268/54

G.P.-S.918-1950-1-2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

[illegible] N.O. and PALMER TRUST INVESTMENT AND ESTATE ADMINISTRATORS (PTY) LTD Appellant,

versus

E. G. WATSON & OTHERS Respondent.

5121 — 272

Appellant's Attorney
Prokureur vir Appellant [illegible]

Respondent's Attorney
Prokureur vir Respondent [illegible]

Appellant's Advocate
Advokaat vir Appellant [illegible]

Respondent's Advocate
Advokaat vir Respondent [illegible]

Set down for hearing on
Op die rol geplaas vir verhoor op Wednesday, 1st June, 1955.

(NPD.2)

(9.45 – 12.50)
(2.15 – 5.40)

6; C. A. (C.A.V.)

Appeal allowed, [illegible] [illegible] set aside [illegible] [illegible] [illegible] costs of appeal [illegible] [illegible] [illegible] [illegible]

[illegible]

3/11/55

Record.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

JOHN JOSHUA CROOKES N.O.
and ANOTHER — Appellants.

&

ELAINE CORAL GORDON WATSON
and OTHERS — Respondents

CORAM :- Centlivres C.J., Schreiner, van den Heever, Fagan et Steyn JJ.A.

Heard :- 1st June 1955. Delivered :- 3.11.55

JUDGMENT

CENTLIVRES C. J. :- In 1936 J. J. Crookes (to whom I shall refer as the Settlor) entered into a notarial deed of trust which was registered in the Deeds Registry in Natal. According to Clause 1 of the deed the Settlor in consideration of his natural love and affection for his daughter Elaine gave and donated irrevocally upon trust certain shares to two trustees, one of whom was the Settlor himself. Clause 3 of the Deed is as follows :

" The Settlor shall have no power wholly or partly to revoke, cancel or annul any of the trusts or provisions hereby declared or to declare any new or other trusts of and concerning the same or any part thereof, but the Settlor may from time to time add to the Trust Fund hereby created. "

Under Clause 4 the Trustees are to hold the shares in trust for the following purposes :

(1) to apply so much of the net income from the shares as in their discretion may be necessary for the education, maintenance and support of Elaine until she attains the age of 25 years ;

(2) on Elaine attaining the age of 25 years to pay to her for life the net income up to £1,000 per annum ;

(3) to accumulate all income not required for (1) and (2) so as to create an income reserve which could be drawn upon for the purposes of (2) in case the income from the trust fund falls short of £1,000 in any year ;

(4) on Elaine's death to distribute the trust fund, including the income reserve, among her lawful issue equally, failing lawful issue equally among her other ~~surviving~~ surviving brothers and the issue of any deceased brother, and failing surviving brothers among her next of kin.

Clause 5 empowered the trustees to realize the shares and invest the proceeds. Clause 10 reserved to the Settlor the right to discharge any of the trustees and to appoint another or others in his or their stead. This right was also reserved to the executors of the Settlor after his death. Under Clause 15 each trustee (other than the Settlor) was to receive £50 per annum as remuneration. The concluding clause of the Deed stated that the trustees "declared to have accepted as they hereby accept the foregoing gifts in Trust and the Trust herein-before mentioned. "

Elaine attained the age of 25 in 1945. She is married out of community of property and has two minor children. She has four brothers, all of whom are married and have minor children. From 1945 the trustees have paid Elaine £1,000 per annum and have paid the surplus income into an income reserve account which now stands at more than £22,500. The assets of the trust fund are now worth about £60,000.

The Settlor desires to increase the amount of income payable to Elaine, both because the value of money has fallen considerably since the trust was created and because the trust fund has increased far beyond his expectation through accumulation of surplus income. The Settlor feels that it is not in the interests of Elaine's children, nor is it his wish, that they should receive a very large sum from the trust fund. He therefore desires to amend the trust deed in order to empower the trustees to -

(a) reduce the trust fund by paying £5,000 to Elaine and
(b) pay Elaine the whole of the net income from the trust fund.

The trustees (one of whom is still the Settlor) moved the Natal Provincial Division for an order declaring that it was competent for the trust deed to be amended accordingly by mutual agreement between the Settlor and the trustees. In their petition to the Provincial Division they contended that such an amendment was competent because :-

" (a) there has been no acceptance by or on behalf of the ultimate beneficiaries of the benefits conferred by the Trust Deed ;

(b) the acceptance by ~~the said MRS. GORDON WATSON~~ Elaine of the limited benefit conferred upon her is not, in law, an acceptance on behalf of such beneficiaries nor is it sufficient , in law, to render such acceptance unnecessary ;

(c) the acceptance by the Trustees of the property ~~referred to in Clause 1 of the said Deed~~ for the purposes of the said Trust is not, in law, an acceptance on behalf of such beneficiaries, nor is it sufficient in law to render such acceptance unnecessary ;

(d) the gift in favour of such ultimate beneficiaries, not having been accepted by them or on their behalf, may accordingly be revoked and/or amended by mutual agreement between the Settlor or donor and the said Trustees. "

The petition annexed affidavits made by Elaine, her husband and her four brothers all agreeing to the terms of the suggested amendment of the trust deed. All these persons figured as respondents. Elaine's husband and her four brothers professed

to give their consent in their personal capacity as well as in their capacity as father and natural guardian of their minor children. The seventh respondent was Mr. Burne in his capacity as duly appointed curator-ad-litem to represent :-

(1) all possible unborn lawful issue of Elaine ;
(2) all possible unborn lawful issue of Elaine's four brothers;
(3) all other possible beneficiaries under Clause 4 of the trust deed.

The Provincial Division dismissed the application. The learned Judge President held that "the true juristic nature "of the transaction" (i.e. the trust) "is a contract for the "benefit of third parties having the effect of a fideicommissum." He stated that the general rule was that "beneficiaries" acquire no rights under a trust such as the present until they have accepted "but that there was an exception to this general "rule, the exception being that in the case of the settlement "of property in a family the acceptance of the first donee en-"ures for the benefit of and is considered an acceptance by "all the donees. " The learned Judge President held that as Elaine, the first donee, had accepted the benefits under the trust her acceptance enured for the benefit of all the beneficiaries and that the trust deed could not be amended. For this reason he held that the declaratory order must be refused.

