1977 *Present*: **Pathirana, J., Ratwatte, J. and Wanasundera, J.**

MICHAEL GUNASEKERA and Others Defendants-Appellants *and*
ABEYWICKREMA JAYATILLAKE, Plaintiff-Respondent.

S. C. 245/68 Inty – D.C. Colombo 10328/P.

Gift to minor – Who should accept? – Donor not natural guardian – Same principle extended.

Rev. Gunasekera who had no children of his own adopted Maisy Wijesekera as his own child. There was no legal adoption. Rev. Gunasekera by Deed of Gift P5 donated an undivided 1/3 share of the land to Maisy Wijesekera a minor who was an orphan. The Deed of Gift was accepted by Letitia Gertrude Pinto at the request of the donor. Maisy Wijesekera subsequently sold her rights on Deed P5 to the plaintiff and the 1st Defendant. The 4th and 7th defendants appellants challenged the validity of the Deed of Gift for want of valid acceptance.

Held, where a parent donates property to his child such a gift may be accepted on behalf of the child by a person authorised by the parent to accept the gift. There must also be the intention on the part of the parent to divest himself of the property in favour of the child with some kind of solemnity indicating to all concerned the exact nature of the transaction.

Held, further (Wanasundara J. dissenting) that this principle can be extended to the present case where Rev. Gunasekera is not a natural guardian and that the acceptance of the gift P5 by Letitia Gertrude Pinto is valid.

The case of Francisco v. Don Sebastian reported in 69 N.L.R. 440 not followed.

APPEAL from a judgment of the District Court of Colombo.

H. W. Jayewardene with *V. Arulambalam* and *Miss S. Fernando* for 4th, 7th and 8th defendant-appellants.

Nimal Senanayake with *Miss S. M. Senaratne* for the Plaintiff-Respondent.

Cur. adv. vult.

June 24th, 1977. PATHIRANA, J.

The plaintiff-respondent instituted this action to partition the land described in the schedule to the plaint. He pleaded that Rev. Gunasekera, his predecessor-in-title who was entitled to the entirety of the land, by deed No. 10873 of 23.5.44 (P5) donated an undivided 1/3 share to Maisy Wijesekera subject to his life-interest. Maisy Wijesekera sold her rights by deed No. 747 of 31.5.59 (P6) to the plaintiff and the 1st defendant who became entitled therefore to a 1/6th share each.

The question for decision in this appeal is whether there had been a valid acceptance of the deed of gift No. 10873 of 23.5.44 (P5) by which Rev. Gunasekera transferred an extent of immovable property in favour of his "adopted daughter" Maisy Wijesekera, a minor, who subsequently sold to the plaintiff and the 1st defendant her rights in the deed of gift, P5, by deed P6 of 31.4.59. The 4th and 7th defendants-appellants challenged the validity of the deed of gift for want of valid acceptance by the donee or on her behalf by a person competent to accept. They further pleaded that Rev. Gunasekera by deed of revocation No. 1660 of 1.10.53 (4D6) about ten years after the execution of P5 had revoked P5. Having subdivided the land into lots he gifted by deed No. 407 of 1955 a defined portion in extent about 9 perches to his adopted son Michael Gunasekera, the 4th defendant, subject to the donor's life interests and by deed No. 250 of 17.8.56 (7D1) he gifted to Upasena, the 7th defendant, an extent of 11.80 perches subject to the donor's life interest.

Rev. Gunasekera had no children of his own. He had adopted Maisy Wijesekera as his own child. The deed of gift P5 by Rev. Gunasekera in favour of Maisy Wijesekera was accepted by Letitia Gertrude Pinto to whose cousin Rev. Gunasekera was married. The Deed P5 describes Letitia Gertrude Pinto as "aunt" of the said donee. Maisy Wijesekera was an orphan. She lived at St. Margaret's Home where orphans were living. She was boarded in the Convent and during the holidays she came and lived with Rev. Gunasekera in his home. So one knew who her close relations were. Rev. Gunasekera died on 15.11.58.

The main contention raised at the trial was that Maisy was an orphan and one did not know who were her close relations. Acceptance must therefore be by a properly appointed curator and in the absence of acceptance by a person so appointed the deed of gift had not been validly accepted.

The learned District Judge followed the principle laid down by Gratiaen, J. in the case of *Mohaideen v. Maricair*[1] – where it was held that under the Roman Dutch Law, a father, when he makes a donation to his minor child, can authorise some other person by "a special mandate" to accept the gift on the child's behalf. He also adopted the following test laid down by Gratiaen, J. at page 176 in the same case:–

> . . . the real test in each case is whether the father has "proved his intention to divest himself of the property" in favour of his child "with some kind of solemnity indicating to all concerned the exact nature of the transaction."

[1] (1952) 54 N.L.R. 174

He therefore held that as Rev. Gunasekera was instrumental in procuring the acceptance of the gift by Letitia Gertrude Pinto in an open and public manner as to make it binding and irrevocable on him, the deed of gift was validly accepted. He also held that the deed of revocation, 4D6, did not validly revoke the deed of gift P5.

Donation is regarded in Roman Dutch Law as a contract. As in other contracts no obligation arises until acceptance by the donee or by some person qualified to accept on the donee's behalf. The acceptance must be made during the lifetime of the donor and the donee in as much as otherwise the will of the donor and the donee would not be united as required in the case of a contract of donation. The exception is that if the gift is to take effect after the donor's death it may be accepted by the donee after the donor's death. *Nonai v. Appuhamy.*[2] The onus is on the claimant to satisfy the Court of the existence of the *animus donandi* which is essential to his case. *Timoney and King, v. King*[3] – and *Mayer and Others v. Rudolph's Executors.*[4] In the case of donations to a minor there are judicial dicta to the effect that under the Roman Dutch Law such a gift to be valid must be accepted by his natural guardian or by his legal guardian appointed either by will or by Court. According to this view of the Roman Dutch Law the mother and father have the relationship of the natural guardian as also the grandmother and grandfather. The uncle of the minor was not considered a natural guardian. *Silva v. Silva.*[5]

