1935 *Present* : **Macdonell C.J. and Maartensz J.**

FERNANDO *et al. v.* ALWIS *et al.*

137—D. C. Colombo, 51,422.

Fidei commissum residui—*Joint will—Survivor's interest—Power of survivor to alienate—Donation by survivor—Prejudice to heirs—Gift to minors—Validity of acceptance—Renunciation of gift.*

Where a joint will contained the following clause : "All our movable and immovable property, held by us both, after the death of one of us, the survivor shall possess doing whatever he (or she) pleases and thereafter anything that is left, after the death of both of us shall be divided by the children of us both equally.",—

***Held*, that the clause created a *fidei commissum residui* and that the survivor had the right to alienate the property of the estate subject to the rights of the fideicommissary heirs in the residue.**

A donation of such property by the survivor is not *ipso facto* void but it may be avoided on the ground that it has prejudiced the heirs.

Where a deed of gift in favour of five brothers, four of whom were minors, was accepted by the major brother (J. F.) and another person (H. S.) in the following terms : "We the undersigned J. F. and H. S. for and on behalf of . . . . (*i.e.*, the minor donees) do thankfully accept the above gift",—

***Held*, (1) that the gift was not accepted by J. F. on behalf of his brothers ; (2) that H. S. not being a person entitled to accept the gift on behalf of the minors the gift to the minor donees was invalid for want of a valid acceptance.**

Acceptance of a deed of gift may not be presumed merely because subsequent to the gift the donees renounced their rights under the gift.

THE plaintiffs sued for declaration of title to an undivided half share of an allotment of land with the buildings bearing Nos. 1-12, Gasworks street, and 135-149, Dam street, Colombo.

The premises originally belonged to Manuel Fernando, who with his wife Adriana Suwaris executed a joint will No. 2,051 (P 1) dated December 31, 1860, whereby, according to the plaintiffs, all their movable and immovable property were devised and bequeathed to the survivor with power to deal with it as he or she pleased.

Adriana, who survived her husband, duly proved the will, and by deed No. 232 dated November 4, 1871, donated the premises to her five sons—(*a*) Johanes, (*b*) Theodoris, (c) John Henry, (*d*) Marthinus, (*e*) James—to the exclusion of all females. Theodoris died in 1874 a minor. John Henry and Johannes left no male issue. James died on July 28, 1931, leaving two sons, the plaintiffs. Marthinus, who has three sons, is not a party to the action. The case of the plaintiffs was that James and Marthinus each became entitled to a half share and that they succeeded to the share of their father on his death.

It would appear that Adriana by deed No. 619 dated January 21, 1884, revoked the deed of gift No. 232 and that the donees, four of whom were surviving, renounced their rights under it.

Adriana, however, gifted again three-fourths of the premises to John Henry, Marthinus, and James by deed No. 1,792 dated October 8, 1894, reserving to herself the life interest. Adriana on the same day by will

No. 1,793 bequeathed the remaining one-fourth to Johannes subject to certain conditions. In accordance with this deed of gift the brothers and their descendants possessed the property. The defendants, who claim from the female heirs of John Henry, dispute the title of the plaintiff on the following among other grounds:—

(*a*) They deny that Adriana had a disposing power under the joint will in pursuance of which she executed the deed of gift No. 232.

(*b*) They challenge the validity of the deed of gift on the ground that it was not duly accepted by the minors.

The learned District Judge held that Adriana had only a *usufruct* under the joint will and that she had no power of alienation.

H. V. Perera (with him *N. K. Choksy*), for plaintiffs, appellants.—The first point arising in this case is stated in issue 6. Had A. S. the right to execute deed No. 232 of November 4, 1871? A. S., as survivor under the joint last will (P 1) became entitled, *inter alia*, to the property in dispute and her right to deal with it is given in clause 4 of P 1, the translation of which is as follows:— "*After the death of one of us the survivor can possess all the movable and immovable property belonging to us according to his or her pleasure and whatever property remains after the death of both of us shall be divided equally among our children*". The children only get "whatever property remains". This impliedly gives the survivor full power of alienation of the whole or any part of the property (*Brown v. Rickard.*[1]) This clause was construed in this sense in *Ferdinandus v. Fernando*[2]. and it was held in that case that the clause created a *fidei commissum residui*. Although the survivor is not directly instituted heir the dominium according to the terms of the clause must necessarily rest in the survivor because no interest vested in the children as long as the survivor was alive. "Whatever property remains after the death of both of us shall be divided equally among our children" gives the children an interest only after the death of the survivor. (*Joachinoe v. Robertu*[3] and *Omer Lebbe Marcar v. Ebert.*[4]) The dominium in a case like this must be deemed to have been in the survivor as the dominium cannot be in abeyance (*Voet, bk. VII., art. 9, t. 1* (*Searle* and *Joubert's Trans. p. 11*)). The 4th clause of the joint last will creates a *fidei commissum residui* and A. S. had a right to alienate the property of the estate.

The second point in the case is whether deed No. 232 was accepted by Johannes and Haramanis or either of them on behalf of the four minors, if so, is such acceptance valid? The acceptance in the deed is as follows:— "We, the undersigned Watumullegey Johannes Fernando and Beruwellegey Haramanis Suwaris, for and on behalf of . . . . accept the above gift". Johannes is the major brother of the minor donees and on the face of the deed there is a clear acceptance by him for himself and for and on behalf of his minor brothers. It has been held that a brother who is a major may accept a deed of gift on behalf of himself and his minor brothers or sisters (*Lewishamy v. Cornelis de Silva*[5] followed in *Bindua v. Untty*[6]). See also *Babaihamy v. Marcinahamy*[7].

[1] *2 Juta 167*
[2] *6 N. L. R. 328.*
[3] *(1890) 9 S. C. C. 101.*
[4] *(1893) 3 Cey. Law Rep. 5.*
[5] *(1906) 3 Bal. Rep. 43.*
[6] *(1908) 13 N. L. R. 259.*
[7] *(1910) 11 N. L. R. 232.*

It may be argued from the acceptance clause that Johannes accepted for himself, and Haramanis Suwaris accepted for and on behalf of the minors. The law is clear that in the case of a gift to a minor acceptance of the gift may be (1) by the minor himself or his agent, (2) by the natural or legal guardian of the minor or by someone in the position of a parent, (3) by any one at the request of the donor, and (4) by any one on behalf of the minor in which case the acceptance must be adopted by the minor himself at a later stage. See *Maasdorp, vol. I., pp. 267; 1 Kotze's Van Leeuwen 13, 104; Voet XXXIX. 5, 12,* In this case there is evidence that at the date of the donation the father of the minors was dead and that Haramanis Suwaris who accepted on behalf of the minors was in the position of a parent and acting as a guardian of the minors. Even in the absence of such evidence acceptance by Haramanis must be presumed to have been at the request of the donor herself or the minors. It is now—sixty years after the donation—well nigh impossible to bring evidence of the circumstances under which Haramanis accepted and in the absence of such evidence the law must presume a valid acceptance. (*Francisco v. Costa* [1], *Government Agent, Southern Province v. Karolis* [2], *Lokuhamy v. Juan* [3].) In any case, the acceptance by Haramanis on behalf of the minors makes the gift irrevocable by the donor and the alleged revocation of the gift by her on deed P 4 is void as against the minors. Even if the acceptance by Haramanis is that of a complete stranger, the conduct of the minors is such that an inference of the adoption of the acceptance may be made from it. It is significant that P 4 is not merely a revocation by the donor but also a renunciation and disclaimer by the minors of their right, title and interest in, out of, or upon the said property under and by virtue of or in respect of the deed of gift No. 232 of November 4, 1871, and a grant, retransfer and reassignment of their said interests to A. S. the donor. There cannot be a disclaimer and renunciation and a consequent retransfer and reassignment of an interest unless such interest had devolved upon them. It is sufficient therefore for the purposes of this case to say that at some point of time, may be immediately before the execution of P 4, the minors adopted the deed of gift P 2 and by such adoption ratified the acceptance by Haramanis Suwaris for and on their behalf. See *Tissera v. Tissera* [4], and *Wickramasinghe v. Wijetunge* [5]. The deed of gift No. 232 created a *fidei commissum* in favour of the male heirs in the male line of the five sons of A. S. When Johannes accepted the gift he had a vested interest in one-fifth and a contingent interest in four-fifths. Acceptance by him may be regarded as an acceptance of the whole property subject to the conditions of the deed of gift, namely, that the property should devolve on the male heirs of the five sons. Therefore the acceptance by Johannes alone will enure to the benefit of the plaintiffs in this case who are the male heirs in the male line of the donors' five sons. In any event acceptance by Johannes is good as regards one-fifth of the property and half of one-fifth will devolve on the plaintiffs according to the terms of the deed of gift No. 232.

[1] *8 S. C. C. 189.*
[2] *(1896) 2 N. L. R. 72.*
[3] *Ram. Rep. (1872, 1875. and 1876) 215.*
[4] *(1908) 2 Weer. Rep. 36.*
[5] *(1913) 16 N. L. R. 413.*

The third point in the case is whether deed of gift No. 232 created one *fidei commissum* or five separate *fidei commissa*. The deed of gift clearly donates the whole property to the five sons and after their death to the descending heirs in the male line to the exclusion of all daughters, granddaughters or other remote descendants of the five sons as long as there should be a male heir or heirs in the male line. It does not in terms donate a one-fifth share to each of the donees nor can the intention to do so be inferred. The terms of this deed cannot be distinguished from the terms of the deed of gift considered in the case of *Carlinahamy v. Juanis*[1] which was held to create one *fidei commissum*. The property is to devolve on the male heirs after the death of the donees. "After their death" should be read as "after their respective deaths". See *Abeyratne v. Jagaris*[2]. Therefore on the death of James his share devolved on the plaintiffs, and the learned District Judge should have answered the issue No. 8, namely, "Did all the interests conveyed under deed No. 232 vest in Marthinus on the death of his brother James? If so can the plaintiffs maintain this action?" in favour of the plaintiffs. The issue of prescription has also been decided against the plaintiffs. No authority is necessary for the proposition that if deed No. 232 created a valid *fidei commissum* the interest devolved on the plaintiffs only on the death of their father, and prescription begins to run against them only from that date. It is in evidence that plaintiffs' father died only in 1931.