Milne J. held that a trust inter vivos can be validly created so as to confer actual rights upon third parties without their having to notify their acceptance to the Settlor, the true principle being that the trustee in accepting the trust, undertakes to hold the property against all comers, including the settlor, for the benefit of the indicated beneficiaries. The learned Judge therefore held that the trust deed in this case could not be amended. The learned Judge President found himself unable to agree with the view taken by Milne J. on this ground for holding that the petition should be dismissed. But Milne J. assuming that his view of the legal position was incorrect, concurred with the learned Judge President's reasons for refusing the declaratory order

The first question to be decided in this appeal is whether a settlor, having executed a trust deed and having handed over the subject matter of the trust to the two trustees appointed in terms of the will, one of whom is himself and the other of whom holds his office during the pleasure of the settlor, is entitled to amend the deed with the concurrence of his co-trustee and of the only beneficiary who has accepted any benefit under the deed, if the result of such an amendment will be to prejudice the rights of other beneficiaries who have not notified their acceptance of any benefit and who have not agreed to the amendment. I shall refer to these beneficiaries as the ultimate beneficiaries and I may at this stage remark that the ultimate beneficiaries are at present unascertainable. Elaine,

the immediate beneficiary, is still alive and the ultimate beneficiaries can be determined only as at her death. Elaine's four brothers, who in the event of their surviving her and of Elaine's lawful issue predeceasing her would be ~~the ultimate~~ beneficiaries, consent to the proposed amendment. They and Elaine's husband also profess to consent on behalf of their minor children. I shall assume, against the appellants, that such consent cannot bind the minor children and in any event there is no purported consent on behalf of any children that may still be born to Elaine.

Elaine's next of kin are also possible ultimate beneficiaries: who they might be on Elaine's death it is impossible to say and in the nature of things their consent to the amendment is not possible. Consequently I shall decide this appeal on the footing that the consent of all the possible ultimate beneficiaries has not been obtained. And I may add that, if ~~it~~ the proposed amendment is competent, it will operate to the detriment of the ultimate beneficiaries.

Before considering the effect of any authorities on the point in issue it will be convenient to consider the terms of the deed itself in so far as those terms may be regarded as being relevant to the enquiry. The acceptance by the trustees of "the foregoing gifts in Trust and the Trust hereinafter mentioned" does not amount, in my opinion, to an acceptance by them on behalf of the ultimate beneficiaries : it amounts to no more than an agreement to carry out the provisions of the trust deed

as long as it stands in its present form. They do not profess to accept on behalf of any of the beneficiaries and they themselves are not beneficiaries. The remuneration to which the one trustee is entitled is merely recompense for work and labour done in carrying out the terms of the trust and cannot make that trustee a beneficiary under the deed.

Under Clause 1 of the deed the Settlor donated "irrevocably" to the trustees the shares mentioned in that clause. I do not think that the word "irrevocably" is of any significance as far as the present proceedings are concerned. If A enters into a contract with B and the contract purports to be irrevocable that does not mean that the contract may not be cancelled or amended with the consent of of both A and B. Similarly when a contract is entered into between A and B for the benefit of C and C has become a party thereto by acceptance such a contract can, notwithstanding that it purports to be irrevocable, be cancelled or amended if A, B and C agree to such cancellation or amendment. Speaking generally, every contract, whether it purports to be irrevocable or not, is irrevocable in the sense that it cannot be revoked by the unilateral act of one of the parties.

The next provision of the deed to be considered is Clause 3 which provides that "the Settlor shall have no power "wholly or partly to revoke, cancel or annul any of the trusts "or provisions hereby declared." This provision applies in my opinion only to unilateral action on the part of the Settlor. In the present appeal he is not asking for an order declaring that he, acting alone, is entitled to amend the trust deed : the application made in the Court a quo is made by both the trustees with the concurrence of Elaine. It is not necessary to consider what would have been the position if the Settlor's co-trustee had refused to join in the application - an eventuality which was not likely to have arisen in view of the fact that under Clause 10 of the deed

the Settlor is given the power to discharge a trustee. The Settlor would no doubt have ~~examined~~ exercised this power in the event of his co-trustee not conforming with his wishes.

There is nothing else in the deed which seems to me to need consideration and the question now arises as to the principle of Roman-Dutch law which is applicable in the present case. We are not concerned with the English law of trusts which has never to my knowledge been held to be applicable in South Africa. The cases quoted by the appellants' counsel ~~shew~~ support the view that a trust deed executed by a settlor and a trustee for the benefit of certain other persons is a contract between the settlor and the trustee for the benefit of a third person and that the settlor and the trustee can cancel the contract entered into between them before the third party has accepted the benefits conferred on him under the settlement. This question was carefully considered by this Court in the case of Commissioner of Inland Revenue v Estate Crewe (1943 A.D. 656). In that case the Court directed that there should be further argument on the following points :-

(a) whether or not the trust deed in that case was a contract made for the benefit of third parties which took the form of a contractual fideicommissum or a donatio sub modo ut res restituatur alii ?

(b) If it was a contract of that nature did Sir Charles Crewe retain the right of revoking during his lifetime any of the benefits conferred by the deed on such third parties ?

(c) If he retained such a right did any property pass to any beneficiary before the death of Sir Charles Crewe ?

In directing a re-argument the Court referred counsel to the following authorities :-

Code 8,55,3 ; Digest 32,37,3 ; 16,3,26 ; Voet 36,1,9 ; 36, 1, 67 ; 39,5,43 ; Dr. de Wet's Thesis on Die ontwikkeling ten behoewe van 'n derde ; van der Plank N.O. v Otto (1912 A.D. 353) ; Mutual Life Assurnace Company of New York v Hotz (1911 A.D. 556) ; Act 34 of 1934 ; Estate Reynolds v Commissioner for Inland Revenue (1937 A.D. 57 at pp. 65 & 66).

Dr. de Wet in his learned thesis on "Die ontwikkeling van die ooreenkoms ten behoewe van 'n derde" discusses the authorities at length and on p. 141 says that there were three theories which I gather to be as follows : (1) as soon as the agreement is executed between the settlor and the trustees (for convenience sake I am using the terms I have used in this judgment) the beneficiary obtains an irrevocable right. (2) The beneficiary obtains no right on the mere execution of the agreement between the settlor and the trustees. The agreement constitutes an offer of a donation by the settlor to the beneficiary through acceptance of which the beneficiary obtains a jus perfectum against the trustees. (3) The beneficiary does obtain a right on the mere execution of the agreement between the settlor and the trustees, but his right is dependent on the will of the settlor who can discharge the trustees of the obligation to before the beneficiary accepts hand over the subject matter of the agreement to the

beneficiary. Dr. de Wet favours the third theory which he says is that of the majority of the commentators. The learned writer criticises the decisions of this Court in van der Plank N.O. v Otto (1912 A.D. 353) and McCullogh v Fernwood Estate Limited (1920 A.D. 204) in which the second theory was adopted. Prof. Wylie in the 1943 Tydskrif vir Hedendaagse Romeins - Hollandse Reg at pp. 113 and 114 supports the second theory and so does Professor McKerron in 46 S.A. Law Journal at pp. 394 and 395.

