake of completeness, and to allay any misgivings, I should say this: a property which is liable to be returned upon an order for revocation on account of ingratitude, does not include the fruits of the property up to the time of the joinder of issues (Voet xxxix.5.25). Further, a property donated cannot be claimed for ingratitude if the donee, in good faith and without any intention to defraud the donor, had alienated the property by sale, donation, exchange, dowry or transfer on account of any other lawful cause whatever. (Voet xxxix.5.24; *Horatala v. Sanchi*[62]; *Manuelpillai v. Nallamma*[63]; at Nathan (op. cit. 60).

There is no doubt that if the conveyance in this case was either an ordinary gift, in the first place, as I think it was, or assuming as the

Court of Appeal did that it was a *donatio propter nuptias*, then, since, as a matter of law, it had to be regarded as an ordinary gift after the dissolution of the marriage, it would in either case have been revocable for ingratitude. (Voet xxxix. 5.22 read with xxxix. 5.17, 25 and 34).

Mr. Daluwatte, however, argued that the gift is not revocable because the evidence did not support the allegation of assault and that there was no proof of ingratitude. The learned District Judge was satisfied that the fact of assault was proved and I see no reason to disagree with him. Mr. Daluwatte submitted that if there was a single blow or a single incident, as in this case, it was then a manifestation of "slight" ingratitude. I agree that slight acts of ingratitude are insufficient for revocation. Voet xxxix. 5.22 explained it in this way:

> *Leviores plane ingratitudinis causae revocationi faciendae haud sufficiunt: licet enim & leges & rectaratio ominem omnino, utcunque leviorem, ingratitudinis maculam vitumque damnent, non tamen ideo protinus eam revocatione donati voluerunt mulctari. Tolerant scilicet legum latores leviora, dum emendare nequeunt, ac satis praevident, fora omnis atque tribunalia non suffectura actionibus adversus ingratos movendis, si quodlibet ingratitudinis etiam levioris crimen severa foret lege vindicandum.* Of course slighter causes of ingratitude are by no means enough to bring about a revocation. Although both the laws and right reason entirely condemn every blot and blemish of ingratitude, albeit somewhat slight, nevertheless they have not intended that for that reason it should be forthwith penalized by revocation of the gift. I mean that the framers of the laws put up with slighter things, since they cannot better them, and they foresee quite clearly that all courts and benches would not be enough for the starting of actions against ungrateful persons, if every offence of ingratitude even of slighter kind had to be punished by a stern law. – Gane, Vol. 6 p. 114.

What amounts to an act of ingratitude, sufficient to warrant revocation, must vary with the circumstances of each case. For example, in *Sansoni v. Foenander*[64], revocation was granted on account of the non-fulfilment of a condition, and for atrocious and

calumnious slander by the donee-nephew of his donor-aunt. In *Hamine v. Goonewardene*[65], the donee-son calling the donor-mother a "whore" during a quarrel, under provocation, was held to be insufficient for revocation. In *Sinnacuddy v. Vethattai* [66], the elopement of the donee with a low caste man was held to be insufficient. In *Sivarasapillai v. Anthonypillai* [67], the donor-wife was driven out of the house given to the donee-husband by reason of her "nomadic habits" leading to a "cat and dog life". It was held to be not sufficient. However, the laying of personally violent, impious, wicked, sacrilegious hands (judges and jurists translate *manus impias* in these, and perhaps other, different ways) on the donor is, without question, one of the five specified causes of ingratitude warranting "just" revocation. A donor is entitled to revoke a donation on account of ingratitude (1) if the donee lays *manus impias* on the donor; (2) if he does him an atrocious injury; (3) if he wilfully causes him great loss of property; (4) if he makes an attempt upon his life; (5) if he does not fulfil the conditions attached to the gift. In addition, a gift may be revoked for other, equally grave, causes. *(Manuelpillai v. Nallamma*[63]; Voet 39.5.22; Van Leeuwen, *Censura Farensis*, xxxix. 5.22 and *Het Roomsch Hollandsche Recht.*, (Kotze Vol. 2 pp. 235-236; Huber, *Heedensdaegsche Rechtsgeleertheyt,* (Gane) Vol. 1 p. 477; Grotius, *Inleidinge*; 111.2.16 and 17; Burge, *Commentaries on Colonial and Foreign Laws*, (1838), Vol 2. p. 146; Domat, *Les Loix civiles dans leur ordre naturel*, Vol 1, p. 406 ; Maasdorp, op. cit. p. 60. These acts are regarded as so serious, that a gift is revocable on account of such manifestations of ingratitude, even though the donor may have expressly agreed on oath not to exercise his power of revocation. (Voet xxxix. 5.22. See also Perezius, *Praelectiones Codicis Justiniani*, viii. lvi.4.7; *Krishnaswamy v. Thillaiyampalam*[68]).