Keuneman (with him *Canakaratne*), for the third and fourth defendants, respondents.—The fourth clause of P 1 gave A. S. only a usufructuary interest. The terms of the present will are almost indentical with the terms of the will construed in *D. C. Colombo, 56,846*, reported in *Vanderstraaten's Reports, 203*. In that case the Supreme Court held that the survivor was only entitled to possess and not to alienate. A similar clause was construed to give the surviving spouse merely a usufructuary interest (*Weerasinghe v. Gunatilleke*[3]). The decision in *Ferdinandus v. Fernando*[4] on this point was a mere *obiter dictum* and therefore not binding on this Court. Even if P 1 creates a *fidei commissum residui* A. S. had no power to alienate the property by way of gift. The right of alienation of a fiduciary heir under a *fidei commissum residui* do not extend to donations. See *1 Kotze's Van Leeuwen (1st ed.), pp. 380, 381, and 382, and the case of Mr. Koedyk referred to therein; Voet, bk XXXVI., tit. 1, s. 54, (Macgregor's Trans. p. 118)*. With regard to the second point it is clear from the acceptance clause that Johannes accepted for himself and Haramanis on behalf of the minors. It is impossible to argue on a clear reading of the clause that Johannes accepted for and on behalf of the minors because in that case Johannes has not accepted for himself. Haramanis has accepted for and on behalf of the minors and there is no evidence that he was a legal guardian; nor is there evidence that he was authorized to do so by the donor or by the donees. It cannot, as argued by the plaintiff's Counsel, be presumed that Haramanis had such authority. A presumption of acceptance can only be made when there are circumstances to justify it (*Lokuhamy v. Juan* (*supra*)). There must be some affirmative evidence of acceptance on the minors'

[1] (1924) 26 *N. L. R. 129.*
[2] (1924) 26 *N. L. R. 181.*
[3] *14 N. L. R. 38.*
[4] *6 N. L. R. 328.*

part (*Wellappu v. Mudalihamy* [1]). There is further no evidence that the donees acted on the deed of gift. On the contrary the donor remained in possession and dealt with the property as her own. See lease 1D2 of December 30, 1876. Deed of revocation P 4, the plaintiffs' Counsel argued, was entered into on the footing that the deed of gift was acted upon. There is nothing in the terms of P 4 to suggest that, and even an inference to that effect cannot be drawn from a disclaimer and renunciation. Further, P 4 was executed because doubts had arisen as to whether the deed of gift was validly executed. All along the deed of gift was considered as giving no rights to the donees. The plaintiffs must fail on the question of acceptance of the deed of gift No. 232.

N. E. Weerasooria (with him *D. E. Wijewardene*), for first defendant, respondent.—The last will P 1 does not directly institute the survivor heir. In such a case no fiduciary interest passes to the survivor. The case of *Brown v. Rickard* (*supra*) was decided as creating a *fidei commissum residui* because the survivor was instituted heir. There is no significance in the words "whatever property remains". These words do not give impliedly a power of alienation. *Botha v. Vander Vyver* [2] followed in *Cowen v. Estate Cowen* [3]. The effect of P 1 is to continue the community after the death of one spouse between the survivor and the children. The survivor in such a case takes only a usufructuary interest.

Even if P 1 creates a *fidei commissum residui* A. S. had no power to donate. Voet in *bk. XXXVI. tit. 1, s. 54*, says "according to our present practice the better view is that donations should be disallowed which are fraudulently made for the sake of curtailing the *fidei commissum* and defrauding the fideicommissary". If by the donation the fidei-commissaries are prejudiced then such a donation is void according to law. In this case Johannes and John Henry would have succeeded to a share absolutely under the last will but according to the terms of the deed of gift they get it burdened with a *fidei commissum*. There is sufficient prejudice caused to Johannes and John Henry so as to avoid the deed of gift.

We have here a long series of decisions on the question of acceptance of a deed of gift in favour of a minor. Whatever be the Roman-Dutch law on this point our law is embodied in these decisions. See the cases reported in (*1872-75-76*) *Ram. Rep. 215, 8 S. C. C. 189, 2 N. L. R. 72, 12 N. L. R. 1, 11 N. L. R. 161, 11 N. L. R. 232, 3 A. C. R. 4, 13 N. L. R. 259, 3 Bal. 43, 2 Weer. 36, 2 S. C. D. 36, 4 Bal. 110, 3 C. A. C. 80, 34 N. L. R. 57, 6 N. L. R. 212, 6 N. L. R. 233, 33 N. L. R. 44, 1 Cur. L. R. 73, 2 A. C. R. 13.* Acceptance in this case by Haramanis for and on behalf of the minor donees is not a valid acceptance according to our law and no interest passed to the plaintiffs in this case under that deed of gift.

Even if deed of gift No. 232 is validly accepted by the donees the donor can revoke it with the consent of the donees if the fideicommissary donees had not accepted it. At the date of the deed of revocation P 4 the fideicommissaries had not come into being and therefore the revocation

[1] (1903) 6 *N. L. R. 233.* [2] 25 *S. C. R. (South Africa) 760.*

[3] (1932) *S. A. Law Reports. Cape P. D. 39.*

being before their acceptance was a valid revocation. See *7 N. L. R. 123* and *2 Nathan 1031*. If P 4 is invalid as a deed of revocation it effected a compromise binding upon the fideicommissary donees including the plaintiffs. (*Voet, bk. II, tit. 15, art. 8* (*Buchanan's Trans. p. 366*).)

The deed of gift No. 232 creates five separate *fidei commissa*. It is true that it does not in terms donate a one-fifth share to each of the donees but the intention to do so may be inferred from the words "their lawful descending heirs in the male line" in the *habendum* and from the words "and their respective heirs" in the operative clause. There are five separate *fidei commissa* and five separate male lines and the conditions of the deed will govern each separate *fidei commissum*. If the deed of gift is construed in this manner the plaintiffs get only a one-fourth share. Even if there is only one *fidei commissum* the fideicommissaries do not get an interest till after the death of all the fiduciary donees. The plaintiffs cannot maintain this action as long as Marthinus is alive. "After their death" means after the death of all of them.

N. Nadarajah (with him *H. E. Amarasinghe*), for second defendant, respondent, and

Mackenzie Pereira, for fifth defendant, respondent, adopted the arguments of counsel for first, third, and fourth respondents.

H. V. Perera, in reply.—The failure to institute the survivor as heir is not fatal to a *fidei commissum residui*. The will is in Sinhalese and the testators and notary are Sinhalese. Therefore the absence of the word heir is not so significant as it would have been in the case of an English will. The case of *Botha v. Vander Vyver* is in favour of the contention that a *fidei commissum residui* may be created without appointing the survivor heir. Laurence J. said that he did not wish to be understood as laying down the proposition "that in no case the survivor as usufructuary, if not instituted direct heir, would possess the power of unrestricted alienation . . . . See further *Voet, bk. VII., art. 9, tit. 1* referred to (*supra*) as to the construction given to the words "whatever property remains" in *Botha v. Vander Vyver* and *Cowen v. Estate Cowen* (*supra*). Sufficient effect could be given to the words otherwise than suggested by the plaintiffs in those cases because the subject-matter of the usufruct was movable property. The words "that may be left" and "the balance that may then be left" were construed to mean what was left after the ordinary wear and tear resulting from use and after the losses from unprofitable investments. If the last will P 1 created a *fidei commissum residui* then A. S. had full power to alienate the property by way of sale and also by way of donation *inter vivos*, provided that the donation was not made fraudulently for the sake of curtailing the *fidei commissum* and defrauding the fideicommissary. (*Voet, bk. XXXVI., tit. 1, s. 54.*) What Voet means by this passage is that the donation is not *ipso facto* void but only voidable at the instance of the fideicommissary who must prove that it was made fraudulently and with a view to prejudicing his interests. The respondents in this case have failed to prove that deed No. 232 was executed fraudulently and with a view to prejudicing their interests. On the contrary the deed of gift gave

them a present interest whereas under the joint last will they would have got an interest only after the death of A. S. The fact that the interest they got under the deed of gift was burdened with a *fidei commissum* is not by itself sufficient to prove prejudice. A fiduciary under a *fidei commissum residui* is not entitled to dispose of the property by will. It was on this principle that Koedyk's case was decided. Although the gift in that case was one *inter vivos* it was to take effect after the death of the donor and therefore it was in effect a testamentary disposition. With regard to the argument that P 1 created a continuation of the community of property between the survivor and the children it was held as long ago as 1892 that the Roman-Dutch law of continuing community formed no part of our law (*Wijeyekoon v. Gunewardene* [1], *Carolis Appu v. Jayawickrama* [2], *(1858) D. C. Colombo, No. 21,043* reported in the appendix to *Vanderstraaten's Reports, page 46*).

The reason for executing the deed of revocation (P 4) was that doubts had arisen as to the right of A. S. to make a gift and not that the acceptance by Haramanis was imperfect. P 4 was not merely a revocation of the gift but a disclaimer and a renunciation of the rights that the donees acquired under the deed of gift No. 232 and a retransfer and reassignment of those rights to A. S. (See the recitals and operative part of P 4.)

A fiduciary cannot compromise to the prejudice of a fideicommissary. It is possible for a fiduciary under a *fidei commissum* created by will to compromise in certain circumstances and such a compromise will be binding on the fideicommissary. But a fiduciary under a *fidei commissum* created by deed *inter vivos* can never compromise because a fideicommissary donee who dies before the fiduciary transmits the expectation of the *fidei commissum* to his heirs. (*Mohamed Bhai v. Silva* [3].)