In Crewe's case (supra) the matter was fully considered by the majority of the Court after a re-argument was directed on that very matter. The minority judges agreed with the order made by the majority judges but for different reasons : they did not consider it necessary to decide the point I am now considering. Watermeyer C.J, who delivered the majority judgment, said on pp. 674 and 675 in reference to Dr. de Wet's view :-

" It may be that the series of decisions of the Appellate " Division culminating in the case of McCullogh v Fernwood "Estate Limited (1920 A.D. 204) precludes this Court from accept- "ing his "(Dr. de Wet's) " contention, but, be that as it may, "even assuming that a right of some kind is acquired by the "beneficiary, what is its nature ? It is clearly inchoate "because, until the benefit stipulated for has been accepted by "the beneficiary, he can be deprived of it by agreement between "the contracting parties. (see van der Plank v Otto - 1912 A.D. "353). "

On pp. 683 - 684 the learned Chief Justice in dealing with a direction in a trust deed to the trustees to pay out of the trust funds after the settlor's death such duties as might become payable by R. O. Crewe in respect of benefits which might be received by him from the settlor's estate said :-

"It" (i.e. the payment of death duties on behalf of R.O. Crewe) "was stipulated for in a contract between the donor and trustees, "to which R. O. Crewe was not a party. Therefore no right "under that contract, save the inchoate right to which reference "has been made above, vested in R. O. Crewe on the making of "the contract..... Until acceptance by R. O. Crewe, the "direction given by the donor to the trustees to pay the death "duties could have been revoked by agreement between the donor and "the trustees, and consequently until acceptance his right was "inchoate. Nothing is said about acceptance in the special "case, but since the trust was a family arrangement it is not "unreasonable to assume that there was acceptance by R. O. Crewe "during the donor's lifetime. "

For reasons which are irrelevant to the present case the learned Chief Justice went on to say that even on that assumption R. O. Crewe did not obtain a vested right before the settlor's death. It seems to me that the learned Chief Justice arrived at his conclusion on two grounds : (1) there was no proof that prior to the settlor's death there was any acceptance by R. O. Crewe and therefore the latter acquired no vested right prior to the settlor's death and (2) assuming that there was such

an acceptance there was in any event no vested right in R. O. Crewe prior to the settlor's death. If this reading of the learned Chief Justice's judgment is correct it follows that part of the ratio decidendi was the first reason which I have mentioned and that that ratio decidendi should, on the principle of stare decisis, be followed in this case unless there are compelling reasons to induce us to hold that the ratio decidendi was wrong. I can find no such compelling reasons, in view of the fact that the decision of the majority in Crewe's case was based on previous decisions of this Court which date from 1912 and which have no doubt been relied on by settlors since that date. As Dr. de Wet has pointed out in his valuable treatise there were three theories, the second of which was deliberately chosen by this Court and it seems to me that it is now too late to ask this Court to depart from its previous decisions. If it is considered desirable to do so, it is for Parliament and not this Court to alter the law so as to make a trust deed irrevocable as soon as a trust deed has been entered into and the subject matter of the trust handed over to the trustees. Assuming that I am wrong in thinking that the first ground mentioned above was part of the ratio decidendi it is clear that that ground was arrived at after re-argument directed to that very point and that the majority of the judges held that it was necessary to decide that point. In those circumstances the view arrived at by those judges should be followed unless they were clearly wrong.

I may add that Dr. Coertze in "Die Trust in Romeins - Hollandse Reg" at p. 98 correctly states the result of the decisions of our Courts when he says that if the beneficiary has not yet accepted but the settlor has transferred the trust property to the trustee, the settlor can revoke the trust only with the cooperation of the trustee. Even on the third theory accepted by Dr. de Wet the trust deed in the present case is revocable by the settlor in so far as the ultimate beneficiaries are conderned, for they have not accepted any of the benefits conferred on them.

Milne J. held that at the stage when the trust deed was signed and the shares handed over to the trustees there was no longer "a contract between A and B for the benefit of C." Proceeding he said : "There was a completed contract between "A and B. There was nothing left for A (the donor) to do and "B (the trustees) did all that was required of B under the con- "tract of donation when the ownership of the property was "received subject to the burden of the trust..... There was "no longer a contract in existence between the donor and the "trustees when the latter received transfer of the shares "because the contract had been discharged by performance : "there was no contract left the benefit of which a third party "could adopt. "

With respect I am unable to agree with the above reasoning. Apart from the fact that the contract has not been discharged by performance, (for continuing duties were laid on the trustees)

I can see no reason in law why a contract between a settlor and trustees, which is intended for the benefit of a third party, should not be capable of being amended by agreement between the settlor and the trustees, as long as the third party has not accepted the benefit of the contract. Up to this stage there is no vinculum juris as between the beneficiary and the settlor or trustees.

The conclusion at which I arrive on this ~~point~~ part of the case is, therefore, that the learned Judge-President was correct in his view which he took as to the general rule. For the purpose of this case it is not necessary to consider the question whether a trust deed can be amended after the settlor's death but, in view of the second theory which has been adopted by this Court, the answer to that question seems to be in the negative.

The remaining question is whether the learned Judge-President was correct in holding that this case falls within the exception to the general rule that beneficiaries acquire no rights under a trust such as the present until they have accepted. The exception referred to by the learned Judge-President is to be found in what he termed the Perezius rule viz: that "in the case "of the settlement of property in a family the acceptance of the "first donee enures for the benefit of and is considered an acc-"eptance by all the beneficiaries." If I read Perezius Ad.Cor. 8, 55 correctly, he was referring to a case where the thing donated was to remain in a family. Zoezius Ad. Dig. 39, 5 seems to me to be to the same effect. Molina Disputat. de Contract. 2 Disput 265 says in brief that when anything is given

by way of a perpetual fideicommissum through the eldest son of each generation acceptance by the first donee is regarded as acceptance on behalf of all the succeeding fideicommissories. All these authorities seem to me to refer to cases where it was a condition that the thing donated was to remain in the family of the donor and if this is the correct view it follows that this is not a case which falls within the exception to the general rule which I have mentioned. For in the present case the thing donated consists of shares, which (or the proceeds of which) are to go free of any fideicommissum in favor of members of a family to the ultimate beneficiaries on Elaine's death. They are to become absolute owners of those shares (or their proceeds). What Elaine accepted was the gift of the nett income up to £1,000 per annum and nothing more than that and her acceptance of that sum cannot, in my opinion, be regarded as an acceptance on behalf of the ultimate beneficiaries of the corpus and of the income in excess of that £1,000 per year all of which was to go to the ultimate beneficiaries. Moreover as the trustees are empowered to sell the shares and invest the proceeds, this is not a case where the settlor intended that the subject matter of the donation (the shares) should remain intact. Perezius and the other authorities to which I have referred seem to me to be dealing with a case where the subject matter of the donation is inalienable and must remain intact.

The reasons given by Perezius for the exception which he mentions must not be read out of its context. He first states

the general rule viz: that acceptance is necessary before a beneficiary is entitled to claim the benefit conferred on him and he then mentions a number of exceptions. In respect of the exception I am now dealing with he says that it would be absurd for the making of an irrevocable fideicommissum that the acceptance of infants and people as yet unborn should be required. That statement is made after he has made it clear that the first beneficiary, who was a fiduciary, has accepted. In other words where there is a settlement in favour of a family and the first member of the family accepts his acceptance enures for the benefit of all succeeding members of the family. What is accepted is the ownership of the subject matter of the donation and the benefits flowing from such ownership. The reason given by Perezius cannot be pushed too far, however attractive it may be to apply it to the circumstances of the present appeal. Pushed to its logical conclusion one would have to say that when there is a settlement by contract in favour of infants it would be absurd to require acceptahce before the settlement becomes binding. The accepted authorities show, however, that such a settlement only becomes binding when there has been an acceptance. A father can, as natural guardian, accept on behalf of his infant children and such an acceptance would be necessary.

