1908.
July 27.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

BABAIHAMY *v.* MARCINAHAMY *et al.*

D. C., Galle, 8,009.

Donation to minor—Acceptance by minor—Validity—Fidei commissum—*Right of survivorship.*

It is competent for a minor to accept a donation in his favour, inasmuch as he is benefited thereby.

Where one of several donees, who were all present at the execution of the deed of gift, accepted the donation on behalf of himself and some minor donees and entered into possession of the property,—

Held, that such possession must be considered as possession on his own behalf and on behalf of the minors, and constituted a valid acceptance of the donation.

Where a deed of gift creates a single *fidei commissum* with institution of the donees' descendants, so long as a descendant of any of the donees exists he is entitled to the possession of the entire property.

Tillekeratne v. Abeyesekara[1] followed.

APPEAL by the plaintiff from a judgment of the District Judge of Galle (K. W. B. MacLeod, Esq.). The facts and arguments fully appear in the judgment of Wendt J.

Bawa (with him *A. Drieberg*), for the plaintiff, appellant.

A. St. V. Jayewardène, for the defendants, respondents.

Cur. adv. vult.

July 27, 1908. WENDT J.—

The parties are agreed that Tombuage Jando was the original owner of the property in dispute, and that by the deed No. 1,071 of June 5, 1860 (not 1863, as erroneously stated in the translation), he gifted one-half of the soil and the whole of the house to his adopted daughter Nonkohami, and the other half of the soil to his other adopted children, her brothers, named Salman, Davit, and Baron. The deed created a *fidei commissum*. It does not appear that the donees were any relations in blood of the donor. In 1889 Davit and Baron conveyed to Salman two-thirds of the property, the vendors' title being alleged to be by " inheritance from parents;" and in 1896 Salman sold and conveyed the whole property to Karlentinahami, reciting as his title the deed of 1889 and " inheritance from parents." Neither deed makes mention of the donation of 1860. The " parents " never had any title. In 1899 Karlentinahami conveyed to the plaintiff, who, in November, 1905, brought the present action. The

[1] *66 L. J. P. C. 55; 2 N. L. R. 313.*

first defendant is the only child of Nonkohami, who died thirty years ago, and the second defendant is the husband of the first. The added parties are the children and heirs of Salman, who died nine or ten months before the trial. Baron died soon after his deed of 1889, and Davit eight or ten years ago, both of them intestate and without issue, so that Salman and the first defendant were their next of kin.

The learned District Judge finds that neither plaintiff nor his vendor Karlentinahami ever had possession, and there is no reason for disagreeing with that finding.

The plaintiff, as I understand, puts his case in this way: The donation was invalid for want of acceptance (the acceptance clause having been signed by Salman alone), and Salman alone had possession—at any rate since 1889—and he thereby acquired prescriptive title. As regards this prescriptive title the District Judge has found that it was not established, and I think that finding right. There remains the question as to acceptance.

The deed of donation recited that the donor was old and infirm, and proceeded, in consideration of his love and affection to the four donees, whom he had adopted as his own children, to gift certain lands to them with a *fidei commissum* in favour of their descendants. The deed then proceeded: "Thus this deed is caused to be written, signed, sealed, and granted to the said four individuals (naming them) to be retained with any one of them, on this 5th day of June, 1860 A.D., by me, the said Tombuage Jando at Galupiadde." Here followed the donor's signature, and then the following paragraph: "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." Here followed a cross and Salman's signature in English characters, and then the notary's attestation to the effect that after he had read and explained the deed to Jando and the donees Salman, Davit, Baron, and Nonkohami in the presence of the witnesses, the same was signed "by all the proper parties" in the presence of each other. From an inspection of the original instrument it appears probable that the cross at foot of the acceptance clause was the mark of one of the donees other than Salman, which of them there is no evidence to determine. At all events it is 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 Salman being of "proper age to sign," by which I suppose full age is meant, actually signed it. In the body of the deed the donor "annuls all my rights, title, claim, and demand whatsoever in and to the same from the date hereof," and the acceptance clause witnesses that the donees "have

1908. July 27. WENDT J.

entered into possession of the said lands from this day." It is, I think, a fair inference, from the circumstances attending the execution of the deed, that the donees whose signature do not appear, if minors, were still old enough to understand the nature of a gift and to express their wishes to the notary. The fact that Salman, their brother, was over twenty-one years old supports this inference.

No case has been brought to our notice which lays down the broad proposition that a person under the age of twenty-one years is incapable of validly accepting a donation. Such a broad proposition would, I think, be contrary to our law. It is true a minor is incapable of binding himself to his own detriment by an onerous contract, but he can always accept an unequivocal benefit, such as a donation essentially is. *Voet, lib. 26, 8, 2*, after stating that in some cases the authority of a guardian is not necessary, that in many cases it is both necessary and sufficient, and in certain cases necessary but not sufficient, lays down that "it is unnecessary in all those cases in which the ward makes his condition better, and does not in turn bind himself to the other party, as where he exacts a stipulation from another or *obtains possession*" (compare *1 Nathan, Common Law of South Africa, 159; 1 Maasdorp's Institutes, p. 246*). "Acts and obligations entered into by the wards, without the guardian's knowledge (says Van Leeuwen), are not binding, but void to the extent to which they have been defrauded or prejudiced thereby. But if the wards have profited by the transaction, it will hold good; so that they may stipulate and bind others, and, indeed, be themselves bound where it is for their benefit, but they cannot bind themselves to their prejudice." (*1 Kotze, p. 135.*) Again, after saying that minors cannot without the knowledge and assistance of their guardians bind themselves, Van Leeuwen adds (*ibid., vol. II., p. 4*): "with this distinction, that by accepting anything from another, they may indeed acquire something, but do not bind themselves in favour of another further than they have been actually benefited thereby."

So I regard Salman's brothers and sisters as having been competent to accept, and as having signified their acceptance of, the donation. The deed attests a present transfer of possession, and Salman admittedly entered into possession. Twenty-nine years afterwards he accepts a conveyance of their interest in the land from his brothers Davit and Baron, so that they also had possession. And this possession, in view of the admission of Jando's title, is itself evidence of acceptance of the donation. In view of Salman having signed an acknowledgment of acceptance and of entry into possession by all the donees, I would regard his occupation (even if he had exclusive occupation) as having been on behalf of his brothers and sister as well as himself, and the District Judge has rightly found against the allegation of prescriptive possession by him. I therefore hold that the title of the donees was completed by acceptance.

1908.
July 27.

WENDT J.

The deed of donation did not create two separate *fidei commissa* of the moities of the land in question, but a single *fidei commissum*, with institution of the donee's descendants. It follows that so long as a descendant of any one of the donees exists, he is entitled to the possession of the whole property as against an alienee of one of the donees (*Tillekeratne v. Abeysekara* [1]). The first defendant being such a descendant, plaintiff's action fails, and it was rightly dismissed by the District Judge.

The appeal must therefore be dismissed, with costs.

HUTCHINSON C.J.—I concur.

Appeal dismissed.