Where the gift is to a family, acceptance by the first donee or donees is sufficient to vest the property in the subsequent donees and their acceptance is not necessary. The gift under deed No. 232 was in favour of a family and if it was validly accepted by the first donees the donor had not the power to revoke it even with the consent of the first donees. (*Perezius 8 55, 12; John Perera v. Avoo Lebbe Marikar* [4] *Soysa v. Mahideen* [5]; *Ex parte Orlandini and two others* [6].) Case reported in *7 N. L. R. 123* was wrongly decided. One of the Judges, Wendt J. who decided that case, said in a later case, *Asiathumma v. Alimanachy* [7], that he was of opinion on reconsideration that the *7 N. L. R. 123* case had not been correctly decided.

Cur. adv. vult.

June 24, 1935. MACDONELL C.J.—

I have read and concur in the judgment of my brother Maartensz, and wish only to add a few observations on the question whether or not it is possible to hold that those of the donees under deed No. 232 (P 3). who were minors at the time of its execution, namely Theodoris, John Henry, Marthinus, and James, accepted that deed of gift.

[1] *(1892) 1 S. C. R. 147.*
[2] *(1906) 1 Matara Cases 103.*
[3] *(1911) 14 N. L. R. 193 (Full Bench).*
[4] *6 S. C. C. 135.*
[5] *(1914) 17 N. L. R. 279.*
[6] *(1931) S. A. L. R. O. F. S. Prov. Div. 141.*
[7] *(1905) 1 A. C. R. 53.*

Firstly, the argument from the recitals in the deed of revocation No. 619 (P 4). In these Adriana Suwaris, donor on deed No. 232, recites her doubts as to her right under the joint will No. 2,064 (P 1) to make the gift purported to be made by deed No. 232, and the surviving donees (Theodoris was dead), being then of full age, recite their desire to disclaim all title under that deed and their desire to reconvey the property to the donor Adriana " to have and to hold as in her former estate under the said joint will ". It was argued that we should infer from these recitals either that there had been an acceptance or that these recitals were themselves an acceptance, an act that needed no formalities, one that could be done at any time before the donor's death.

To take the latter contention first, that these recitals were themselves an acceptance. But the recitals contain a disclaimer of title and a reconveyance of the property by the donees who in effect adopt the doubts of the donor whether she had power at all to make deed No. 232; how then can they amount, implicitly or explicitly, to an acceptance?

The other contention as to these recitals was that they implied a previous acceptance and in argument it was put to us thus, 'they presuppose a previous acceptance; the facts are recited *in extenso*, and no question is raised in the recitals with regard to the completeness of the donation'. But the recitals are almost or wholly negative; 'probably Adriana had no right to make the gift and therefore we the named donees desire to renounce any title we may have', but they do not assert that they have any title, and even if the words expressing a desire to 'reconvey' imply something affirmative, still they must be interpreted in the light of the surrounding words and, so interpreted, they seem to mean no more than this: 'we desire to reconvey whatever we may have but we doubt we have anything at all'. Interpreting these recitals as best I can, they seem when analysed to convey a series of negative propositions, yet we are invited to draw from them the inference that there had been a previous acceptance, an affirmative proposition. But this would be contrary to ordinary principles of reasoning.

Next, the argument that the acceptance in the deed No. 232 (P 3) by Johannes Fernando, the only one of the five donees who was major at the date of its execution, was an acceptance for and on behalf of the remaining four donees, minors at that date, but I see grave difficulties on the words of the acceptance in accepting this argument. They are these—" We, the undersigned Wattemullegey Johannes Fernando and Beruwallegey Haramanis Suwaris, for and on behalf of Wattemullegey Theodoris Fernando, Wattemullegey John Henry Fernando, Wattemullegey Marthinus Fernando, and Wattemullegey James Fernando, do thankfully accept the above gift ". The plaintiffs ask us to interpret these words to mean that Johannes and Haramanis, one or both, accepted the gift for and on behalf of the four minor donees. Now, these words contain an acceptance by Johannes. For and on behalf of whom? Primarily, you would presume, for and on behalf of himself. He was a named donee, and was *major* and *sui juris* at the time of the gift, so presumably he accepted on behalf of himself at any rate, and indeed it is part of the plaintiffs' case that he did. If, however, the words of

acceptance are to be interpreted to mean that Johannes, jointly with Haramanis, accepted for and on behalf of the four minor donees but not for and on behalf of himself also, then this would be an interpretation contrary to the natural interpretation of the words of acceptance following as they do on earlier words in the deed making Johannes a donee, and would also be contrary to the plaintiffs' case. Then we must hold on the plain meaning of the words of acceptance, that Johannes accepted at any rate for himself. But the contention of the plaintiffs will then have to be that Johannes accepted not only for and on behalf of himself but for and on behalf of the four minor donees also. Then it will be necessary to add something to the clause and to make the words of acceptance say, "I, Johannes, for myself and the four minor donees, and I, Haramanis, for the four minor donees, thankfully accept the above gift", but the words of acceptance as they stand in deed No. 232 do not say this, and I doubt we would be justified in adding the words required by the plaintiffs' argument. The words as affecting Johannes mean normally that he accepts for himself and in the absence of further words 'exhaust' his acceptance, if the phrase may be permitted. The normal meaning of the words of acceptance seems to be that Johannes accepts for himself, since he is a donee and was of age when he accepted, and that Haramanis accepts for the four minor donees. The absence of anything in the words of acceptance to show that Johannes accepted for the four minor donees as well as for himself, seems to put the plaintiffs in a dilemma. Either they must argue that Johannes accepted for the four minor donees only whereby, apart from other difficulties, they will be putting a less normal meaning on the words in which he accepts, or they must admit that he did accept for himself but not for the four minor donees also. They do not, and indeed cannot, it seems, urge the former of these two possible arguments. Then they are thrown back on the latter; the acceptance for the four minor donees was by Haramanis only, which indeed is the normal interpretation of the words of acceptance in the deed. But if they found on an acceptance by Haramanis, and they seem to be driven to this, then they are faced with the difficulties on the point set out in the judgment of my brother Maartensz; I need not repeat what he has said.

I agree that this appeal must be dismissed with costs.

MAARTENSZ J.—

The plaintiffs in this action allege that they are entitled to an undivided half share "of an allotment of land with the buildings bearing Nos. 1-12, Gasworks street, and 135-149, Dam street, and bounded on the north by Dam street, east by Kachcheri grounds and properties bearing Nos. 130-134, south by premises belonging to the Crown and bearing No. 13, and west by Gasworks street formerly known as St. Pauls road, containing in extent two acres", and that the defendants who have no manner of title are in wrongful possession of a moiety of their share, and plaintiffs pray that they be declared entitled to that one-fourth share and for possession and damages as claimed in the plaint.

The land in dispute hereafter referred to as the premises admittedly belonged to Manuel Fernando who with his wife, Beruwellege Adriana Suwaris, executed a joint last will No. 2,064 (P 1) dated December 31, 1860.

whereby all their movable and immovable property were, according to the plaintiffs, devised and bequeathed to the survivor of them with power to deal with the same as he or she pleased during his or her life time.

Adriana Suwaris, who survived her husband, duly proved the will and by deed No. 232 (P 3) dated November 4, 1871, donated the premises in dispute to her five sons—(*a*) Johannes, (*b*) Theodoris, (c) John Henry, (*d*) Marthinus, and (*e*) James—to the exclusion of all females whether daughters or granddaughters or other remoter female descendants of the said sons so long as there should be a male heir or heirs alive in the said male line.

Theodoris Fernando died in 1874, a minor, without issue. John Henry and Johannes Fernando left no male issue. James Fernando died on July 28, 1931, leaving two sons, the plaintiffs. Marthinus has three sons and is still alive, but is not a party to this action.

The case for the plaintiffs is that James and Marthinus each became entitled to a half share and that they, plaintiffs, succeeded to the share of their father on his death. They are admittedly in possession of a one-fourth share. No one disputes their right to this, but they word their claim as one to a fourth share, thus making up the half which they say was the rightful share of their father.

It will be convenient to state here the relationship of the defendants to Adriana Suwaris and the donees under deed No. 232.

The first defendant was married to a daughter of John Henry Fernando named Mary Fernando who died leaving a will by which she devised a one-eighth share of the premises to the first defendant. The second defendant is a sister of Mary Fernando, the fifth defendant is her husband to whom she gifted a one-sixteenth share by deed No. 94 dated May 1, 1926.

The third and fourth defendants are brother and sister; they are the children of Johannes Fernando's daughter Agnes who died in November, 1907.

It appears from the proceedings that Adriana Suwaris by deed No. 619 (P 4) dated January 21, 1884, revoked the deed of gift No. 232 reciting that she had executed the deed of gift in the *bona fide* belief that she was created sole heir by the joint will of herself and her husband and that doubts had arisen as to her right to do so.

Theodoris had died in 1874 before the deed of revocation was executed. The remaining donees were parties to the deed, which is in form an indenture, and they renounced and disclaimed all their rights to the premises under the deed of gift "or otherwise howsoever" and reassigned and retransferred the premises to Adriana Suwaris.

Adriana Suwaris, however, again gifted three-fourths of the premises to John Henry, Marthinus, and James Fernando by deed No. 1,792 (P 5) dated October 8, 1894, subject to certain conditions, reserving to herself the right to take the produce and income of the premises during her life-time and the right to alter or modify the conditions of the gift and to impose fresh and further conditions without assigning any reason therefor.