In my opinion the appeal should be allowed, the order made by the Provincial Division should be deleted and the following order substituted : "Ordered as prayed." As regards the costs

of appeal it is ordered that those costs, including the costs of the curator-ad-litem be paid out of the Trust Fund.

A. D. Watt.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

J.J. CROCKS N.O. AND ANOTHER
Appellants

and

E.C.G. WATSON AND OTHERS
Respondents.

Coram:- Centlivres, C.J., Schreiner, van den Heever, et Steyn, ~~Centlivres~~ et Fagan, JJ.A.

Heard:- 1st June, 1955. Delivered:- 31/11/1955.

VAN DEN HEEVER, J.A. JUDGMENT

For the purposes of this judgment I desire to recall a few of the relevant facts. The "settlor" in a notarial deed of trust records that he "had given and donated as he does hereby irrevocably give and donate" certain shares to his trustees "in trust to hold and apply the same upon the trusts and subject to the provisions hereinafter set forth". The trustees were to have wide powers of realisation and reinvestment.

During the minority of the settlor's daughter, Elaine, and until she attained the age of

25 years, the Trustees were to apply so much of the nett income from the shares as in their discretion seemed necessary for her education, maintenance and support. After she attained that age she was to receive £1000 per annum for life. On her death the capital was to be distributed to her issue, failing which to her brothers and the issue of any deceased brother, failing which to her next-of-kin.

The deed contains the following provisions:-

"3. The Settlor shall have no power wholly or partly to revoke, cancel or annul any of the trusts or provisions hereby declared or to declare any new or other trusts of and concerning the same or any part thereof, but the Settlor may from time to time add to the Trust Fund hereby created."

"9. The Settlor hereby appoints himself and Palmer's Trust Investment and Estate Administrators Limited, with power to act by its proper officer ..... to be the Trustees for the purpose of this Trust."

"10. The Settlor reserves the right at any time to discharge any of the Trustees appointed by him hereunder and to appoint another or others in his or their stead and this right shall extend to the Executors and Administrators of the Settlor's Estate after his death."

3/ The .....

The Trustees accepted the gifts in trust and the trusts.

The Settlor is still alive. If the provisions in the deed to which I have referred are valid according to their tenor, the settlor holds the key to the management of the corpus. If a co-trustee proves obdurate or obstinate, he can promptly discharge him and appoint another who promises to be more tractable. Shorn of verbiage the trust deed amounts to no more than this: it is a contract between the settlor on the one side and himself and his by no means independent nominee on the other, pursuant to which he takes his money from one pocket, places it in the other and proceeds to dictate laws unto himself as to what the fate of that money shall be.

In Estate Kemp and Others v. McDonald's Trustee, (1915 A.D. 491, 499) Innes, C.J. remarked:

> "The English law of trusts forms, of course, no portion of our jurisprudence: nor as pointed out by the learned Judge President in his able reasons have our Courts adopted it; but it does not follow that

"testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our law."

In his valuable monograph "Trust en Stigting" p. 25 Prof. W.M.R. Malherbe says:

"Watter reëls aangaande die trust geld by ons? Seker nie die van die Engelse trust nie. Met die resepsie van die Engelse terme trust en trustee het ons die Engelse trustreg nie oorgeneem nie. Reeds is 'n begin gemaak met die ontwikkeling van 'n eie trustreg, ooreenkomstig die grondbeginsels van ons eie regstelsel."

With that observation I agree.

In regard to testamentary trusts there is no great difficulty. The execution of a will is a unilateral act and since the "uti legassit ..... ita jus esto" of the Twelve Tables it has always been recognised as a matter of public policy that effect should be given to the lawful directions of a testator. Wills received a more liberal interpretation and treatment than juristic acts inter vivos. If, for example, a performance which would be an illegality is stipulated in a contract, it vitiates the contract. If such a direction (say

in the form of a condition or a modus) is given in a will, it is either remitted or the bequest is discharged cypres so as to avoid the illegality while substantially carrying out the testator's intention (Cf. D. 33.2.16). Until the moment of his death the testator's dispositions in his will are ambulatory. The will takes effect only when he is dead. The question of revocability cannot therefore arise. By means of appropriate provisions in his will the testator can benefit future generations within the limits imposed by law for considerations similar to those which restrict mortmain. Beneficiaries under a will who survive the testator transmit to their heirs bequests of which they had no knowledge. The oft-repeated saying that a legatee does not acquire a legacy unless he accepts it, misplaces the stress; it would be more correct to say that he acquires a right to the subject-matter of the bequest unless he repudiates it.

Since testation has become unfettered, the testator is not obliged to benefit any person under his will, and if he does, he is at liberty to condition and restrict the benefits which he confers in any manner

putting into effect the provisions of

he pleases. In interpreting and ~~executing~~ a will the testator's wishes are of paramount importance (D. 34.5.24; 35.1.101; 50.17.12), whereas a contracting party is steruly held to his intention as expressed.

These considerations and this attitude do not apply to juristic acts inter vivos. Save in exceptional cases provided by statute and not now relevant, I can think of no principle of our law according to which the individual can during his life time unilaterally sequester a portion of his estate and dedicate it to certain ends. I have especial difficulty in seeing how he can in that manner irrevocably benefit persons not as yet conceived. If he performs an act purporting to do these things I have some difficulty in seeing how he himself can inhibit his autonomy.

It is obvious that a man may jettison his assets, whereupon they become res nullius at the mercy of the first occupant. But before someone else has acquired a right to them he may change his mind and recover his quondam property.

In the present case the settlor, with

the concurrence of his co-trustee wishes to benefit his daughter, Elaine, at the expense of the other, presently unascertained beneficiaries under the trust. The rights of the daughter are not in question. She has accepted and is enjoying an annuity of £1000 a year. She is of full capacity and, naturally, acquiesces in the relief asked for. The only question is therefore whether action under the deed in its proposed amended form would infringe the rights of others. The answer to that question seems to me to depend on whether under the original deed there are rights adverse to the settlor and which he may not infringe.

Having entered a caveat in regard to the substance of the trust deed which, if valid, would leave the settlor a free hand, I proceed to consider other difficulties which have to be surmounted before it can be held that the proposed ~~amended~~ amendment would not be lawful - I shall assume for the purpose of this judgment that the principle: "plus valet quod actum est ...." does not apply to the trust deed as it stands.

I agree with Mr. Duncan's contention

that in the circumstances the only agency which could conceivably have established the trust inter vivos is contract, and, in the present instance, donation.