The judgment of the Privy Council in *Nagalingam v. Thanabalasingham*[6] – which was delivered on 6th October, 1952 has laid down the strict view that only a natural or legal guardian can accept such a gift on behalf of a minor. In this case a gift of immovable property by a father to his minor son and accepted by the maternal uncle on the minor's behalf without appointment by the lawful authority, was held invalid for want of acceptance, the uncle not being a natural guardian. In this decision at page 125 their Lordships stated:–

> "Their Lordships see no reason for doubting the correctness of the decision of the District Judge that the maternal uncle's acceptance of the gift on behalf of the minor was not a valid acceptance according to the Law of Ceylon. The finding is supported by authority. In addition to the case of *Silva v. Silva* (11 N.L.R. 161) on which the District Judge relied on there are two other decisions of the Supreme Court to the same effect, namely, *Avichchi Chetty v. Fonseka* – (1905) 3 A.C.R. 4 and *Cornelis v. Dharmawardene* – (1907) 2 A.C.R. Supp., XIII. A maternal uncle is not a natural guardian; in the strict sense he is not even a member of the same family."

[2] (1919) 21 N.L.R. 165
[3] (1920) SALR 133
[4] (1919) 21 N.L.R. 165
[5] (1908) 11 N.L.R. 161
[6] (1952) 54 N.L.R. 121

There is another line of decisions which seems to take a more liberal view recognising a broader class of persons who can accept gifts made to a minor by his parents. This view appears to keep abreast with the gradual development of the principles of Roman Dutch Law on donations which in the words of Gratiaen J. in *Mohaideen v. Maricair*[5] – "are perfectly capable of sensible adaptation to suit modern conditions and situations in this country". A leading case on this trend is *Mohaideen* v. *Maricair* (supra) – delivered on 18th July 1952 before the judgment of the Privy Council in *Nagalingam v. Thanabalasingham.*[6] In this case a father donated to his minor daughter certain lands. The uncle at the express request and with the full concurrence of the father who was the donor and the natural guardian of the donee, formally accepted the gift. Gratiaen J. having observed that the Roman Dutch Law relating to donations by the father in favour of his minor child had taken a more liberal view than the early Roman Law said:–

> "It seems to me that these principles are perfectly capable of sensible adaptation to suit modern conditions in this country, and **that the real test in each is whether the father has "proved his intention to divest himself of the property" in favour of his child "with some kind of solemnity indicating to all concerned the exact nature of the transaction".** *De Kock v. Van de Wall* – (1895) 12 S.C. 163. The Roman Dutch Law does not regard it as incongruous that the donor, qua parent of the donee, should formally accept his own gift on the child's behalf. *A fortiori*, he could authorise some other person by "a special mandate" to accept the gift. Voet 39-5-13. In the present case, he was instrumental in procuring the necessary acceptance by Pathumma's uncle "in such an open and public manner as to make it binding on the father and irrevocable by him. "Maasdorp's Institutes" – (5th Ed) 3,69.93. The property was formally conveyed and the deed was duly registered in accordance with the law affecting title to land in Ceylon; and he unambiguously manifested his intention to complete the gift which in consequence became irrevocable as far as he was concerned. Vide also footnote (a) at page 17 of Krause's translation of Voet on Donations. The case is not complicated by other considerations which may possibly arise if a transaction of this kind is attacked by a creditor of the donor."

De Villiers, C.J. in the case of *Slabber's Trustee v. Neezer's Executor*[7] makes this observation at page 167 regarding the changes the law relating to donations has undergone.

> "There is no branch of law which has been more altered than that which relates to donations."

[5] (1902) 11 N.L.R. 161
[6] (1952) 54 N.L.R. 121
[7] (1895) S.C. Cases 163

He refers to the earlier Roman Law which regarded the son or daughter who was still in *familia* as having no legal existence independently of the paterfamilias. One consequence was that a father could not even make a donation to him. The Dutch Law modified the stringency of the old *patria potestas,* and at an early stage allowed the father to contract with his child, but did not at once allow donations to be made. Subsequently such donations were allowed with certain limitations, and the intervention of some public authority was required to give validity to the donation.

In *Lewishamy v. Cornelis de Silva*[8] a donation by a father was accepted on behalf of the minor donee by his elder brother. It was held that as the father of the donee permitted the elder brothers to accept for the minor brother there was nothing wanting in the implementation of this donation. This Court on this occasion followed the decision in *Francisco v. Costa*[9] where parents gifted a land to their minor son, an infant of tender years, and the son's maternal grandmother. The gift was accepted by the grandmother who entered into possession. Clarence J. took the view that there was a valid acceptance for the following reason:

> "Since the parents, when they executed this conveyance, allowed the grandmother to accept on behalf of the infant and take possession of the property, I can see nothing wanting to clothe the gift with reality."

As against this view there is the case of *Packirmuhaiyadeen v. Asiaumma.*[10] The question arose in this case whether the donation by a father in favour of his minor son was validly accepted by the donee's elder brother on behalf of the minor donee. It was held that there was no valid acceptance on behalf of the minor donee. Sansoni J. having also referred to *Mohaideen v. Maricair* (supra) however followed the Privy Council judgment in *Nagalingam v. Thanabalasingham* (supra) and dealt with the matter thus:–

> "To deal with the first question it is clear that the major brother was neither the natural nor the legal guardian of his minor brother. There have been cases where acceptance by a major brother on behalf of his minor brother has been held to be sufficient. See *Lewishamy v. de Silva* (supra), where Middleton J. followed *Francisco v. Costa* (supra), a case in which acceptance by the grandmother of a donee was considered sufficient. But the reason given in those two cases was that the father, who was the donor, permitted acceptance by those persons. I do not think that such a reason would be upheld today. Subsequent cases such as *Babaihamy v. Marcinahamy*[11] and *Binduwa v. Untty*[12] have upheld the acceptance by such persons who are neither legal nor natural guardians only where possession of the property by the donees was subsequently proved. See *Fernando v. Alwis*[13]. The recent decision of the Privy

[8] (1906) 3 Bal. 43
[9] (1889) 8 S.C.C. 189
[10] (1956) 57 N.L.R. 449
[11] (1908) 11 N.L.R. 232
[12] (1910) 13 N.L.R. 295
[13] (1903) 37 N.L.R. 201

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

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

In short, firstly, Sansoni J. was not prepared to accept as correct the view that where the acceptor was neither the natural nor legal guardian of the minor and if the father permitted such a person to accept the gift on behalf of the minor such acceptance is valid. Secondly, in regard to the decided cases where acceptance was by a person who was neither the legal nor the natural guardian, he observed that the acceptance was upheld in these cases only when the possession of the property by the donees was subsequently proved.