As for the argument that there was but a single blow, or a single act of ingratitude, I think the answer was, with great respect, sufficiently given by Basnayake, C.J. in *Krishnaswamy* (*supra*) at p. 269 when he said :

> "The ways in which a donee may show that he is ungrateful being legion, it is not possible to state what is "slight ingratitude" and what is not, except in regard to the facts of a given case. There is nothing in the books which lays down the

rule that a revocation may not be granted on the commission of a single act of ingratitude. Ingratitude is a form of mind which has to be inferred from the donee's conduct. Such an attitude of mind will be indicated either by a single act or by a series of acts."

I have no doubt that the donee-daughter, by assaulting her donor-parents, was guilty of what Voet (xxxix. 5.35) referred to as "the foul offence of ingratitude". I am of the view that her mother, the donor-appellant, was justified in seeking the assistance of the District Court, (revocation is not automatic and requires a decision of a court – see *Ratnayake v. Mary Nona* (*supra*)), for the revocation of the gift of Apaladeniya Estate.

For the reasons set out in my judgment I allow the appeal, set aside the order of the Court of Appeal and affirm the order of the District Court. The respondent, Mallawa Arachchige Rohini Senanayake, shall pay the appellant, Ranaviratne Arachchige Dona Podi Nona Ranaweera Menike, a sum of Rs. 10,000 as costs.

FERNANDO, J.

I agree.

KULATUNGA, J.

I have had the advantage of perusing in draft, the judgment of my brother Amerasinghe, J. He has set out the facts and cited the judicial decisions and authorities on the issues involved. I agree that upon a proper construction of the Deed No. 3412, the gift of property which is the subject-matter of the above action is not a *donatio propter nuptias* made on account of the marriage of the 1st defendant-respondent Rohini Senanayake. She is the only daughter of the donors, the 2nd plaintiff-appellant, (her mother), and her late father who was the 1st plaintiff in the above action. The said gift was subject to a life interest in favour of the donors. There is nothing to indicate that it was a gift to "tempt" the marriage, or on account of the promise of marriage or was "prompted" by the marriage of the

donees taking place, which features constitute the characteristics of a *donatio propter nuptias.*

On the face of the Deed the said gift is an "ordinary gift"' made out of liberality and generosity. As such it gives the donee a "lucrative" rather than an "onerous" title and hence it is revocable on account of ingratitude. The use of the expression contained in the said Deed that the gift was "in consideration of the marriage of the donees" or the condition that it was to take effect "on the marriage of the donees" are not sufficient to rebut this position and to make it a *donatio propter nuptias* or a dowry deed, which is irrevocable.

I am of the view that the Court of Appeal was in error in regarding the issue as to the character of the gift as a pure question of law, when it was raised for the first time in appeal and in interfering with the judgment of the trial Court on that basis in the absence of sufficient evidence on record to hold that the Deed was a dotal agreement.

I agree with my brother Amerasinghe, J. that the donee appellant, by assaulting her donor parents, was guilty of ingratitude, which warrants the revocation of the gift. The judgment of the District Court allowing its revocation on the ground of gross ingratitude was, therefore, right. Accordingly, I allow the appeal, set aside the judgment of the Court of Appeal and affirm the judgment of the District Court.

I also agree with the order for costs made by my brother Amerasinghe, J. in a sum of Rs. 10,000/- (Rupees Ten Thousand) and direct Mallawa Arachchige Rohini Senanayake to pay the said sum to Ratnaviratne Arachchige Dona Podi Nona Ranaweera Menike.

Appeal Allowed.