Adriana Suwaris on the same date by will No. 1,793 (P 6) bequeathed the remaining one-fourth share of the premises to Johannes Fernando subject

to certain conditions. Adriana Suwaris died in or about the year 1896. It is in accordance with this deed of gift No. 1,792 (P 5) and this will No. 1,793 (P 6) that the brothers Johannes, John Henry, Marthinus, and James, and their descendants have beep possessing and enjoying this property ever since the execution of those documents in 1894, a period of about 40 years, and it is the family settlement, as it may be called, that these two instruments create which the plaintiffs by the present action seek to impugn.

The defendants dispute the claim made by the plaintiffs on the following grounds. (*a*) They deny that Adriana Suwaris had a disposing power under the joint will in pursuance of which she purported to execute the deed of gift P 3, in the alternative they contend that the power of alienation, if any, did not extend to alienation by way of donation. (*b*) They challenge the validity of the deed of gift on the ground that it was not duly accepted by John Henry, Theodoris, and James Fernando who were minors at the time of its execution. In the alternative they contend (1) that the deed of gift created separate *fidei commissa* and that the plaintiffs only succeeded to a one-fourth share of the premises on the death of James Fernando, and (2) that if it created one *fidei commissum* the plaintiffs have no right of action as Marthinus Fernando is still alive.

There were other subsidiary defences which are formulated in the issues stated on page 60 of the record.

The first question for decision is stated in issue 6, " Had Adriana Suwaris the right to execute deed No. 232 of November 4, 1871 ".

The answer to this question depends on the construction to be placed on the 4th clause of the joint will P 1 which is expressed as follows in the translation of the will filed by the plaintiffs:—

> " Fourthly. After the death of one of us the survivor can possess all the movable and immovable property belonging to us according to his or her pleasure, and whatever property remains after the death of both of us shall be equally divided among our children ".

There are no words in the clause expressly appointing the survivor the heir of the predeceasing spouse. Nor are there any terms such as " devise " and " bequeath " from which it could be inferred that the survivor was to be the heir of the joint estate. The will however is expressed in Sinhalese and the testators and the notary were Sinhalese and the absence of such terms is not so significant as it would have been if the will was drawn in English by a notary familiar with the modes of expression used in wills by which a person is appointed heir of the testators' property and not merely a usufructuary heir. But whether the draftsman of the will was familiar with the modes of expression or not, the clause according to the translation from which I have quoted gives the survivor up to a point no more than a right to possess the movable and immovable property of the estate in any way he or she pleases. If it stopped there. I would have had no difficulty in holding that the survivor had no more than a usufruct in the property. The clause, however, in directing how the property is to be disposed of after the death of the survivor refers to it as whatever property remains. It was pressed upon us very strongly that the expression " whatever remains " impliedly gave the survivor a power of alienation and that what the testators intended was that the

survivor should possess and do as he or she liked with the property even to alienating all or any part of it and that whatever was left, if any, at the death of the survivor should be equally divided among the children. In short that the clause created a *fidei commissum residui.*

The clause was construed in this sense in the case of *Ferdinandus v. Fernando*[1] when the Appeal Court considered a translation of the clause in exactly the same terms as the one before us and a literal translation made by Mr. Felix Dias, the District Judge, a Sinhalese gentleman familiar with the language, who tried the case.

The translation made by the District Judge Mr. Dias is, according to the report of the case, as follows:—" The survivor having done as (he or she) pleased with all our movable and immovable property, (and) having possessed (the same) afterwards on the death of both of us it is our will that whatever remains shall be divided equally amongst our children ". The words within brackets are not in the clause as written in Sinhalese.

Moncreiff and Middleton JJ. who heard the appeal came to the conclusion that the clause created a *fidei commissum residui.* Moncreiff J. thought there was little difference in effect, if any, between the two translations. Middleton J. was inclined to accept the translation of the District Judge but expressed the opinion that the words " whatever property remains " in the translation put forward " contemplate a possible dispossession of part of that which was to be possessed according to pleasure ". In that case, however, the first question for decision was whether a daughter of Manuel named Engeltina had by her acceptance of a deed of gift executed by the donors renounced her right of inheritance in the estate of the testators. The acceptance being " subject to the condition and restriction that Engeltina was not to claim hereafter any inheritance out of the estate of us Wattumullege Manuel Fernando and B. Adriana Swaris ".

This question was answered in the affirmative and there was no necessity for their Lordships to consider the question of the effect of the 4th clause of the will and their opinion is not binding on us. Respondents' Counsel on the other hand referred us to an anonymous case, *D. C. Colombo, 56,846,* reported in *Vanderstraaten's Reports 203,* where it was held that the surviving testator of a will containing a very similar clause had no right to alienate the property. The clause in that will was split up into two and was as follows. " Fourthly. The testators declare to reserve to the survivor of them the right to possess all their movable and immovable property as he or she pleases. Fifthly. The testators declare it to be their will and desire that after the death of both of them, whatever property is left be divided equally among their four sons and two daughters or their heirs and be possessed by them as they please ". The District Judge held in effect that the clause created a *fidei commissum residui* giving full effect to the words " whatever property is left ", the Sinhalese word for the expression being *" ethuru "*, the same word is used in the joint will we are considering. The District Judge's decision was set aside in appeal. The Supreme Court in a very brief judgment held as follows. " The Supreme Court thinks that the first defendant

[1] *(1903) 6 N. L. R. 328.*

(the survivor) under the terms of the will cited in the libel took only a life interest in the property devised; and that, in the absence of any express power to alienate, there are no words used in the will sufficiently strong to raise such power by implication. On the contrary the clause directs that the survivor shall possess and enjoy the property, and that after his death the property should be divided, rather imply that it should be possessed and not alienated". The authority of this decision is rendered dubious by the absence of any reference to the words " whatever property is left " and an opinion as to their effect. Middleton J. in the case of *Ferdinandus v. Fernando* (*supra*) thought *D. C. Colombo, 56,846,* was wrongly decided. Respondents' Counsel also contrasted the terms of Manuel Fernando's will with the terms of the will made by David Ekanayake and his wife which was considered in two cases, *Weeresinghe et al. v. Gunatilleke* [1] and *Wirasinghe v. Rubeyat Umma* [2].

In the former case the translation of the relevant clauses numbered (2) and (3) was as follows:—

" (2) It is directed that all the movable and immovable property belonging to us, be possessed by us, the above named, during the life-time of both of us according to our wish, and in the event of one of us predeceasing the other, the above-named property be possessed according to the wish, and dealt with according to the pleasure, of the survivor.

" (3) It is directed that after the death of both of us all the movable and immovable property belonging to us shall devolve on the children, grandchildren, and such other heirs descending from us ".

It was held that the surviving spouse was merely entitled to a usufruct.

In the latter case which came before another Bench the translation of the second clause adopted for the purposes of the decision was as follows:—

" (2) It is directed that all the movable and immovable property belonging to us be possessed by us, the above named, during the life-time of both of us according to our wish; if one should die and the other survive, the person who lives is directed as far as in us lies to possess the property according to his or her pleasure, and to do whatever he or she likes with it ".

The translation of the 3rd clause adopted by the Court was the same as that adopted in the earlier case.

It was held that the will created a *fidei commissum residui* and that the survivor was a fiduciary with a free power of alienation.

Pereira J. who delivered the judgment of the Court based his decision on the evidence of a Sinhalese scholar that the words in clause (2) constituted a regular Sinhalese phrase or sentence used to convey the fullest and most absolute rights over property. He added that the word " saha " which was translated as " and " should be properly translated as " and also ". In the course of his judgment he observed that " the fact that not only immovable property but movable property is dealt with by the provision in question of the will renders it highly improbable that the intention was that the survivor should have no more than a mere usufruct in the property devised ".

[1] (1910) 14 *N. L. R.* 38. [2] (1913) 16 *N. L. R.* 369.

I do not think either of these decisions affords any guide to what construction should be placed on the clause which we have to interpret. There is no extrinsic evidence of any sort from which the intention of the testators can be inferred and the intention must be determined as best we can by the words alone in which they purported to express that intention.

It is to my mind very unlikely that both the testators would by a joint will divest themselves entirely of the ownership of property to which they were respectively entitled; they would at least preserve a fiduciary right which might become absolute in case the beneficiary heirs failed. Approaching the problem from this point of view it is improbable that the testators would have reserved to the survivor only a usufruct in the joint estate. Have they so expressed themselves as to reserve to the survivor dominium in the estate and not a usufruct merely? In the translation submitted by the plaintiffs the only words which suggest that they have reserved a dominium to the survivor are the phrase " whatever property is left ". The translation made by the District Judge in *Ferdinandus v. Fernando* (*supra*) has the words " the survivor having done as (he or she) pleased with all our movable and immovable property " which more strongly suggest that dominium was reserved to the survivor.

The District Judge Mr. Fernando, also a Sinhalese gentleman, commenting in the present case on the translation made by the District Judge in the case of *Ferdinandus v. Fernando* (*supra*) says, " I would venture to think that the meaning of the Sinhalese words will perhaps be more clear if it is noted that the phrase ' having done as he or she pleased, &c.' qualified the word ' possessed '. In other words the dealing contemplated is one of the methods of possession ".

This explanation of the phrase as appears from his judgment which I have consulted was suggested to and rejected by the District Judge who made the translation in *Ferdinandus v. Fernando* (*supra*).

I am not prepared to accept it myself as it must necessarily exclude any effect being given to the word ' *ethuru* '. At our request Mr. Guneratne, Sinhalese Interpreter Mudaliyar of this Court, furnished us with a translation of the 4th clause which is as follows:—

> Fourthly. All our movable and immovable property held by us both after the death of one of us the surviving other shall possess doing whatever (he or she) pleases and thereafter anything that is left after the death of both of us shall be divided by the children of us both equally.

The word ' *ethuru* ' he translates as " anything that is left ".