Gratiaen J. however, in *Mohaideen v. Maricair* thought that in the case of acceptance by a person who was neither the natural nor legal guardian the fact that possession of the property by the donees subsequent to the donation was not an essential requirement to be taken into consideration to determine the question of valid acceptance. Having referred to *Francisco v. Costa* and *Lewishamy v. de Silva* (supra) he said:–

"It is true that in both these cases the property was in fact subsequently possessed on the minor's behalf but I am not convinced that this further step is always essential to clothe the parent's gift to his child with validity. Such a requirement certainly will be highly artificial where the parent had reserved to himself the enjoyment of the property during his lifetime."

I am in agreement with this view of Gratiaen J. especially in view of the fact that in many donations of property by parents in favour of minors such donations are invariable subject to the life interest of the donor. The question of valid acceptance has generally to be determined independently of the fact whether or not possession was enjoyed by the donees subsequent to the donation.

In *Abeywardene v. West*[14], the Privy Council was called upon to deal with a case where a donation was made in favour of two minors Jane and Cecilia which was accepted on their behalf by Cooray and their brothers Alfred and James. Cooray was Jane's brother-in-law married to her sister Isabella. It was held that there was no reason to think that this was not a valid acceptance on behalf of Cecilia and Jane. Lord Keith of Avonholm at page 319 observed:–

> "Their natural guardians, their father and their mother, could not accept for them, because they were the donors. In similar circumstances acceptance on behalf of a minor donee by his grandmother (who was the other donee) was held good in *Francisco v. Costa and Others* (supra) as was also acceptance by a brother on behalf of his minor brother in *Lewishamy v. De Silva* (supra). One of the grounds of judgment in these cases was that the donors had allowed such acceptance to be made on behalf of their minor children "

In *Nagaratnam v. John*[15] – Sansoni J. having referred to the vexed question as to what constitutes proper acceptance of a donation to a minor acknowledged that his earlier decision in *Packirmuhaiyadeen v. Asiaumma* (supra) could no longer be considered correct. In this case the father gifted a land to his minor daughter. As the donee was a minor the donation was accepted on her behalf by her maternal grandfather. While holding that there was authority for the proposition that a grandfather is a natural guardian of a minor following *Silva v. Silva, Avichchi Chetty v. Fonseka and Cornelis v. Dharmawardene*[17] he held that the grandfather was a proper person to accept on behalf of a minor. He therefore held that the donation was a valid one. Sansoni, J. however, stated that there was a further reason why the acceptance in this case should be considered to be good and it was that the donor had allowed the acceptance to be made by the grandfather on behalf of his minor child. In this case Sansoni J. observed:–

> "The recent Privy Council decision in *Abeywardene v. West* (supra) leaves no doubt on this point, for it was held there that acceptance by two brothers and a brother-in-law of a donation made by the parents of a minor donee is good. Lord Keith of Avonholm said in that case: "In similar circumstances acceptance on behalf of a minor donee by his

[14] (1957) 58 N.L.R. 313
[15] (1958) 60 N.L.R. 113
[16] (1905) 3 A.C.R. 4
[17] (1907) 2 A.C.R. Supp. XII

grandmother (who was the other donee) was held good in *Francisco v. Costa and others* as was also acceptance by a brother on behalf of his minor brother in *Lewishamy v. de Silva* (supra). One of the grounds of judgment in these cases was that the donors had allowed such acceptance to be made on behalf of their minor children."

Having referred to the fact that the learned District Judge in the Lower Court had followed the reasoning in his judgment in *Packirmuhaiyadeen v. Asiaumma* (supra) – it was held that the minor donee's elder brother cannot accept the donation on the donee's behalf even where the donor was the father of the minor. Sansoni J. then observed:

". . . but this judgment can no longer be considered correct. My decision was based on the view that an elder brother is not a natural guardian of his minor brother, and the mere fact that the father allowed him to accept a donation on behalf of his minor brother would not make the acceptance valid. I thought that the decision in *Nagalingam v. Thanabalasingham* (supra) justified such a conclusion, since in that case the parents (who were the donors) seemed to have allowed the maternal uncle of their minor child (who was the donee) to accept the donation on the child's behalf. The Privy Council decided that since the maternal uncle was neither a natural guardian nor appointed by lawful authority he could not accept the donation. I ought to add that there is no reference in the judgment – I have already quoted the relevant passage – to the circumstance that the parents allowed the minor's uncle to accept the donation. However, it is now clear from *Abeywardene v. West* (supra) that in the case of a donation made by parents, acceptance of the donation by the brother-in-law and the brothers of the minor donee is good, for the reason that the donors have allowed such acceptance to be made on behalf of the minor child."

In *Kirigoris v. Eddinhamy*[18] a deed of donation was executed by a person in favour of A, B and C. A was the donor's son, and B and C were A's sister and step-sister respectively. A had reached the age of majority but B and C were minors. The gift was accepted by A on his own behalf and on behalf of the minors B and C.T. S. Fernando J. following *Abeywardene v. West* (supra) and *Navaratnam v. John* (supra) held that the acceptance on behalf of the minors was valid for the reason that the donor had allowed such acceptance.

In *Chelliah v. Sivasamboo*[19] the donor gifted certain immovable property to three persons namely to his two sons and a son of his deceased daughter. The three donees were all minors at the time and the donor allowed his second wife to accept the donation on behalf of the donees. The acceptor was the stepmother of two of the donees and also of the deceased mother of the other donee. According to the terms of the deed the acceptor was

[18] (1956) 69 N.L.R. 223.

