

1903.  
March 25.

FERNANDO v. WEERAKOON.

D. C., Galle, 5,921.

*Deed of gift—Acceptance on behalf of minors.*

Though some Roman-Dutch Lawyers declare that a father cannot make a gift to his minor son who is still subject to his power, yet the practice in Ceylon is for parents to donate to their minor children.

Acceptance is necessary to make a donation fully effectual, but as minors cannot accept it, their grandparent and parents, when not also the donors, may accept for them.

THIS was an appeal from a judgment of the Court below, in which the District Judge held that the plaintiff could not maintain his action brought upon a deed of gift in his favour.

In his plaint the plaintiff alleged that one Lewis Fernando and the defendant were joint owners of the land which formed the subject of dispute, and that Lewis Fernando gifted his half share to the plaintiffs, but that in August, 1898, the defendant prevented the plaintiffs from having their just share of the plumbago excavated from a pit dug by the defendant without the consent of the plaintiffs.

The defendant pleaded *inter alia* that the deed of gift relied upon by the plaintiff was held by the Supreme Court in case No. 3,354 of the District Court of Galle to be of no force or avail in law, as it was not accepted by the alleged donees, and that by mutual arrangement between the defendant and his co-owner Lewis Fernando, the plumbago pit was worked by turns between them, each person appropriating the proceeds to himself during the period of his possession.

At the trial it was agreed that only one issue of law should be decided first, whether the plaintiff's action could be maintained.

The District Judge, Mr. F. J. de Livera, dismissed the action in these terms:—

“ The deed of gift was held to be invalid by the Supreme Court in D. C., Galle, 3,354, reported in 3 N. L. R. 6. If D. C., Galle, 3,354 was an action that could not be maintained, no more can the present action be maintained.

“ Lewis Fernando, the donor, who professed to make the gift in 1893 to the plaintiffs, who were minors, is still in possession of the property gifted. The plaintiff's title is not improved by the donor appearing now as a witness and supporting their claim.”

Plaintiff appealed.

Dornhorst, K.C., for appellant.

Bawa, for respondent.

*Cur. adv. vult.*

25th March, 1903. MONCREIFF, J.—

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Lewis Fernando and the defendant were, by Crown grant of 27th September, 1892, owners of equal shares of Olakanduhena. On the 15th June, 1893, Lewis Fernando donated his half share to his minor children the first, second, third, and fifth plaintiffs. The plaint contains a prayer for an account, and payment of certain shares or damages alleged to be due in respect of plumbago pits dug on the land.

*Vanderlinden* (3rd Edition, p. 124) says flatly that "a father cannot make a gift to his minor son, who is still subject to his power." So also says Voet (39, 5, 12). Groenewegen and Vander Keesel think that by Roman-Dutch Law parents may donate to their minor children on the ground apparently that there being no *patria potestas* in modern life, the principle of the Roman Law cannot be applied. Whether the reason given is good or not, we could hardly in this case depart from the practice of the Court. In *Francisco v. Costa* (8 S. C. C. 189), Dias and Clarence, J.J., held that parents might donate to their minor children, and I think they were mainly influenced by the fact that such donations had constantly been made in Ceylon. Withers, J., in *Fernando v. Cannangara* (3 N. L. R. 6), expressed surprise at the practice, but felt himself bound to follow it.

It is however objected that this donation was never accepted by, or on behalf of, the minors. "No donation is valid unless the donee has accepted it; but it is immaterial whether the acceptance is made in the instrument itself, or by a letter, or in any other way, provided it is sufficiently clear." (*Vanderlinden*, 124.) Acceptance is necessary to make a donation fully effectual; and if there has been acceptance, an action may be brought to enforce the gift (see *Van Leeuwen*, 4, 30, 2). But apparently minors cannot accept, at least they cannot until majority. It would appear that a grandparent, and parents when not also the donors, may accept for them.

Here the father of the minors was the donor, and I should judge from his proceedings that he accepted the gift for himself. He could not accept for the minors. In November, 1898, he entered into an agreement with one Martino de Silva for digging plumbago, in which he described himself as being "in common possession of" part of Olakanduhena. He says he made the donation because he had many enemies, and thought he would be murdered. He brought a case against the Constable Arachchi of Pitigala and some servants of the defendant, in the course of which he said: "This land is mine." In reference to Gahalawattahena, part of the donated lands, he says: "I have been giving that land to one

1902. Lattahandi Samis to plant, averring I was the owner." As to  
*March 25.* Ulukapugoda, which he gifted to the minors, he says: "It was sold  
MONCHEIFF, in execution against me. I purchased it." I think the Judge was  
J. right in holding that the action cannot be maintained. The  
appeal should be dismissed with costs.

LAYARD, C.J.—I agree.

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