The appellants contended that the phrases in this clause for possessing and doing as he or she pleased have the force of two past participles, each independent of the other, so that due weight must be given to each. They further contended that the phrase for the survivor doing as he or she pleased constituted a Sinhalese sentence used to convey a right of ownership as well as of possession.

The respondents cited the case of *Botha v. Vander Vyver and others*[1] (Decisions of the Supreme Court of the Cape of Good Hope during the year 1908) in support of their contention that the provision in the will that "anything that is left shall be divided by the children of us both equally" did not give Adriana Suwaris a power to alienate. In the case cited husband and wife married in community of property directed by their joint will that the survivor should remain in possession of the joint estate and enjoy the usufruct thereof without being required to give any security for the same and bequeathed to the defendants the movable property as follows: "And we give and bequeath to our said adopted child Francina Isabella Milford (meaning the first defendant) the whole of the household furniture and effects that may be left, at the death of both of us, in the homestead at 'Blue Rock' and we give and bequeath to our said adopted children (meaning the first defendant and the said John Milford, minor) the remainder of our movable property, belonging to our said joint estate, which shall be left at the death of the survivor of us, such movable property to be divided between them equally, share and share alike".

The plaintiff, the husband, contended that during his lifetime he was entitled to alienate and dispose of freely the movable property and that the defendants could only claim a residuum at his death.

Laurence J. said with regard to his contention that he did not wish to be understood as laying down the proposition "that in no case the survivor as usufructuary, if not instituted direct heir, would possess the power of unrestricted alienation at all events, to the extent of three-fourths". And added "If such is the only reasonable inference from the terms of the will, not ignoring any part of it, then in accordance with the rules of construction referred to by Beal ('Cardinal Rules' pp. 234-5, and cases there cited), the Court must give effect to the clearly expressed intention of the parties, and hold the position of the life owner to be equivalent to that of an heir".

The conclusion he came to in the case however was that "where the survivor is not expressly instituted heir and the power of alienation is not expressly conferred the mere waiver of security and inventory is not sufficient to entitle him (plaintiff) to such a declaration as is now sought".

He thought "that sufficient effect may otherwise be given to the words 'that may be left'. He would not be responsible for preserving intact or replacing if worn out the household furniture . . . ."

Pereira J. in the case of *Wirasinghe v. Rubeyat Umma* (*supra*) at page 372 said that "the fact that not only immovable property but movable property is dealt with by the provision in question of the will renders it highly improbable that the intention was that the survivor should have no more than a mere usufruct in the property devised", which is not in accordance with the opinion expressed by Laurence J.

The decision of Laurence J. was followed in the case of *Cowen v. Estate Cowen*[2].

The clauses of the will relevant to this appeal are as follows:—(1) I hereby appoint my son-in-law Julius Jeppe . . . . my sole heir (in trust) and executor of my estate . . . . (2) To my dear wife

[1] *25 S. C. R. (South Africa) 760.* [2] *S. A. Law Rep. Cape P. Division 1932, p. 39.*

. . . . : I leave for her life, so long as she shall remain unmarried, the usufruct of my estate . . . . (3) At her death, or retiring to conventual life, or marrying again, I would prefer that the balance that there may then be of my estate, should be invested . . . . ."

It was held (1) that the son-in-law had acquired no right of ownership but merely the right to administer the estate for the benefit of others, (2) that the terms of paragraph (3) were too vague to create a *fidei commissum*, (3) that as the will merely showed a bequest of a usufruct to the testator's second wife "for her life" she was not entitled to the dominium of the property, and (4) that the words "the balance that may then be left" did not render the bequest to the second wife merely subject to a *fidei commissum residui*. Jones J. observed that "investments may have proved unprofitable and have been lost, and movables such as household furniture consumed by use".

The meaning given by the learned Judges to the corresponding words in these wills is certainly inconsistent with the construction plaintiffs seek to place on the words in Manuel Fernando's will. But I agree with their Counsel that the cases are distinguishable.

In both cases the wills distinctly provided that the persons who claimed the right of alienation should have no more than a usufruct and a right to possess the estate.

In the earlier case of *Botha v. Vander Vyver* (*supra*) there was a present bequest of the movable property to the legatee subject to the usufruct. In the latter case the dominium of the property though not the enjoyment was bequeathed to the testator's son and the second wife had necessarily only the enjoyment of the property but not the dominium without which she could not possibly be said to have a right of alienation.

In my judgment the meaning of a phrase in one will cannot be determined by the meaning given to the same or a similar phrase in another will irrespective of the context in which the phrase is used without doing violence to the context and the intention of the testator who used the phrase. Moreover, no inference can be drawn from the absence of any provision in Manuel Fernando's will dispensing with an inventory or security from the survivor as it is not the law in Ceylon to require an inventory and security from a fiduciary heir; unless of course he is appointed executor or administrator of the estate when security is required by the Civil Procedure Code.

The clause in question does not expressly appoint the survivor an heir of the estate. On the other hand there are no words which indicate that the survivor is to have no more than a usufruct; nor are the children appointed heirs of the estate; the clause merely provides that anything that is left shall be divided by the children of the testators after the death of both of them. In the meantime the survivor of the testators could do as he or she pleases and possess the property.

The plaintiffs contended that no interest vested in the children as long as the survivor was alive. The case of *Joachinoe v. Robertu*[1] was cited in support of the contention. There, the head note reads, "The joint will of a husband and wife married in the community of property, after

[1] (1890) 9 *S. C. C. 101.*

appointing the survivor sole heir to all the common property with the right of possession for life, and providing that after the death of both testators such property should be disposed of as thereinafter directed, proceeded as follows:—'It is our will and desire that after the death of both of us to give and bequeath to our beloved son M certain land'. The testator died in 1857, and the testatrix in 1876. M was married in the community of property to B, who died in 1867, leaving plaintiff as her sole issue".

Clarence A.C.J. said, "In my opinion the effect of the joint will is to reserve a life interest for the surviving spouse, with a gift to Don Mathes to take effect on the death of the survivor, and if Don Mathes had predeceased his parents or either of them, my opinion is that the gift in his favour would have fallen through. I read the will as making a gift to Don Mathes contingently on his surviving both his parents. The English Wills Act of 1837, with its 33rd section, is not in force in Ceylon, and even if it were, I doubt whether the words 'after the death of both of us' would not prevent anything from vesting in Don Mathes so long as either parent lived". Dias J. said with regard to the devise to M, "No words can be plainer. The testators gave nothing to Don Mathes during their lifetime, and Don Mathes took nothing during the lifetime of both his parents, and it follows that, as at the date of his marriage one of his parents was alive, he took no vested interest in the garden in question, and it formed no part of the common estate of himself and his wife. The result is that the plaintiff's action fails, and the defendants are entitled to judgment".

We were also referred to the case of *Omer Lebbe Marcar v. Ebert*[1], where the joint will instituted the children of the testator heirs of the joint estate and added that "after the death of the survivor the joint estate and property shall be inherited by their children in equal shares, the shares of any of the children who predeceased the testators to be inherited by their issue by representation" and the Court held "that the devise in favour of the children took effect only on the death of the survivor of the testators, and the property devised vested in only such of the children or their issue as were alive at that date".

In both cases the survivor was said to have only a life interest; but in neither case did the Court decide in whom the dominium vested during the lifetime of the survivor. Mr. Perera argued that it must be deemed to have been in the survivor, as the dominium cannot be in abeyance. In support of this argument he relied on *Voet, art. 9, bk. VII., tit. 1,* (*Searle & Joubert's Trans. p. 11*), where it is stated that "if we find a usufruct either of a single thing or a whole inheritance bequeathed with the burden of restoring the thing or estate to a third person after the death of the legatee, in this case when there is a doubt the ownership with the burden of *fidei commissum* must be considered bequeathed rather than the usufruct; for reason does not admit of the burden of restoring only a usufruct being imposed on the legatee; since, by his death, he loses the whole right of usufruct *ipso jure*, to such an extent that nothing remains to be restored. And this opinion is strengthened by the terms of the law,

[1] (1893) 3 *Cey. Law Rep.* 5.

which are sufficiently clear on the subject, for if a husband is considered not to have intended a *fidei commissum* when he has left the usufruct of an estate to his wife, and through ignorance, not knowing that after her death the right of usufruct determined, has added that after her death "the estate with the rents should revert to his heirs" then on the other hand, if the testator has added such proviso wittingly we must answer that a legacy of the ownership with the burden of *fidei commissum* arises from such disposition".

I must confess I cannot understand the decisions in the two cases referred to above. I prefer to follow the reasoning of Lascelles C.J. in the case of *Mendis v. Fernando*[1], who adopted the statement of the law as given in *1 Maasdorp's Institutes of Cape Law, 176*, that "If the bequest contains words of futurity, the question will be whether they were inserted for the purpose of postponing the vesting, or of merely deferring the fulfilment of the legacy, as where a bequest to one person is made subject to a life interest in favour of another. In such a case the further question arises whether the person (*i.e.*, with the life interest) is a usufructuary or a fiduciary legatee. In the former case the legacy, as a general rule, vests in the remainderman immediately upon the death of the testator, and in the latter the vesting is postponed till the death of the fiduciary legatee".

In *Mendis v. Fernando* (*supra*) Lascelles C.J. does not appear to have been impressed by the decision in the case of *Joachinoe v. Robertu* (*supra*) but said it was not necessary to consider the correctness of the decision.

I think that the survivor by the 4th clause of the will we are considering had more than a life interest as he or she was empowered to do as he or she liked with it and the children were only entitled to what remained.

I accordingly hold that the clause created a *fidei commissum residui* and that Adriana Suwaris had a right to alienate the property of the estate subject to the rights of the fideicommissary heirs in the residue.