[19] (1971) 75 N.L.R. 193.

entitled to accept and enjoy the income and produce till the donees attained majority. It was held that the acceptance by the donor's second wife was valid. Alles J. in a carefully considered judgment has referred to and analysed the two lines of decisions.

We have therefore two trends of decisions each supported by a decision of the Privy Council. The first is the strict view set out in *Nagalingam v. Thanabalasingham* that acceptance of a gift made by a parent to a child must be by the natural or legal guardian and the more liberal view expressed in *Abeywardena v. West* (supra) that in case of such a gift a donation is valid where a donor had allowed such acceptance to be made on behalf of their minor children by a person other than a legal or natural guardian.

South African Courts appear to veer towards the more liberal view that acceptance of a donation made by a parent to a minor child to be valid need not necessarily be accepted by a legal or natural guardian. As an example of the different approach to the same problem, I would refer to the case of *Wellappu v. Mudalihamy*[20] where Layards C.J. expressed the view that he could not see how the donor of a gift to a minor even though he was the father can accept it on the minor's behalf because the rule of law which requires the acceptance by a competent person of a gift is based on the principle that a donation is a contract and there must be two parties to every contract. He, therefore, failed to see how a donor even though the father can act in the two capacities at the same time. He therefore concluded:-

> "I cannot persuade myself that a father can even expressly accept on his child's behalf a gift he has himself made."

The South African Courts, however, appear to have taken a different view on this same question. In the case of *Slabber's Trustee v. Neezer's Executor* (supra) De Villiers, C.J. has however expressed the following view:-

> "An unregistered donation by a father to his minor child is not deemed to be complete without clear proof of acceptance by the child, or by the father on behalf of the child. Acceptance by the child alone is sufficient if he has reached the age of puberty; but if he is under that age, the gift must be accepted by the Court, the Master, or the father in his behalf, whether the minor be under or above the age of puberty, the complete acceptance by the father would be sufficient; **but such acceptance would be incomplete as such without some act done by the father to prove his intention to divest himself of the property,** such as delivery to a third person, transfer in the Deeds Office, or, in the case of a cession of action, notice to the debtor of such cession to the child".

[20] (1903) 6 N.L.R. 233.

I find a case decided in1908 by Wendt J. – *Babaihamy v. Marcinahamy*– which appears to be in accord with the principles laid down in *Slabber's Trustee v. Neezer's Executor* and differing from *Wellappu v. Mudalihamy* (supra). In this case a person called Jando gifted one half of the property to his adopted daughter Nonkohami and the other half to his other adopted children, her brothers, namely Salmon, Davit and Baron. The deed created a *fideicommissum*. Jando was a major while the others were minors. The notary's attestation was to the effect that after he had read and explained the deed to Jando and the donees Salmon, Davit, Baron and Nonkohami in the presence of the witnesses the same was signed "by all the proper parties" in the presence of each other. The four donees accepted the donation and the deed states that those who are of proper age to sign had signed thereto. According to the notary's attestation all proper parties, meaning those who are of the proper age had signed in his presence. There was also evidence that some minor donees signed and entered into possession of the property. Wendt J. stated at page 234:–

> "No case has been brought to our notice which lays down the broad proposition that a person under the age of twenty-one years is incapable of validly accepting a donation. Such a broad proposition would, I think, be contrary to our law. It is true a minor is incapable of binding himself to his own detriment by an onerous contract, but he can always accept an unequivocal benefit, such as a donation essentially is. Voet, lib. 26, 8, 2 after stating that in some cases the authority of a guardian is not necessary, that in many cases it is both necessary and sufficient, and in certain cases necessary but not sufficient, lays down that it is unnecessary in all those cases in which the ward makes his condition better, and does not in turn bind himself to the other party, as where he exacts a stipulation from another or obtains possession "(compare 1 Nathan, Common Law of South Africa, 159; 1 Massdorp's Institutes, p. 246)." Acts and obligations entered into by the wards, without the guardian's knowledge (says Van Leeuwen) are not binding, but void to the extent to which they have been defrauded or prejudiced thereby. But if the wards have profited by the transaction, it will hold good; so that they may stipulate and bind others, and, indeed, be themselves bound where it is for their benefit, but they cannot bind themselves to their prejudice". (1 Kotze, p. 135) Again, after saying that minors cannot without the knowledge and assistance of their guardians bind themselves, Van Leeuwen adds (ibid., vol II., P4): "with this distinction, that by accepting anything from another, they may indeed acquire something, but do not bind themselves in favour of another further than they have been actually benefited thereby."

I agree with Mr. Jayewardene, who appeared for the appellants, that the decision of Wendt J. in *Babaihamy v. Marcinahamy* (supra) will not strictly

apply to the present case as there has in fact been no acceptance by Maisy Wijesekera. This decision however emphasizes the tendency even in this country as far back as 1908 that a donation to a minor to be valid need not necessarily be accepted by the restricted category of persons called legal or natural guardians.

Gratiaen J in *Mohaideen v. Maricair* (supra) follows the principle laid down in the South African case when he says that the real test in each case is whether the father has "proved his intention to divest himself of the property" in favour of his child "with some kind of solemnity indicating to all concerned the exact nature of the transaction." He thereafter made the following observation:–

> "The Roman Dutch Law does not regard it as incongruous that the donor, *qua* parent of the donee, should formally accept his own gift on the child's behalf. *A fortiori*, he could authorise some other person by "a special mandate" to accept the gift."

In my view, the liberal approach expressed by Gratiaen J. in *Mohaideen v. Maricair* and the Privy Council in *Abeywardene v. West* (supra) and the cases that followed these decisions have laid down principles which are capable of "sensible adaptation to suit conditions and situations of this country" without offending the basic principles of the Roman Dutch Law of donation. To my mind the basic principle, adherence to which is a *sine qua non* in a donation is that it is a contract and no obligation or legal effect follows unless there is acceptance of the donation. In the case of acceptance of a gift on behalf of a donee the class of persons competent to accept a donation has undergone changes to keep abreast with "the increasing complexities of modern organised society" without offending this basic principle. The rigours of the original strict view have been toned down in the passage of time by judicial dicta.