It is unnecessary to sketch the development of the pacta adjecta in favour of strangers to the contract. All that need be said is that during the Empire a few of these pacts were declared to be directly and independently enforceable by such a third party by means of the actio utilis or in factum (Sohm, Instit. des R.R., 17th Ed. p. 450 n. 2). One of these was a term in favour of a third party, attached to a donation. The change was made by a rescript taken up in Justinian's Code (8.55. (54). 3) in the title: De donationibus quae sub modo, vel conditione, vel certo tempore conficiuntur. It may be rendered as follows:-

> "If a donation is made on condition that after a time the subject matter is to be rendered to a third party, then, according to the law of the Republic and Principate, if the beneficiary (i.e. the third party) had not himself entered into a stipulation and the condition was not fulfilled, (only) the donor or his heirs could institute a personal action against the direct donee.

Now, however, since departed Emperors have adopted

a liberal ~~xxxxxxxxxxx~~ interpretation of the law and granted the third party, who had not stipulated, an analogous action (actio utilis) pursuant to the donor's intention, you may avail yourself of the remedy to which, had your sister still been alive, she would have been entitled."

From the days of the glossators this lex has given trouble. Disputes arose: was the action real or personal; could the donor revoke and if so, when? During the 16th Century the magna quaestio in regard to revocation broke out all over Europe. However, as has often been said, we are not concerned with the original meaning of this lex but with its meaning as received in the Netherlands and consequently in our law.

There can be no doubt that according to our law a donation is invalid unless either the promise or the promised gift is accepted by the donee, his agent, his father, guardian or other person entitled to do so in his behalf (Lybreghts, Notarisampt, 1.16.14; Grotius, Inleyd. 3.2.12; Schorer's notes and Van der Keessel's Dictata thereon; Zoesius, Comment. ad D. 39.5 n. 65 et seq.; Sande, Decis. 5.1.1; Utrechtsche Consult. 3.17.4; Van der Linden, K.H. 1.15.1; Voet In Instit. Comment.

2.7.2.; ad Pand. 39.5.13). As Voet explains in the last mentioned passage, there can be no donation without a union of wills. If A gives B money to hand over to me as a present, and A dies before the money is delivered to me, the money does not become mine. If the requisite of acceptance were not regarded as essential in the Netherlands, the miserable expedient of provisional acceptance by an unauthorised notary, mentioned by Grotius, Sande, Voet and others, would not have been resorted to.

Where a donor makes a gift over, he really makes two donations: one to the first donee, limited in time and the second to the person to whom the subject matter has to be "restored". As Voet points out (Comment. 39.5.43), just as the first donee has to accept in order to render the donation irrevocable, so has the person intended to be benefited by the gift over. He can accept before the time for fulfilment has arrived, for, as Voet points out, acceptance turns the spes of a future action into a transferable asset (C. 8.53 (54). 3); or, according to Zoesius, (Comment. ad D. 39.5. n. 65 et seq.) acceptance by the direct donee gives the second donee only

an inchoate right which he can confirm by acceptance. Voet and Zoesius both hold (~~12~~ LL. cit.) that where fulfilment of the gift over has been postponed until after the donor's death, acceptance may be made thereafter. This proposition seems illogical and in the nature of an antinomy, but there is Civilistic authority for it.

Schorer's note on Grot. 3.2.13. is capable of being read to mean something different from the law as expounded by Voet. But, since he relies on Voet throughout, it is clear that he has in mind an accepted donation.

During argument both Counsel repeatedly referred to a fideicommissum inter vivos. As I have had occasion to remark before, I have difficulty in grasping how "an administrative peg" can be described as a fiduciary. A fiduciary, as I understand his position, is full owner enjoying all the fruits, save that he is subject to a restraint of alienation and is obliged, when the time arrives or the condition is fulfilled, to yield up the gift over. As Groenewegen remarked (De Legib. Abrogat. ad C. 8.55.1)

12/ the .....

the Roman Dutch rule "meubelen hebben geen gevolg" causes some difficulty (See John Bell and Company Limited v. Esselen, (1954 (1) p. 147). These difficulties have been overcome in the case of testamentary trusts; fortunately they do not arise in the present case. It is a mistake, however, to consider every reference to fideicommissum in the authorities as a reference to fideicommissum as we understand it. Since Justinian's homologation of fideicommissa and legacies both expressions were used indiscriminately as denoting legacies. By that method of reasoning one could come to the conclusion that depositum is a fideicommissum, because Ulpian says that the prefix "de-" fortifies the concept to show "totum fidei eius commissum". (D. 16.3.1 pr.).

In the Court a quo the learned Judge President came to the conclusion that a trust inter vivos in favour of a third party is in general revocable before acceptance by the third party, but he considered himself bound by precedent to hold that what may be called "the exception of Perezius" applied.

Perezius, like Molina upon whom he

relies, was a Spanish Jesuit, but since he was trained and subsequently lectured in Flanders, he may be regarded as an authority on the law of the Netherlands. In his Praelectiones on the Code (ad Lib. 8.55) he states as a general proposition that a gift over is ~~irrecoverable~~ revocable unless accepted by the third party. From this rule he states a number of exceptions not now relevant save that contained in number 12 of his treatise. He says that when a gift is made to a person "in favour of the family in which the donor wishes the subject matter of the gift to remain, the gift cannot be revoked in respect of the first donee's successors. It is deemed to be a perpetual donation which, if accepted by the first, requires no further acceptance."

For this proposition he relies upon D. 31.69.3 and upon a statement by Molina. The fragment referred to deals with testamentary dispositions subject to <u>fideicommissum.</u> The facts considered by Papinian were these: a testator instituted his brother as heir and requested him not to let their home fall into strange hands but to leave it in the family. If the heir

14/ alienated .....

alienated the house or died after having appointed a stranger as his heir, Papinian rules, every member of the family may enforce the fideicommissum by means of a petitory action. But what if they compete with each other for the right of doing so? Those nearest in degree of relationship will have preferent rights. But those more distantly related would not be prejudiced by the inactivity of the nearest relations. Each in sequence of proximity may institute the action, provided he is prepared to enter into recognisances that the home will not be alienated out of the family. Perez adds that it would be absurd if it required acceptance by infants and nascituri to render the fideicommissum inter vivos irrevocable.

Molina (Disputat. de Contract., Tract. 2 Disput. 265 n. 8.) deals with the question of the revocability of a donation made to one person subject to the condition that the subject matter be "restored" to another. He says it is doubtful whether the donor can revoke the gift or release the first donee from the obligation to "restore" before the third party has accepted. He enumerates a number of situations, however, in which there can be neither revocation nor

14(a)/ release .....

release and in which the third party, when the time arrives, has a personal action to enforce the condition even if he had not stipulated for it from the donor and without cession of action. One of these situations is where the donation had been made in modum majoratus so that it should devolve perpetually upon members of a certain family in a certain order. Acceptance by the first donee renders the gift irrevocable. According to the lexicon of Maigne D'Arnis the primary meaning of majoratus is the law of Aragon relating to primogeniture. It is clear that Molina treats the family concerned as a sept, a persona in itself, acting through one of its members in accepting. That, too, is the sense in which Perez treats the exception. Divorced from its context the postulated

15/ absurdity .....

absurdity itself becomes absurd, for an infant donee who is a direct must accept through his father or guardian.