But this finding does not conclude the matter, for it was contended by the respondents that the rights of alienation of a fiduciary heir under a *fidei commissum residui* did not extend to donations. In support of this contention we were referred to *1 Kotze's Van Leeuwen* (*1st ed.*) *pp. 380, 381* and particularly p. 382. Section 9 on page 380 deals with the case of a *fidei commissum* in which "power is given to the first heir to spend and alienate the property, and deal with it as with his own, subject to this burden alone, viz., of letting whatever is left of it at his death descend (to the next heir)" which the section says "often takes place between husband and wife among us". Section 10 on page 382 lays down that "the free power of alienating and dealing with property as one's own in fideicommissary inheritance may not be extended further than to alienation *inter vivos*, without thereby any disposal or direction being allowed to be made by last will". In support of this proposition Koedyk's case is cited. "Mr. Koedyk (who had been instituted heir by his deceased wife to all her property in order to do therewith as he pleased, just as a person may deal with his own property, provided that on his death her relations should enjoy the half of all the property which should be left remaining by him, her husband, at his death) had declared by a

[1] (1905) 9 N. L. R. 77.

certain deed in favour of his maid servant that for her faithful services he made over to her in full property the right in a certain obligation of four thousand guilders, reserving the fruits and yearly income thereof for himself for life. The Court, notwithstanding the fact that the said Koedyk had by inheritance from his sister considerably enriched the estate after the death of his wife, held that the said deed of gift could not exist to the prejudice of the relatives and instituted heirs of his wife, and the defendants" (the executors of Koedyk's last will) "were ordered to increase the value of the estate by this amount". There is no indication except the context whether or not anything turned on the fact that the donor had reserved a life interest. In Lorensz's translation of *Van Der Keessel's Commentary on Grotius' Introduction to Dutch Jurisprudence at p. 115, section CCCXX.*, it is laid down that "The community of property, which is continued by desire of a deceased testator differs from a *fidei commissum* of the residue, ... but it resembles the latter in this respect, that the portion which the heirs of the deceased are entitled to cannot be diminished by donation or last will". In a note to the section, *Van Leeuwen's Commentary, bk. III., ch. 8, s. 10, i.e.*, the passage cited above, is referred to. The writer draws no distinction between simple donations and donations in which a life interest is reserved nor does Voet who, commenting on the Roman law which permitted donations to be made to the extent of three-fourths of the inheritance, says. "But according to our present (practice) the better view is that donations should be disallowed *which are fraudulently made by the fiduciary for the sake of curtailing the fidei commissum* and defrauding the fidei-commissary" (*Voet, bk. XXXVI., tit. I., s. 54—Macgregor's Trans. p. 118.*)

I presume what Voet means by the passage underlined is that the donation must in fact curtail the estate to which the fideicommissary would otherwise succeed. A donation is then not *ipso facto* void but is disallowed if it curtails the fideicommissary's estate.

According to the rule in *Voet* the respondents must establish that their share of the *fidei commissum* property has been curtailed by the deed of gift No. 232.

There is no definite evidence in this case as to the number of children who survived the testators but it was agreed at the argument in appeal that there were five sons and seven daughters and that the daughters during the lifetime of the testators renounced their rights of inheritance. John Henry and Johannes through whom the defendants claim would accordingly be entitled to succeed to a one-fifth share each under the joint will of Adriana Suwaris and her husband. Under the deed of gift they received the shares they would have succeeded to, but burdended with a *fidei commissum*, whereas under the will they would have succeeded to those shares absolutely.

It was urged on behalf of the respondents that that fact was sufficient to establish that John Henry and Johannes were prejudiced by the deed of gift. I cannot assent to that contention.

The two cases must be considered separately. Johannes had attained majority and accepted the gift himself and I do not think he could claim a

declaration that the deed of gift was invalid even if it did prejudice him. John Henry's case is somewhat different as he was a minor when deed No. 232 was executed. He might possibly have pleaded that he was not bound by the acceptance of a gift, if it was accepted, made on his behalf to his prejudice. But I think it would have been incumbent upon him to prove that he was prejudiced. He could not have merely pointed to the fact that he was given a share burdened with a *fidei commissum* when he was entitled to a free inheritance under the will ; for by the deed of gift he received immediately the share that he would have inherited under the will after the donor's death. In these circumstances there must be in my opinion proof of prejudice. There is no such evidence. In this connection it must be noted that John Henry accepted a gift of a one-fourth share from Adriana Suwaris on October 8, 1894 (No. 1,792, P 5) also burdened with a *fidei commissum,* though of a somewhat different character.

I am accordingly of opinion that the deed of gift cannot be held to be invalid on the ground that it prejudiced the respondents.

It was contended however that the gift would be invalid if it prejudiced the other heirs. But none of the other children have asserted any claim in this case and any pleas of prejudice they may have set up are not relevant to the issue whether John Henry and Johannes have been prejudiced.

The next question for decision is " Was deed No. 232 dated November 4, 1871, accepted by Johannes and Haramanis or either of them on behalf of the four minors is so is such acceptance valid ? " (Issue 1.)

The donees with the exception of Johannes were admittedly minors, and both by the Roman-Dutch law and the law as laid down in local decisions acceptance by the minors or by someone on their behalf is necessary for the validity of the gift.

There is in the deed of gift an acceptance of it in the following terms: " We, the undersigned Wattemullegey Johannes Fernando and Beruwellegey Haramanis Suwaris, for and on behalf of Wattemullegey Theodoris Fernando, Wattemullegey John Henry Fernando, Wattemullegey Marthenus Fernando, and Wattemullegey James Fernando do thankfully accept the above gift ".

Now it has been held that a brother who is a major may accept a deed of gift on behalf of himself and his minor brothers or sisters. In the case of *Lewishamy v. Cornelis de Silva* [1] Middleton J. said " There is the further question whether the acceptance of the donation on behalf of the minor donees by his elder brother was a good acceptance. In *Francisco v. Costa* [2] an acceptance by the grandmother of the donee was deemed sufficient in law, and for the same reason given by Clarence J. at page 192 I would hold that as the father, the donor, permitted the elder brothers to accept for their minor brothers I can see nothing wanting in the implementing of this donation ".

The facts are very briefly stated and it does not appear whether the donees were given possession of the property donated or not. This decision was followed in the case of *Bindua v. Untty* [3], but in this case it

[1] *(1906) 3 Bal. Rep. 43.* [2] *8 S. C. C. 190.*

[3] *(1910) 13 N. L. R. 259.*

was proved that the donor surrendered the property to the donees after the execution of the deed of gift and that the major brother possessed the land thenceforward and his minor brother and sisters took the produce themselves as they attained majority and also dealt with the land as owners while the donor was still alive. In *Babaihamy v. Marcinahamy* [1], the donor gifted the property to his adopted daughter and her brothers. one of the donees accepted the donation on behalf of himself and some minor donees and entered into possession and it was held that there was a valid acceptance of the gift.

The plaintiffs' first contention was in view of these decisions that the terms of the acceptance endorsed on the deed of gift No. 232 amounted to an acceptance by Johannes on behalf of himself and his brothers, the other donees.

I am unable to read into the endorsement an acceptance by Johannes on behalf of his minor brothers as well as for himself. If that was intended there was no necessity for the introduction of the name of Beruwellegey Haramanis Suwaris. In my opinion the gift was accepted by Haramanis Suwaris on behalf of the minor donees.

The evidence as to the position of Haramanis Suwaris in the family is very indefinite. Ursula Fernando, the mother of the plaintiffs, said he was a cousin of Adriana Suwaris; but she was unable to say who his mother was or who his brothers and sisters were. Another witness Paulis Tillekeratne said, "the street talk was that he was a son of a paternal uncle of Adriana". For the defence it was suggested that he was an illegitimate son of Adriana's father. The plaintiffs have clearly failed to prove that Haramanis Suwaris stood in such relationship to the minors as to constitute him their natural guardian. Nor is there evidence, as in the case of *Tissera v. Tissera* [2], that Haramanis Suwaris accepted the gift at the request of the donor.

Plaintiffs' counsel next argued that we must presume that the minors, who were living with their mother, either accepted the gift themselves or that they appointed Haramanis Suwaris to accept on their behalf. In short, he asked us to presume what was in fact proved in the case of *Babaihamy v. Marcinahamy* (*supra*).

The deed of donation considered in that case recited a gift to the donees and after the signature of the donor there was a paragraph as follows: "We the said four persons (named) do hereby declare to have accepted the above donation granted by Tombuage Jando with the highest regards, to have entered into possession of the said land from this day, and to have bound ourselves to observe the above directions without violation or contradiction of even one syllable, and we who are of proper age to sign have also signed hereto"

This declaration was signed by Salmon, one of the donees, and another donee who could not be identified as he signed with a cross.

The notary's attestation clause was to the effect that after he had read and explained the deed to the donor and the donees (who were named) in the presence of the witnesses the same was signed by all the proper parties in the presence of each other.

[1] (1908) 11 *N. L. R.* 232.

[2] (1908) 2 *Weer. Rep.* 36.

It was accordingly held (1) " that it was clear that all four donees were present at the execution of the deed, and assented to its terms, setting forth that they accepted the donation, and that Salmon being of proper age . . . . actually signed it; (2) that it was competent to a minor to accept a donation in his favour; and (3) that Salmon's brothers and sisters had signified their acceptance of the donation ".

There is with regard to deed No. 232 no evidence that the minors were present when the deed was executed or that they signified their acceptance of the gift or that they appointed Haramanis Suwaris their agent. On the contrary the attestation clause only mentions Johannes Fernando and Haramanis Suwaris as being present when the deed was executed by Adriana Suwaris. In my judgment it is impossible to apply to this deed the *ratio decidendi* in the case of *Babaihamy v. Marcinahamy* (*supra*) nor can I in this case presume acceptance. No doubt Bonser C.J. in the case of the *Government Agent, Southern Province v. Karolis* [1], approved of the dictum of Dias J. in the case of *Francisco v. Costa* (*supra*) that " the law favours the acceptance of a gift in the case of minors " and cited with approval the case of *Lokuhamy v. Juan* [2], where it was laid down that acceptance will be presumed when there are circumstances to justify such a presumption. But the presumption cannot be drawn when there are no circumstances—such as delivery of the deed or delivery of possession—to justify it. As Layard C.J. said in the case of *Wellappu v. Mudalihami* [3], there must be some affirmative evidence of acceptance on the minors' part.