Where a parent therefore donates property to his child such a gift may be accepted on behalf of the child by a person authorised by the parent to accept the gift. There must also be the intention on the part of the parent to divest himself of the property in favour of the child with some kind of solemnity indicating to all concerned the exact nature of the transaction. But as Wood Renton J. stated in *Binduwa v. Untty*[21] – the question of acceptance is a question of fact, and each case has to be determined according to its own circumstances. The donation of course, must not be detrimental to the minor but must benefit him.

The next question is whether in the current case a person like Rev. Gunasekera who had adopted Maisy Wijesekera and to whom he was her only "father" in this world is in the same position as a parent and whether he

[21] (1910) 13 N.L.R. at 260.

could request some person of his choice to accept the gift on her behalf when he made the donation in question.

Mr. Jayewardene, however, contended that the liberal view I have referred to has been circumscribed by judicial decisions relied on by him culminating in the Privy Council judgment in *Abeywardene v. West* (supra) which restricted it to those cases where only a natural guardian like a parent is the donor and is thereby unable to accept his own gift to his minor child. In such a circumstance he can nominate a person who is not a natural guardian to accept a donation on behalf of the donor's minor child. He submitted that the present case is not such a case as Rev. Gunasekera is not the natural guardian of Maisy Wijesekera.

In my view the principle laid down in these cases could logically and without injustice be extended to such a case. The Roman Dutch Law is not a static unchanging law like the laws of the Medes and the Persians. In *Pearl Assurance Company Ltd. v. Government of the Union of South Africa*[22] – Lord Tomlin spoke meaningfully of the malleability and adaptability of the Roman Dutch Law to meet changing situations in modern life. He said:–

> "In the first place, the questions to be resolved are questions of Roman Dutch Law. That law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society. That those principles are capable of such adaptation cannot be doubted".

Adoption of children has through the ages been a common occurrence in the life of our people to whatever race, caste or creed they belong to. People adopt near relations and even strangers. Affection and concern for their future compel them to donate properties to such adopted children to provide for their future. In making such a donation in order to pass legal title to the donee is it always necessary that the acceptance of such a donation should be by a natural or legal guardian as understood in some of the decisions which I have referred to. So long as the donor seriously intends to benefit his minor adopted child by a donation and intends to divest himself of the property in favour of such adopted child, I see no reason why such person should not select a person in whom he has confidence to accept the gift on behalf of his child. Could it be contended that such a donation is bad for want of acceptance by a competent person? I do not think so.

I find that there is no positive evidence of Maisy having being at any time adopted by Rev. Gunasekera under the Adoption of Children Ordinance, Chapter 61 which came into operation on 1st February, 1944. I shall therefore deal with this case on the footing that there was no such adoption

[22](1934) A.C. 570.

under the Ordinance in respect of Maisy by Rev. Gunasekera. In the case before us nothing has also been urged to show that the donation has not been to the minor's benefit.

The donation was made in my view by Rev. Gunasekera with due solemnity indicating to all concerned the exact nature of the transaction and he also did so with the intention to divest himself of the property in favour of the child. Although on the date of execution of the deed, that is 23.5.54, Rev. Gunasekera was living in Colombo, he went all the way to Kegalle to have this deed of gift executed. One of the attesting witnesses to this deed he chose was a reverend gentleman, called Rev. Paul Victor Covilpulle. The acceptor was described as an aunt of the donee. This in fact, is not strictly correct. Maisy Wijesekera was not present at the execution of the deed. At this time she was at St. Mary's School, St. Margaret's Convent, Polwatte, Colpetty. Letitia Pinto was a person in whom apparently Rev. Gunasekera had confidence. She is the 3rd defendant in this case. She has given evidence and stated that she had known Maisy and that she had been adopted by Rev. Gunasekera. Rev. Gunasekera had by deed (3D1) of 14.7.45 gifted a share of this same property to her and the attestation was by the same Notary Mr. Herat who attested P5. We also find that Rev. Gunasekera by deed 2D1 of 14.7.45 that is the same day, gifted a second property to Dr. D. W. Walpola. It was the same Letitia Pinto who accepted the gift on behalf of Dr. Walpola. The Notary who attested the instrument was the same Mr. Herat. According to the evidence of Letitia Pinto, Rev. Gunasekera came all the way to Kegalle to ask her to sign the deed accepting the deed of gift. The deed of gift itself was not revoked for nearly 10 years till 1953. This shows that when Rev. Gunasekera donated the property he did so with the intention to divest himself of the property. The reason why Rev. Gunasekera decided to revoke the deed appears to be that Maisy Wijesekera had got married on her own accord when she was 18 or 19 years old without his consent.

In the context of modern times where families migrate from their ancestral homes and villages to far away places even overseas they might find it difficult to get a natural guardian to accept a gift in favour of a minor. Could acceptance in such an event be only by a legal guardian appointed by Court? Situations may arise when there is a sense of urgency for the donation to be given to a minor by a person and the delay and expense in appointing a legal guardian may defeat the anxious and serious intention of such a person to benefit a minor by donation. In such situations should a parent or any other person like Rev. Gunasekera if he has a serious intention of parting with his property by donation to a minor for his benefit not be permitted to appoint a person of his choice to accept such gift on behalf of the minor donee specially as in the case of Maisy who had no known kith and kin. What difference does it make that the person accepting the donation on behalf of the minor is not the natural or legal guardian of the minor in such

situations? No grounds of morality, reason or justice can be urged against such acceptance of a gift by a person so chosen on behalf of the minor. The law being the soul of reason cannot therefore stand against such an acceptance.