Molina's de Hispanior. Primogenitura, to which reference was made during argument and which is cited by some of the authorities, is not available to me, but Knipschildt in his Tractatus de Fideicommissis Familiarum Nobilium (Cologne, 1710) quotes liberally from that work. One gathers that the majoratus to which Molina refers could also mean something like feudal tenure under the rules of chivalry. The direct donee and his successors were generally obliged to bear the donor's name and coat of arms. Because of this the donation was considered to be ob causam and therefore no true donation requiring registration. If that is so it is difficult to see how the gift could be revocable unilaterally. Moreover such a gift inter vivos was regarded very much in the same light as the Dutch uitbrooding and had the legal consequences of a testamentary disposition or a donatio mortis causa (Knipschildt, Op. Cit. cap. 6 n. 57 - 73).

I do not think that Molina's remarks

15(a)/ on .....

on a rather peculiar Spanish institution can cast any light on our law even though the Civilians have attempted its reconciliation with Roman texts.

Zoesius (Comment. in D. 39.5. n. 72) also states that the initial acceptance suffices "si donatio uni facta concernat favorem familiae, in qua velit eam manere donator".

None of these considerations applies to the present case. Not only is there no prohibition of alienation to persons outside the family; there is no prohibition at all. Once the assets are distributed to the persons who prove to be the beneficiaries upon Elaine's death, no burthen will encumber their shares.

There is no gift over of Elaine's benefits under the trust deed. She draws an annuity which is hers out and out. Molina, Perez and Zoes contemplate the donation of ~~xxxxxx~~ an asset (not its fruits which accrue irrevocably to the first donee) granted on condition that it remains perpetually in the family. Assuming the exception of Perez still to be sound law, it cannot apply to the present case. The same must be said of

the rule relating to the donor dying before the gift over becomes due. No other exception mentioned by the authorities applies.

The facts in Commissioner for Inland Revenue v. Smollan's Estate, (1955 (3) S.A. p. 266) were radically different from the facts of this case. There the beneficiary the nature of whose rights was in issue had accepted. Moreover when the dispute arose the settlor was dead.

I cannot agree with the reasoning of Milne, J., that upon the shares being transferred to the trustee pursuant to the contract the contract is discharged by performance and the settlor is out of the picture. The settlor or his heirs could always invoke one of the condictiones datorum against a trustee who fails in his trust (C. 8.55.3) or fails to fulfil a condition governing the donation (C. 8.56.10 in medio). What was new in C. 8.55.3. was the elevation into a general rule of special acts of Imperial grace allowing a stranger to the contract a right of action in certain circumstances.

I have considered whether the provisions of Act 34 of 1934 affect the questions arising in this case. Those provisions fall strictly within the ambit of the long title, viz. an "Act to provide for the protection of trust moneys". The objects of those provisions are clearly to conserve trust property and not to change the course of its devolution as determined by the juristic act constituting the trust or to impress independent charges or liabilities in respect of such property. If therefore ~~xxxxxx~~ according to Roman Dutch Law the settlor could lawfully revoke or amend a donation before it had been accepted by or on behalf of the "donee" whose benefit by gift over was contemplated in the constituent juristic act, there is nothing in the statute now to prevent him from doing so.

I have come to the conclusion, therefore, that whatever may have been his intentions, the settlor has not managed to create out of his assets a frozen fund which is beyond his reach, and nothing prevents him from making the proposed adjustments in the

interests of his daughter Elaine. It is unnecessary to discuss the hypothetical problem as to what the position would have been if the co-trustee had refused to co-operate.

If considerations de lege ferenda are the criteria, it may be that the conclusion to which I have come is not a happy one. Before the reception in the Netherlands of Roman law in subsidio there was no difficulty in creating by act inter vivos a trust which was irrevocable as from its constitution. It may be that the same result may be achieved in our law if the proper means are adopted. Conceivably the creation of a stigting or the appointment of an existing one might meet the difficulty. That possibility was considered in the unreported case of Ex Parte Grayson and Others, (S.W.A. 22.7.1935). I do not think that the analogy of a negotiorum gestor is helpful. It would appear that the gerens may act on behalf of a person unknown to him, to a foetus in utero and to a heriditas jacens, but I cannot imagine an unauthorised agent acting on behalf of an undetermined individual to be conceived in future. The reciprocal obligations and rights connected with negotiorum gestio grew out of the Praetor's Edict in

which he said: Si quis negotia alterius gesserit, judicium eo nomine dabo (D. 3.5.3.). If I buy timber in order, during your absence, to shore up the wall of your house which threatens to fall, and in doing so observe the standards of diligence required by the institute, I will have an action against you for payment of my expenses. But if, before I start the work, I come to the conclusion that the undertaking is too risky, or for some other reason decide to mind my own business, I cannot conceive on what ground you could insist that I should not have compromised with the merchant to rescind the sale of timber.

On the other hand I can foresee many problems and abuses which will arise if the individual can during his life time sequester a portion of his estate and freeze it for future purposes by irrevocably signing or even thinking it away.

In the light of the authorities to which I have referred, I am persuaded that our law in circumstances such as these permits of revocation by the donor during his lifetime and prior to acceptance by the beneficiaries. Consciously to depart from this rule in order to advance the development of an institute, trust, on the ground of its

usefulness, would be legislation. It is for Parliament, if so advised, to alter the law.

For these reasons I concur in the order proposed by the Chief Justice.

J.H.D. Hewes.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

J. J. CROOKS N.O.
and Another — Appellants

and

E. C. G. Watson and Others — Respondents

Coram: Centlivres C.J., Schreiner, v.d.Heever, Fagan et Steyn JJ.A.

Heard: 1st. June, 1955. Delivered: 3rd. November, 1955

JUDGMENT

SCHREINER J.A. :- The relevant facts appear from the judgment of the Chief Justice. It was rightly conceded on behalf of the appellants that nothing turns on the fact that the order sought by them was a declaration that it was competent for the settlor and the trustees by mutual agreement to amend the deed, and not a declaration that they could cancel it. The merits of the proposed amendments are not in issue, and the fact that the consent of the major beneficiaries and the guardians of the minor has been obtained is irrelevant, since account must be taken of possible unborn beneficiaries. The court a quo was not asked to exercise any power that might be supposed to exist of modifying, or approving the modification of,

the/.....

the trust property having been delivered to the trustees,

the terms of the deed. The sole question was whether the settlor and the trustees, acting in agreement, have the right in law to cancel or amend provisions of the deed which, if carried out in their unamended form, would or might enure to the advantage of persons who have not accepted the benefits of the deed.