We were not referred to any affirmative evidence in this case from which acceptance of the gift could be presumed. No doubt it is difficult if not impossible to procure evidence of circumstances from which acceptance could be inferred after the lapse of sixty odd years. But the fact that evidence is not procurable cannot justify a presumption of acceptance being drawn because evidence might have been available if the question of acceptance had arisen earlier. The defendants have on the other hand produced an indenture of lease No. 1,261, 1 D 12, dated December 30, 1876, which if it deals with the premises the subject of the deed of gift No. 232 indicates that Adriana Suwaris dealt with the premises as her own after the execution of the deed of gift No. 232. The property leased is described thus : " The rooms, well, 8 tubs, trees, and plantations and the gate made towards Dam street on the land adjoining Dam street in Kaymans Gate and Gasworks street, Colombo, and belonging to the estate of the said Watumullage Manual Fernando, renter, exclusive of the shops, or the house adjacent to the road, the room built for storing bones, the gate or door towards Gasworks street and the bungalow put up for the sale of vegetables therein ". Plaintiffs' Counsel contended that this property could not be identified with the premises gifted. The defendants contended that the identity of the property was not questioned in the Court below and submitted that the description of the situation of the property in the indenture of lease make it clearly identifiable with the premises gifted. I am inclined to think so. The property in the lease is described as belonging to Manuel Fernando's

[1] (1896) 2 *N. L. R.* 72. [2] *Ram Rep.* (1872. 1875. *and* 1876). *p.* 215.
[3] (1903) 6 *N. L. R.* 233.

estate situated in Kaymans Gate and Gasworks street. In the deed of gift P 3 the premises are said to be bounded on one side by St. Paul's road. In P 5, No. 1,792, executed on October 8, 1894, the same premises are described as situate and lying along Dam street and Gasworks street at Kaymans Gate. St. Paul's road, the deed No. 1,792 states, is now called Gasworks street. When it was put to James Fernando's wife Ursula that a portion of the premises gifted was leased by this deed, she merely said, "I cannot remember". There was no suggestion then that they were not part of the premises gifted. The District Judge in dealing with lease D 12 clearly dealt with it as if there had been no question as to its being a lease of part of the premises referred to in deed No. 232.

A further argument in support of the acceptance of the gift was based on the deed P 4, No. 619 of January 21, 1884, by which Adriana revoked the deed of gift No. 232 and the donees disclaimed and renounced all their right, title, and interest "in, out of, or upon the said property and every part thereof under and by virtue or in respect of the said deed of November 4, 1871, or otherwise howsoever, and granted, reassigned, and retransferred to Adriana Suwaris the said property, to wit, (here follows a description of the premises) with all and singular the appurtenances thereto . . . . and all the right, title, interest, claim, and demand whatsoever of them and each of them . . . . to, in, out of, or upon the said premises".

Adriana Suwaris recited in this deed No. 619 that she had made a joint will with Manuel Fernando, which she proved after Manuel Fernando's death, and that she executed deed No. 232 acting under the *bona fide* belief that as such survivor as aforesaid she was by the said will created sole heir of her husband and as such had absolute power to deal with the entirety of the common estate, and continued as follows: "And whereas doubts having arisen as to the right of the said Beruwellegey Adriana Suwaris under the said joint will to make the gift and disposition aforesaid, and the validity thereof being in question, she is desirous of revoking the same, and that the said Johannes Fernando, John Henry Fernando, Marthinus Fernando, and James Fernando are likewise desirous of disclaiming all title to the said property under the said deed of gift and of reconveying the same to the said Adriana Suwaris to have and to hold as in her former estate under the said joint will".

It was contended that as the reason for the deed of revocation No. 619 was that Adriana Suwaris doubted her power under the will to execute the deed of gift No. 232, the recitals in this deed of revocation amounted to a statement that the gift under No. 232 had been sufficiently accepted at the time No. 232 was executed and the disclaimer and renunciation by the donees of their rights under that deed of gift, and their reconveyance of all their interests in it to the donor, manifested an acceptance of the deed of gift or was in itself a subsequent acceptance.

These are certainly startling propositions, and plaintiffs' counsel was unable to support his argument with authority. Nor have I been able to find any.

There are two cases in which instruments executed by the donee at a later date than the instrument of gift were held to amount to an

acceptance. But the first point to be decided is whether a minor can manifest his acceptance of the deed of gift at some time after the deed of gift was executed

In the case of *Silva v. Silva*[1] Grenier J., with whom Hutchinson C.J. agreed, held that " in the case of a donation to a minor the law requires a present acceptance by the natural or legal guardian of the minor and not an acceptance at some further indefinite time by the minor himself, after he has attained majority ". This decision is against the proposition. But it was not followed in the case of *Wickremesinghe v. Wijetunge*[2] where it was, I venture to think, rightly held that " under the Roman-Dutch law a donation may be accepted at any time during the lifetime of the donor, and where its fulfilment is postponed till after the donor's death, it may even be accepted after the donor's death ". This is one of the two cases referred to above. It was an action by the donor against the donee, his daughter, and her husband for declaration of title to the land he had gifted to the donee. The plaintiff alleged that the donation was not completed by delivery and acceptance and that the land donated was in his possession till the ouster complained of. Before the commencement of the action the donee had sold half of the three lands gifted to her to her husband. This was held to be " clearly an act of acceptance ". In the other case *Tissera v. Tissera* (*supra*) the deed of gift was one made by the father and sister of the donees, it was accepted on behalf of the donees by a stranger. The acceptor gave evidence that he had accepted the gift at the request of the father. It was admitted that the maternal grandmother was alive. One of the donees had mortgaged the share donated to him reciting title under the deed of gift and acceptance was presumed from this recital.

The donees in both cases exercised for their own benefit a right derived by them from the deed of gift. They could only do so on the footing that they had accepted the deed of gift and were vested with rights under it. But a donee who renounces a right created by a deed of gift may do so even if he was not in fact vested with the right.

In my judgment the exercise of a right derived from a deed of gift as proof of acceptance is very different to the renunciation of a right derived from such a deed unless there was proof that the deed had been accepted before the deed of renunciation was executed.

In my opinion the deed of renunciation cannot by itself be held to establish an acceptance by the donees. They might have proceeded on the assumption that the acceptance by Haramanis Suwaris was a valid acceptance. If that were so they could not rely on the deed of renunciation as proof of acceptance for they might have executed the deed for the purpose of divesting themselves of their rights *if any* under the gift or they might have been joined to preclude them from thereafter raising questions as to the validity of Adriana Suwaris' title.

I find it impossible to accept the proposition that a deed of gift invalid for want of acceptance can attain validity from the deed, and nothing else, by which the donees renounced their rights, if any, under the deed of gift.

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

[2] *(1913) 16 N. L. R. 413.*

I accordingly hold that the gift of the premises to the donees other than Johannes was invalid for want of acceptance by them.

Plaintiffs' counsel contended however that even if the gift to John Henry, Theodoris, and James was invalid for want of acceptance the plaintiffs acquired rights to the premises by virtue of the acceptance by Johannes.

The argument so far as I could understand it was this. The gift was a gift of the entirety of the premises to teach. Therefore the rule in *Voet, XXXIX. V, XIV.* that "if a donation either of a particular piece of property or of all property be made to several persons together and one of them does not accept the gift his share by no means accrues to the others but it rather remains outside the operation of the donation, because such a donee is neither an heir nor a legatee", did not apply, and Johannes became entitled to the entirety of the premises by his acceptance of the deed of gift. Accordingly on the death of Johannes without male descendants the premises devolved in terms of the gift on Marthinus and the male children of James. In the alternative it was argued that if the rule applied, the plaintiffs as the male descendants of James succeeded to a one-tenth share, that is, to half of Johannes' one-fifth share.

I am unable to agree with either branch of the argument. Even if Adriana Suwaris intended to create one *fidei commissum* for the benefit of the male descendants of the five donees that intention failed as a result of the non-acceptance of the gift by the donees other than Johannes and the rule stated by *Voet* became applicable and Johannes and his descendants in the male line became entitled to only a one-fifth share. But whether the rule applied or not the descendants of the donees in the male line who had not accepted the gift did not acquire any rights under the deed of gift. The argument would I think have had force if the gift was a donation to Johannes and to the descendants of Johannes in the male line and failing such descendants to the descendants in the male line of his brothers. In such a case the descendants in the male line of the brothers would succeed by virtue of the gift to Johannes as fiduciary for the descendants of his brothers in the male line on failure of his own male descendants. But in terms of deed No. 232 the descendants in the male line of the brothers became fideicommissary heirs by virtue of this gift to John Henry, James, Marthinus, and Theodoris Fernando as fiduciary heirs, and on their failure to accept the gift their descendants in the male line did not become fideicommissary heirs at all and therefore could not succeed to the share Johannes had accepted.

I have I think considered every argument that was adduced in support of the plea that deed No. 232 was accepted by John Henry, James, Marthinus, and Theodoris Fernando. In my opinion the plea fails and I agree with the District Judge's finding that "there is no proof that deed of gift P 3 was in fact accepted by any of the minor donees".

It appears from the District Judge's judgment that a lease P 7 and not the deed of revocation P 4 was relied on in the District Court as proving that the minor donees had in fact accepted the gift. This lease P 7, No. 1,734, dated May 14, 1894, was not relied on by the plaintiffs in this

Court for that purpose. I do not think any inference can be drawn from the parties to or the terms of the lease P 7 as it was executed after the execution of the deed of revocation P 4.