I shall now deal with the case of *Francisco v. Don Sebastian*[23] relied on by Mr. Jayewardene to support his contention that a person like Rev. Gunasekera could not authorise Letitia Pinto to accept the donation as she was not the natural guardian or the parent. Although this decision has followed *Abeywardene v. West*, *Nagaratnam v. John* (supra) and *Francisco v. Costa* (supra) and reaffirmed the view that in all cases of gifts by parents to their minor children where the parents have either permitted or authorised acceptance by others for the obvious reason that they themselves cannot accept the gift on behalf of their minor donees, such acceptance is valid, however took the view that on the facts of the case there was no valid acceptance. In this case the donor, Maria Alwis gifted to Emaliyanu and Gabriel, both minor children of one Maria Perera, who does not appear to have been related to the donor Maria Alwis. Emaliyanu was the son of Stephan Rodrigo who was married to Maria Perera. Maria Perera subsequently eloped with a person called Jusey son of the donor Maria Alwis and by that adulterine union she had the donee Gabriel. Jusey accepted the donation on behalf of the minor children Emaliyanu and Gabriel. He purported to do this on behalf of Gabriel "a son of mine" and on behalf of Emaliyanu "an adopted son of mine".

Sri Skandarajah J. (Alles J. agreeing) held that at the date of the donation Jusey was not Gabriel's natural guardian as he was for all time prohibited from becoming Gabriel's natural guardian. The reason given is that by section 21 of the Marriage Registration Ordinance children procreated in adultery cannot be legitimated by subsequent legal marriage of the parents, therefore he could not accept the gift on behalf of Gabriel and that Maria Perera the mother was the only person competent to accept the gift. Regarding the gift to Emaliyanu his father Stephen Rodrigo was alive on that date. Maria Perera, his mother, was his natural guardian. Only one of them could validly accept the gift. The Court rejected the argument that as Maria Alwis had allowed the acceptance by Jusey the acceptance was valid. The Court on this occasion as I remarked took the view it was only in the case of gifts by parents to their minor children that they can permit authorise acceptance by others for the reason that they themselves cannot accept a gift on behalf of their minor donees. I should, however, think that the principle laid down in *Abeywardene v. West* (Supra) could have been extended without offending the basic principles of Roman Dutch Law to the facts of this case. The donees were Emaliyanu and Gabriel, the children of Maria Perera. The donor was Maria Alwis. Gabriel was the illegitimate son of Jusey, the son of the donor Maria Alwis. Maria Alwis therefore was "the grandmother" of the donee Gabriel. If, however, the donee was the legitimate offspring of Jusey

[23] (1964) 69 N.L.R. 440.

then acceptance by Jusey at the request of his mother Maria Perera, who could come under the category of a natural guardian, of the donation in favour of Jusey's son was unexceptionable. Could the circumstance that the donee was the illegitimate son of Jusey make a difference? I find it difficult to understand how the principle stated in *Abeywardene v. West* (supra) could not have been extended to this case. After all the donor Maria Alwis was making a donation in favour of an illegitimate son of her own child Jusey. She has selected none other than her son Jusey, the putative father of the donee to accept the gift. Could it be contended that the putative father was not competent to protect and advance the interests of Gabriel? I should think that Jusey was competent to accept the donation on behalf of his illegitimate son Gabriel.

With respect I cannot accept as correct the reasoning given in the judgment for rejecting the argument that although Maria Alwis had allowed Jusey to accept the gift, the acceptance was not a valid acceptance. Regarding the donation to Emaliyanu it may well be that after Maria Perera eloped with Jusey, Emaliyanu was brought up in the household of Jusey and was considered "an adopted son" of Jusey. No doubt, Stephen Rodrigo, the father of Emaliyanu, was alive and could have accepted the gift. But one does not know the state of relations at the time between Maria Perera and Rodrigo. I also agree that the donation could have been accepted by Maria Perera, the mother. But could it be said that if, in fact, Emaliyanu was brought up in the household of Jusey, then Jusey's mother Maria Alwis could not have selected Jusey to be competent to accept the gift?

On the facts of this case therefore I hold that the deed of gift, P5, was validly accepted. The reasons given in 4D6, the deed of revocation, of 1.10.1963 by Rev. Gunasekera for revoking the gift was that Maisy Wijesekera was unaware of the said deed of gift and the said deed of gift was at no time accepted by the said Maisy Wijesekera and the said deed of gift was invalid in law for want of acceptance by the said Maisy Wijesekera or by any person authorised by law for the said Maisy Wijesekera. I have already held that the gift P5 was validly accepted. I also agree with the learned District Judge that there was no ingratitude established on the part of Maisy Wijesekera towards the donor to entitle the donor to revoke the deed of gift P5.

I would therefore dismiss the appeal with costs, and affirm the interlocutory decree.

RATWATTE, J. – I agree with the judgment of my brother Pathirana, J.

Appeal dismissed.

WANASUNDERA, J.–

I regret that I have to dissent from the majority judgment in this case and from the reasons by which it is supported.

This is an action for partition of the land described in the plaint and the contest which gives rise to this appeal is one between the plaintiff-respondent and the 1st defendant-respondent on the one hand, and the 4th and 7th defendants-appellants on the other. The title of both sides devolve through Rev. D. G. Gunasekera, their immediate predecessor-in-title.

The plaintiff-respondent alleges that Rev. Gunasekera, by instrument of donation P5 of 1944, gifted an undivided 1/3rd share of Lot B of this land, together with two buildings, to Maisy Wijesekera, reserving to himself a life interest. Maisy Wijesekera, by deed P6 of 1959, sold her rights to the plaintiff-respondent and the 1st defendant-respondent in equal shares.

The 4th and 7th defendants-appellants have challenged the validity of the donation P5 to Maisy Wijesekera. It is their case that Maisy Wijesekera, who appears to have been an infant at the time of the gift, had not accepted the donation. It is also averred that Rev. Gunasekera, by deed of revocation 4D6 of 1953, revoked the gift to Maisy Wijesekera. Thereafter Rev. Gunasekera, after subdividing the lands into lots as shown in plan 4D8 of 1953, gifted defined extents of the land to the 4th defendant-appellant by deed 4D7 of 1955 and to the 7th defendant-appellant by deed 7D1 of 1956.