Although the issue thus raised is clearly of importance in relation to the law of trusts in South Africa it is not necessary or advisable, in my view, to enter upon any full discussion of that branch of the law, which appears to be developing more pronouncedly than most branches of our growing system. Interesting and useful examinations of the general subject are to be found in four recent works (L.I.Coertze - Die Trust in die Romeins-Hollandse Reg(1948); T. Nadaraja - The Roman-Dutch Law of Fideicommissa(1949); W.M.R.Malherbe - Trust en Stigting(1953); P. Frere-Smith - Manual of South African Trust Law(1953)). It is sufficient, however, for present purposes to refer to portions of the judgments in Estate Kemp v. McDonald's Trustee (1915 A.D. 491). At pages 507 to 508 SOLOMON J.A. says:

".....the constitution of trusts and the appointment of trustees are matters of common occurrence in South Africa at the present day. Thus it is a recognised practice to convey

property/.....

property to trustees under antenuptial contracts; trustees are appointed by deed of gift or by will to hold and administer property for charitable or ecclesiastical or other public purposes; the property of limited companies and other corporate bodies is vested in trustees and the term is used in a variety of other cases, as e.g., in connection with assigned or insolvent estates. The underlying conception in these and other cases is that while the legal dominium of property is vested in the trustees, they have no beneficial interest in it but are bound to hold and apply it for the benefit of some person or persons or for the accomplishment of some special purpose. The idea is now so firmly rooted in our practice, that it would be quite impossible to eradicate it or to seek to abolish the use of the expression trustee, nor indeed is there anything in our law which is inconsistent with the conception. On the contrary it is thought by many writers that the trusts of English Law took their origin from the fidei-commissa of the Roman Law." The correctness or otherwise of the view referred to in the last sentence may be left to the historians of English Law; if it is correct, that is no reason why we should treat the whole of the English Law of trusts as part of our law, while if it is incorrect, that is no reason for not using the English law of trusts as a valuable field from which in proper cases we may gather suggestions for

the development of our own law. What is of greater importance, however, is that our modern law of trusts should not be unduly hampered by views regarding its association with other branches of our own law which may not be historically justified and which, in any event, should not govern, though they may sometimes assist, the development of the law of trusts. It is not necessary in the present case to consider whether in relation to testamentary trusts the more guarded language used by SOLOMON J.A. at pages 512 to 513 of the report of Kemp v. McDonald is not preferable to that of INNES C.J. at page 499 and of MAASDORP J.A. at pages 516 to 518. We are not concerned in the present appeal with the tendency, reinforced if not created by some portions of these judgments, to treat testamentary trusts for all purposes under the heading of fideicommissary dispositions. It is sufficient, and important, to repeat that trusts are an established feature of our legal landscape and to point out that their use has been extended and their importance has grown since 1915. To the evidence of widespread recognition mentioned by SOLOMON J.A. at page 508 of the above case may now be added the Trust Moneys Protection Act (34 of 1934) and the cases which have not infrequently dealt with trusts in relation to death duties.

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In the present case we are concerned, not with the problem whether testamentary trusts should be treated as a kind of fideicommissa, but with the parallel problem whether trusts arising out of an inter vivos transaction between a settlor and a trustee or trustees are to be treated as a kind of contract for the benefit of third persons. It is natural, when one is considering a branch of the law on which there is relatively little direct authority, to seek assistance from other portions of the law that seem to present useful analogies; but analogies are only useful if they provide, not merely some solution of the problem under inquiry, but a solution which is satisfactory, i.e., in the present context, which is convenient and just in relation to the intentions and expectations of the parties affected. This is even more clearly the position when the proposal goes further than an argument by analogy and seeks to bring the branch of the law under investigation wholly within the framework of another portion of the law. Care must be exercised not to force a legal instrument of great potential efficiency and usefulness into a mould that is not properly shaped for it.

There appear to be serious objections to treating a trust, by which the settlor delivers

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property to a trustee to be held by the latter for certain purposes or persons, as nothing but a contract for the benefit of a third person, in the legal sense. Trusts expressly created inter vivos are no doubt ordinarily, even if they are not necessarily, the outcome of a contract between the settlor and the trustee; and it is also the case that they are generally, though not invariably, designed to benefit other persons. But in the legal sense, which alone is here relevant, what is not very appropriately styled a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two (cf. Jankelow v. Binder,Gering and Co. 1927 T.P.D.364). The nature and extent of the rights of the third party are, as was pointed out by WATERMEYER C.J. in Commissioner for Inland Revenue v. Crewe (1943 A.D. 656 at page 674),a matter of controversy, the limits of which appear rather from discussions in juristic literature than from decided cases. (In addition to the thesis and the review thereof mentioned in the judgment of WATERMEYER C.J., articles and notes in 46 S.A.L.J. 164 and 387, 47 S.A.L.J. 206 and 53 S.A.L.J. 279 may be referred to). As is pointed out by MILNE J.

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in the present case, the typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. What contractual rights exist between A and B pending acceptance by C and how far after such acceptance it is still possible for contractual relations between A and B to persist are matters on which differences of opinion are possible; but broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other. But in the case of the delivery of property by a settlor (A) to a trustee (B) in trust for a beneficiary (C) the purpose aimed at is, speaking generally, that A should drop out when he has by delivery carried out his agreement with B and that C will thenceforward have rights against B. I say "speaking generally" in order to avoid giving a premature answer to the question to be decided in the present appeal; but it is important to emphasise the radical difference in the contemplated end situations in the two cases. In the former A makes arrangements by means of an agreement with B, to be brought into contractual relationship with C, if the latter so wishes. In the latter A divests himself of property in favour of B in order

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that C may be able to receive the benefit of that property from B. In the former, acceptance by C is clearly the gist of the whole matter, for he is after acceptance to be just as much under contractual obligations towards A as he is to be entitled to contractual rights against A. But in the latter, acceptance by the beneficiary is really of no practical importance, since he can only be a gainer. No doubt at the stage when a benefit is tendered to him he may refuse it, (cf. Attorney General v. Parsons ,1955, 3 W.L.R. 29 at pages 36 to 37) but there seems to be no good reason for requiring his acceptance, in advance, of the benefit to which he will or may eventually become entitled. Once the subject-matter has been delivered to the trustee in trust for the beneficiary the settlor has fulfilled the contract made with the trustee and is not liable to be sued by the beneficiary, unless, perhaps, he retakes or otherwise unlawfully deals with the subject-matter, when any action against him would not be of a contractual nature. Where, as is normal, the trust agreement makes no provisions for the acceptance by the beneficiaries, if a beneficiary were to convey his acceptance to the settlor, or to the trustee, it is difficult to see how he could thereby acquire contractual rights against the settlor, since he would merely be stating

that,/.....

that, as at present advised, he is prepared to receive in due course what the trustee has bound himself to hold for his benefit. It seems to me, with respect to those who have approached the matter differently, to be difficult to justify attaching any legal importance to such an intimation.

Counsel for the appellants disclaimed any suggestion that the settlor is, before acceptance by the beneficiary, entitled unilaterally to cancel the trust and claim redelivery of the donated property from the trustee; there must, he contended, be agreement on the part of the latter, who, if he wishes, is entitled to insist on holding the property under the trust as it stands. But it is difficult to reconcile that position with what is contemplated by the parties in the ordinary case of a trust, where the trustee is not beneficially interested in the trust property. It is foreign to the nature of his duties, as usually understood, that the trustee should be able to decide or share in deciding whether the trust is to persist as it is, or is to be cancelled or amended. If he is not <u>obliged</u> to agree to cancel or amend at the request of the settlor, he can hardly be <u>permitted</u> to do so. For on the other view, as is pointed out by MILNE J., outrageous situations could easily arise in which the trustee might drive a bargain with the settlor for his consent

to cancellation or amendment. Clearly such situations would be entirely inconsistent with good faith and could not be tolerated in any civilized system of law.