The plaintiffs' claim to the one-fourth share in dispute in this case based on the deed of gift No. 232 not being sustainable since there is no proof that James, their father, ever accepted that gift, it is not open to the plaintiffs to plead that their rights accrued to them only on the death of James on July 28, 1931, and that the proviso to section 3 of the Prescription Ordinance, No. 22 of 1871, saves those rights from having been prescribed against. I may say here that the proviso to that section would have saved those rights from prescription, since they only became rights in possession on July 28, 1931, if the plaintiffs had been, as they alleged, fideicommissaries under deed of gift No. 232 by reason of James under whom they claim having accepted.

There remains the question whether the plaintiffs can claim title to any share in addition to the one-fourth share to which their title is admitted on the ground that Adriana Suwaris did not dispose of a one-fourth share. The will she executed in favour of Johannes being a breach of the rule of Roman-Dutch law that a fiduciary heir under a *fidei commissum residui* had no right to dispose of the *fidei commissum* property by a testamentary disposition.

Even if a one-fourth was left undisposed of any claim the plaintiffs may have to a share in it has long since been prescribed against.

The plaintiffs' claim in my opinion to any share in addition to the one-fourth share of which they are admittedly owners, fails.

The defendants further contended that the plaintiffs' claim must fail even if deed No. 232 had been accepted. They argued (*a*) that as the fideicommissary donees had not accepted the deed of gift the donor was entitled with the consent of the donees to revoke and had revoked the deed of gift by deed No. 619 (P 4), (*b*) that even if deed No. 619 was invalid as a deed of revocation it effected a compromise which was binding on the fideicommissary donees including the plaintiffs.

The first branch of this contention is against the weight of authority.

It was held in the case of *John Perera v. Avoo Lebbe Marikar*[1], that where the gift is made by the donor in favour of a family in which he wished it to remain the donor is not allowed to revoke the gift even after acceptance by the first donee. The authority for this decision is the following passage in *Perezius, art. 12 (Trans. by Wickramanayake), p. 30,* "Lastly the former opinion would be the more correct if the gift made to one person is made in favour of a family in which the donor wishes the property gifted to remain; for by no pact can it be revoked in respect of after-comers; for it is sufficient in order that it may be considered a perpetual donation that the first donee has accepted it so that there is no need of a subsequent acceptance". This case was treated as a decision of the Full Bench and followed in the case of *Soysa v. Mohideen*[2]. The law as stated by *Perezius* was adopted in the Orange Free State in the case of *Ex parte Orlandini and two others*[3].

[1] *6 S. C. C. 138.*

[2] *(1914) 7 N. L. R. 279.*

[3] *(1931) S. A. L. R. O. F. S. Prov. Div. 141.*

I am unable to distinguish this case from the cases referred to above and I am of opinion that the deed of gift could not be revoked by Adriana Suwaris even with the consent of the fiduciary heirs.

The only case in which it was held that acceptance by the fideicommissary donees was necessary is the case of *de Silva v. Thomis Appu* [1]. One of the Judges, Wendt J., who took part in it, later in the case of *Asiathumma v. Alimanachy* [2] said that he was of opinion on reconsideration that the case had not been correctly decided.

In support of the second branch of the argument *Voet, bk. II., tit. 15, art. 8 (Buchanan's Trans.), p. 366* was referred to. It is there stated that "it seems to accord with reason" that a fiduciary heir may compromise without the consent of the fideicommissary heir so as to bind the latter. It is not necessary for me to consider whether the passage applies to a fiduciary and fideicommissary donee. But apart from the specific reference to heirs there is a passage in the article which suggests that the fiduciary heir has the right to compromise because the fideicommissary heir does not in the case of a *fidei commissum* created by will acquire an interest until the death of the fiduciary. The passage is as follows: "And although it is true that what is done between others ought often not to injure a third party, yet as it is uncertain, while the condition of the *fidei commissum* is suspended, whether anything will ever come to the fideicommissary heir from the subject-matter of the *fidei commissum,* since the fideicommissary may die before the fiduciary heir, or the *fidei commissum* may prove wanting in any other way, it is therefore unnecessary that there be required, and made necessary, for the compromise, the consent of him who only meanwhile cherishes a fleeting and uncertain hope of acquiring the *fidei commissum*". This argument will not apply in the case of a fideicommissary donee who if he dies before the fiduciary donee transmits the expectation of the *fidei commissum* to his heirs (*Mohamed Bhai v. Silva* [3]). Whether the article applies to *fidei commissum* created by deed *inter vivos* or not does not appear to me to be material, for I cannot possibly see how the deed of revocation by which the donees parted with all their interests without any return can be regarded as a compromise.

The defendants also contended that the deed of gift created not one *fidei commissum* but five separate *fidei commissa* and that the plaintiffs did not succeed to the share of any of the donees who died without issue or without issue in the male line. In the alternative that if the deed created one *fidei commissum* the plaintiffs had no interest in the property donated as long as Marthinus was alive.

Adriana Suwaris in deed No. 232 recites her intention and desire to donate the premises to her five sons who are mentioned by name and their descending heirs in the male line to the exclusion of all females whether daughters, granddaughters, or other remote female descendants of her said sons so long as there should be a male heir or heirs alive in the said male line and that in the event of the said heirs of the male line being extinct or then ceasing the said property should go to the descending heirs of the said five sons to the exclusion however of the daughters

[1] *(1903) 7 N. L. R. 123.* [2] *(1905) 1 A. C. R. 53.*
[3] *(1911) 14 N. L. R. 193 (Full Bench.)*

of the said Beruwellegey Adriana Suwaris and their heirs.

By the operative clause she gives grants and assigns unto the said (here follows the names of the donees) and their respective heirs as hereinafter more particularly described as a gift absolute and irrevocable all that (here follows a description of the premises).

The relevant portions of the habendum clause are thus expressed: "To have and to hold the said premises . . . . subject, however, to the following conditions, that is to say, that the said (names of the donees) shall possess the said property under the bond of *fidei commissum* and shall neither alienate nor incumber the said property nor create any charges or lien thereon but shall possess the same during their lifetime, and after their death the same shall devolve on their lawful descending heirs in the male line, subject to the same conditions to the exclusion however of all females whether daughters, granddaughters, or other remote female descendants of the said . . . . so long as there should be a male heir or heirs in the said male line alive; and that in the event of the said male heir or heirs in the male line being extinct then to all the descending heirs of the said . . . . subject to the same conditions, and if such heirs should become extinct then to all the heirs of the said Beruwellegey Adriana Suwaris, subject to the same conditions, and further that the said property or any interest, rent, usufruct, and revenue in and of the said property shall not be liable to be attached, seized, or sold for the debts of any or all persons who shall have a right, title, or claim in and to the said property by virtue of these presents".

The deed of gift clearly donates the whole property to the five sons. It does not in terms donate a one-fifth share to each of the donees. It was submitted however that that intention must be inferred from the words "their lawful descending heirs in the male line" in the habendum and from the words "and their respective heirs" in the operative clause. The argument was that the deed created five male lines from each of the donees and that there were therefore five separate *fidei commissa* and not one *fidei commissum*. In my opinion the words "respective heirs" are controlled by the words in the habendum clause quoted above which indicate that the premises are not to devolve on the female heirs of the donees respectively failing descendants in the male line nor in my opinion do the words "in the male line" create five lines; they are employed for the purpose of stating concisely that the donor intended to exclude the female children of male descendants, as also the male children of female descendants, until all the male descendants of the male donees had failed.

I am unable to distinguish the terms of this deed from the terms of the deed of gift considered in the case of *Carlinahamy v. Juanis*[1], which was held to create one *fidei commissum*.

The contention that the plaintiffs had no interest in the premises during the lifetime of Marthinus was based on the words in the habendum clause that the premises "should devolve on the descending heirs in the male line of the donees after their death". The plaintiffs would have us read the words quoted as 'after their respective deaths'; the defendants on

[1] *(1924) 26 N. L. R. 129.*

the other hand asked us to give the words their ordinary meaning without any addition, namely, that the premises were to devolve after the death of all the donees.

Whether the word "respective" should be added or not depends on what was the intention of the donor so far as it can be gathered from the terms of the deed. For the reasons given by Bertram C.J. in the case of *Abeyaratne v. Jagaris*[1] I would hold that the words after their death should be construed as "after their death respectively". I am accordingly of opinion that on the death of James his share would have devolved on the plaintiffs if there had been a valid acceptance of the gift made by deed No. 232.

There is one other matter I must refer to. In the course of the argument there was a suggestion made rather vaguely that there was a continuation of the community of property between the surviving parent and children. I need only say with regard to this suggestion that as long ago as 1892 it was held that the Roman-Dutch law of continuing community, after the death of a parent, between the surviving parent and the children, was never adopted by us (*Wijeyekoon v. Gunewardene*[2]). A similar opinion was expressed by Wendt J. in the case of *Carolis Appu v. Jayewickreme*[3]. Lawson D.J. was of the same opinion in *1858, D. C. Colombo, No. 21,043* reported in the appendix to *Vanderstraaten's Reports, p. XLVI.* In my experience of thirty-seven years the Roman-Dutch law of a continuing community has never been revived.

I have discussed the main points raised in appeal. In view of my finding that the deed of gift No. 232 was invalid for want of acceptance there was no necessity to deal with the contentions considered in the latter part of my judgment. I have done so out of deference to the full and able arguments which were addressed to us and as there is a possibility of the case being brought before a higher tribunal. We are, I venture to say, greatly obliged to counsel for the assistance we received from the arguments addressed to us in appeal.

In view of my findings that the deed of gift is invalid for want of acceptance and that whatever claims the plaintiffs and their father otherwise had are barred by prescription, the appeal must be dismissed with costs.

Appeal dismissed.