Both Maisy Wijesekera and the 4th defendant-appellant, Michael Gunasekera, are said to have been adopted by Rev. Gunasekera. Rev. Gunasekera appears to have been a benevolent gentleman who had taken care of these two children. The so-called adoption of Michael Gunasekera, the 4th defendant-appellant, was prior to that of Maisiy Wijesekera. Rev. Gunasekera regarded both as his adopted children, and, in fact, in his last will he had referred to the 4th defendant-appellant as the one "whom I adopted." The 4th defendant-appellant seems to have been closer to Rev. Gunasekera in many ways, while Maisy Wijesekera spent her time with him only during her holidays. There is some evidence also to indicate that Maisiy Wijesekera did not, by reason of her behaviour towards him, endear herself to Rev. Gunasekera.

In regard to the so-called adoption, it is clear that the necessary procedures for a legal adoption has not been gone through in either of these cases. Therefore, in so far as this case is concerned, Rev. Gunasekera's gift to Maisy Wijesekera will have to be regarded as being in no better position than that of a donation by a stranger to a minor.

The 7th defendant-appellant, who claims title along with the 4th defendant-appellant, is a child of parents who had been in the service of Rev. Gunasekera. The transfer made to the 7th defendant is in consequence of the gratitude Rev. Gunasekera had for the past services rendered by the parents.

The learned District Judge, after examining the authorities, held that the gift by Rev. Gunasekera to Maisy Wijesekera could be given effect to and upheld the title of the plaintiff-respondent and the 1st defendant-respondent. On the question as to the due acceptance of the gift on behalf of Maisy Wijesekera, he followed the judgment of *Mohaideen v. Maricair* (supra). He held that "in the present case Rev. Gunasekera was instrumental in procuring the necessary acceptance by Letitia Gertrude Pinto in such an open and public manner as to make it binding and irrevocable by him."

The donation P5 which was made in 1944 has been accepted by this lady Letitia Pinto on behalf of Maisy Wijesekera, who must have been an infant at that time. Letitia Pinto lived in Kegalle. Rev. Gunasekera had come all the way from Colombo to meet her and to persuade her to accept it on behalf of the minor child. The deed was executed in Kegalle. The minor was not present at the execution of the deed. The recital in 4D6, the deed of revocation, states that Maisy Wijesekera was unaware of the gift up to the date of the revocation, in 1953. Letitia Pinto, the acceptor, is no relation or connection of the minor. In fact, Letitia Pinto in her evidence said that she has had no acquaintance with Maisy Wijesekera at any time and she was unable to give any worthwhile information about Maisy Wijesekera. Maisy Wijesekera is an orphan whom Rev. Gunasekera took from a convent and educated at his expense. She had no known relations. Letitia Pinto is however connected to Rev. Gunasekera by marriage – Letitia's cousin being the wife of Rev. Gunasekera.

Maisy appears to have been a headstrong girl, determined to have her own way without regard to the feelings of Rev. Gunasekera, her benefactor. When she was about 18 years years old, she had got married apparently against the wishes of Rev. Gunasekera and gone away. She had not come forward to give evidence in this case. She comes into the picture only once more, that is, when she is alleged to have executed the transfer P6 in 1959 to the plaintiff-respondent and the 1st defendant-respondent. Even in this regard, the plaintiff-respondent has stated that he came to know Maisy Wijesekera only one month before he purchased the property from her. This appears to be a speculative purchase, for only the sum of Rs. 3,000/- has been paid at the execution of the deed and the purchasers have promised to pay the balance Rs. 2,000/- in the event they succeeded in having the title to the land vindicated by a court action.

The plaintiff-respondent who purchased this property is an ayurvedic physician, and claims to have been the tenant of premises No. 12 from Rev. Gunasekera since 1949. It would, however, appear that in 1957 Rev. Gunasekera was not satisfied with the plaintiff's tenancy. After

Rev. Gunasekera's death, the plaintiff in 1959 apparently sought out Maisy Wijesekera and obtained title from her to ensure that he would not be evicted from this house. He says that he was however evicted from the land in 1960 by the 7th defendant-appellant.

Turning now to the law, I would like to reiterate that this donation by Rev. Gunasekera to Maisy Wijesekera would have to be treated like a donation from a stranger to a minor and not on the basis of a donation by a parent to a minor child.

A donation being a contract must be accepted by the donee to give it legal effect. In the case of a donation to a minor, the law requires that it should be accepted by the natural guardian or the legal guardian, as a minor is disqualified from accepting a donation. The general rule is that the parents who are the natural guardians are competent to accept a gift on behalf of a minor. Grandparents are also brought under this category. A legal guardian would be a person appointed by a court to look after a minor. In *Silva v. Silva* (supra) the court held that acceptance by an uncle of the minor was insufficient to give effect to the gift.

Donations made by the parents to a minor child involves special treatment. The father and the mother, the natural guardians of a minor child, are disqualified from accepting the gift on the child's behalf, because they are also the donors. There is a line of authorities in Ceylon culminating in the Privy Council decision of *Nagalingam v. Thanabalasingham* (supra), which show that the courts made no exception even in such cases and continue to apply the strict view that it is only a natural or a legal guardian who can accept a gift on behalf of a minor.

The Privy Council decision in *Abeywardene v. West* (supra), which came later, has been the starting-point for our courts taking a turn to the liberalisation of the law in the case of donation by parents to their minor children.

Numerous legal decisions subsequent to this case have gone to the extent of upholding donations made by the parents to a minor child, where the person accepting it was either permitted or authorised by the parents to accept it on behalf of the minor donee. (*Nagaratnam v. John*, *Kirigoris v. Eddinhamy*, *Chelliah v. Sivasamboo*, and *Francisco v. Don Sebastian* (supra)).

The learned District Judge in this case has relied on the judgment of Justice Gratiaen in *Mohaideen v. Maricair* (supra). This decision was prior in point of time to the decisions referred to above, including the two Privy Council decisions. This itself was a case of a donation by a father to his

minor daughter. It was accepted on the minor's behalf by her uncle at the express request of the father. It would appear that the strict view in regard to acceptance had prevailed at the time the case was argued and Justice Gratiaen was merely anticipating the subsequent developments when he sought to broaden the category of persons who can accept on behalf of a minor a donation given by the parents. If that case had to be decided today, I have no doubt that we would ourselves approve of the result in that case.

In the course of his judgment, however, Justice Gratiaen quoted a passage from the judgment of De Villiers, C.J., in *Slabber's Trustee v. Neezer's Executor* (supra). Speaking of donations proper distinguished from remuneratory donations, he said:

> ". . . They require registration in the Deeds Office if they exceed the sum of £500 in value and they are invalid and revocable to the extent of such excess, unless so registered. A donation by a father to his minor child is completed by such registration whatever the amount may be. An unregistered donation by a father to his minor child is not deemed to be complete without clear proof of acceptance by the child, or by the father on behalf of the child. Acceptance by the child alone is sufficient if he has reached the age of puberty; but if he is under that age, the gift must be accepted by the Court, the Master, or the father in his behalf. Whether the minor be under or above the age of puberty, the complete acceptance by the father would be sufficient; but such acceptance would be incomplete as such without some action by the father to prove his intention to divest himself of the property, such as delivery to a third person, transfer in the Deeds Office, or, in the case of a cession of action, notice to the debtor of such cession to the child." (p. 168).

On many aspects, our law is different from the law in South Africa. Mere registration does not give validity to a donation to a minor under our laws, nor do we recognise an acceptance by the minor child or by the father. However, in one sense, our law on this point can be said to be broader, as our courts will now uphold an acceptance on behalf of a minor by a person who has been authorised or permitted to do so by the parents. But, these principles relate to donations by a parent to his minor child. The facts of the case before us is not such a case.

As far as the present case is concerned, the law requires that the gift be accepted by the natural or legal guardian of the minor. *Fernando v. Cannangara,*[24] and *Wellappu v. Mudalihami.*[25] I shall examine only the authorities cited by the respondent contending for a deviation from these time honoured principles.

Counsel for the respondent has drawn our attention to a passage in the judgment of Alles J. in *Chelliah v. Sivasamboo* in support of his argument.

[24] (1897) 3 N.L.R. 6.

[25] (1903) 6 N.L.R. 233.

Alles J. referred to certain observations of Wood Renton J. in *Hendrick v. Sudritaratne.*[26] They were as follows:–

> "I may further point out, that even in the case of *Silva v. Silva,* it was recognised that an acceptance by a person, who was neither the natural nor the legal guardian of the minor, would be rendered valid where the subject of the donation came into the possession either of the donee or of his self-constituted guardian."

Counsel also referred us to a passage in Thomson's Institutes, Vol. 2, at page 51, which is as follows:–

> "Strangers who leave any estate or legacy to the children of others may appoint guardians for them; but this is not a **personal** guardianship, which concerns the maintenance and education of children, but a real guardianship, regulating the administration of the property so bequeathed."

By these authorities counsel sought to introduce the concept of a "self-appointed guardian" and also to argue that Rev. Gunesekera was in *loco parentis* to the minor and it was therefore competent for him to authorise a person to accept the donation on behalf of the minor Maisy Wijesekera.

I have examined these authorities and I find that they have little bearing on this matter. Justice Wood Renton's statement quoted above is not borne out by the judgment in *Silva v. Silva* (supra). The reference to possession by the donee or his "self-constitued guardian" in that case was a statement made to meet an alternative argument adduced in that case that it was open to the donee to accept the gift any time before the death of the donor. That statement cannot mean that the person referred to as the "self-appointed guardian" was entitled to accept the gift on behalf of the minor, for, if so, as there was already an acceptance by the uncle, the donation would have been upheld by the courts. On the contrary, the court held that the acceptance by the uncle was no valid acceptance. The term "self-constituted guardian" as Alles J. himself explains at page 213 of his judgment, means nothing more than saying that the "donor never selected the uncle as an acceptor" and the uncle came in as an acceptor on his own, meaning that the father stood aside and allowed the uncle to accept it. Over and above this, it will be seen that *Silva* v. *Silva* (supra) was a case of a donation by a father to a minor child and would, in the context of the present law, be decided in favour of the minor, as the father had "permitted" the uncle to accept the donation. Similarly the passage from Thomson deals with testamentary guardians and has no application to the present situation.

My brothers are seeking to extend the principles relating to acceptance applicable to donations from parents to minors to cases of donations from

[26] (1912) A. C. 80.

strangers. The two situations are dissimilar. In dealing with this case, we must bear in mind that we are confronted with an exceptional situation – the case of an orphan without a natural or legal guardian. Normally there would be a guardian natural or legal, and even acceptance by a third party with the permission of the proper guardian may suffice to ensure the validity of such gift. If the proposed rule, which is somewhat far-reaching, is accepted, it would mean the donor will be entitled to designate a stranger to accept a donation on behalf of a minor overriding as it were the rights of the natural or legal guardians. Viewed in this context, I feel that this proposal may create problems for the minor and his family and could be productive of mischief.

I agree with my brother Pathirana J. that this branch of the law has undergone change and is susceptible of development. In my view, if further changes are called for, we should move cautiously and by way of accustomed legal concepts and principles. I can envisage a development on the following lines which seems already outlined in the case law. Roman-Dutch law well recognises the principle that one can ratify the act of an unauthorised person so as to give it validity. (Voet, 39.5.13; *Tissera v. Tissera.*[27]) Such ratification should take place before the death of the donor. Since a ratification relates back to the original acceptance, it could even prevent a donor from any subsequent dealings with the property. *Bolton Partners v. Lambert.* [28] The problems relating to acceptance, even in cases of this type, could, to a great extent, be resolved equitably if we were to adopt principles such as these.

I have made these observations in view of the somewhat broader principles enunciated by my brothers. On the facts of this case, however, there has been no acceptance of the gift on behalf of the minor by a person who is duly authorised in law to do so, nor is there evidence of a subsequent ratification of Letitia's acceptance before the death of the donor, by Maisy Wijesekera. The title of the plaintiff-respondent and the 1st defendant-respondent is accordingly affected by the want of acceptance of the donation P5 from which their title flows. In the result, I hold that title of the 4th and 7th defendant-appellants is entitled to prevail over that of the respondents.

I would, therefore, allow the appeal with costs.

Appeal dismissed.

[27] (1908) Weerakoon 6.

[28] 41 Ch. 295.