It may seem at first sight to be less objectionable that the settlor should be entitled at any stage before acceptance by the beneficiary to reverse his act and retake possession of the property from the trustee. For the property was his and if he had handed it to his agent with instructions as to its disposal he could freely have cancelled his instructions or given fresh ones. But the answer is that he delivered the property not to an agent but to trustees, and a trustee is a person who is to be " the "dominus of the relative subject matter" and is to act "in "his own name and on his own responsibility" for the benefit of the beneficiaries (cf. McCullogh v. Fernwood Estate Ltd. 1920 A.D. 204 at page 209; and In re Empress Engineering Co. 16 Ch.D.125 at page 129). To use the language of section 1 of Act 34 of 1934, the trustees were persons appointed by written instrument operating inter vivos whereby moneys were settled upon them to be administered by them for the benefit of other persons. The whole intention of a trust agreement like that in the present case is to avoid what would be the

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result of a mere agency by depriving the settlor, on delivery of the property, of all control over it (other than the irrelevant control exercised by him as one of the trustees and the, in my opinion, equally irrelevant power to change the trustees), and by passing that control over to the trustees as owners, subject only to the duties owed by them to the beneficiaries in terms of the trust agreement. Clause 3 of the present deed expresses what is normally the intention of the parties in such transactions, that the settlor should have no power to cancel or amend the agreement save by increasing the trust fund, nor is there anything in the deed to suggest that it was the intention to give the settlor such power before acceptance by one or other of the beneficiaries. The deed recorded an irrevocable, out and out, disposal by the settlor of his property, which was duly delivered accordingly, and I see no reason why it should be interpreted as permitting revocation if the trustee can be persuaded to agree thereto.

With most of the decisions, which were quoted to us in support of the view that an inter vivos trust is governed by the law of contracts for the benefit of a third person, it is unnecessary to deal, since for the most part they are based upon the interpretation placed upon a few decisions of this Court. Of the latter Mutual Life Assurance/.....

Assurance Co. of New York v. Hotz (1911 A.D. 556) was a case of contract and no question of trust arose. In van der Plank v. Otto (1912 A.D. 353), too, there was no relevant trust, but only a provision in a contract of exchange that would have given the plaintiff the right to enter into a possibly advantageous lease if he had timously availed himself of the opportunity which his mother had contracted for. In British South Africa Company v. Bulawayo Municipality (1919 A.D. 84) the subject of inter vivos fideicommissa was considered, and at page 97 INNES C.J., giving the Court's judgment, said, "In my opinion, regard being had to the "authorities quoted, and to the principle of our law which "recognises a contract made for the benefit of a third party, "a fideicommissum in respect of immovable property may be "created by act inter vivos duly registered." The case was not concerned with a trust and the law relating to trusts was not considered. In Sackville West v. Nourse (1925 A.D. 516) the trust was created by deed of transfer; no reference was made to contracts for the benefit of a third person, the problems to be decided being dealt with along the elastic and equitable lines of fiduciary relations. In Jewish Colonial Trust Ltd. v. Estate Nathan (1940 A.D. 163) the language of fideicommissa was used in connection with what was clearly a

trust/.....

trust of a public or charitable kind, but the trust was testamentary and no question of contracting for the benefit of a third person could therefore arise.

Of more direct relevance are two portions of the judgment of WATERMEYER C.J. in Commissioner for Inland Revenue v. Estate Crewe (supra at pages 673 to 675, and again at pages 684 to 685). There is no doubt that in that case, after a full argument upon and consideration of the subject, the majority of this Court accepted the view that the trust under consideration could properly be regarded as in the nature of a contract for the benefit of a third person, and that the effect of such a contract in relation to cancellation before acceptance was present to the minds of the learned judges. Nevertheless it seems to me that what was said on the subject was unnecessary for the decision, not in the unimportant sense that the same decision could have been reached by other reasoning, but in the sense that there was only one basis for the judgment and that that basis was independent of whether there was or was not an acceptance of the benefits of the trust. The first of the portions of the judgment mentioned above contains some general discussion of contracts for the benefit of third persons; there is, however, no investigation of the question whether trusts should

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properly be brought under this heading. The second portion, at pages 684 to 685, is more important because there WATER-MEYER C.J. is dealing directly with the question of succession duty, which was one of the questions to be decided. The greater part of the relevant passage is quoted in the judgment of the Chief Justice. It is, however, in my view, necessary to quote also the succeeding sentence. For the sake of clarity I set out the three important sentences:- "Until acceptance "by R.O.Crewe, the direction given by the donor to the trustee "to pay the death duties could have been revoked by agreement "between the donor and the trustees, and consequently until "such acceptance his right was inchoate. Nothing is said "about acceptance in the special case, but since the trust "was a family arrangement it is not unreasonable to assume "that there was acceptance by R.O.Crewe during the donor's "lifetime. But, even on that assumption, R.O.Crewe did not, "before the donor's death acquire a vested right against the "trustees." I do not read this passage as providing two rationes decidendi, one based on non-acceptance of the benefit of a contract, and the other based on the non-acquisition by R.O.Crewe of a vested right against the trustees during the donor's lifetime. The basis of the decision, as revealed in these sentences, seems to me to be that R.O.Crewe,

whether/.....

whether or not he accepted the trust, had no relevant vested rights because in terms of the trust deed these were contingent on his surviving the donor. Although the fullness of the consideration which led to the treatment of the trust from the angle of contracts for the benefit of a third person adds weight to what was said by WATERMEYER C.J., neither the principle leading to the decision nor any essential part thereof was that, in the case of a trust which has not been accepted by the beneficiary, there can be an effective cancellation without his concurrence. The passages in question, though entitled to the greatest respect, are not to be regarded as if they had been part of the ratio decidendi, to be departed from only if shown to be clearly wrong.

If what I have said as to the ratio decidendi of Crewe's case is erroneous I nevertheless venture, with all respect, to express the view that the importance of the present matter to the development of our law of trusts is so great, and the effect of treating unaccepted inter vivos trusts as revocable by the settlor and the trustee is so unfortunate, as amply to justify reconsideration of this part of Crewe's case. If, contrary to my view, the existing way of stating the law requires modification, it seems to me that in a matter of this kind improvement can be more satisfactorily achieved by the courts than by the legislature.

Very/.....

Very recently, in Commissioner for Inland Revenue v. Smollan's Estate (1955(3) S.A.266), the matter was again touched upon. The settlor in that case had created a trust fund in January 1945 and in December 1947 had entered into a fresh trust deed in respect of the same fund. At page 271 van den HEEVER J.A., in giving the Court's judgment, said that he had some difficulty in understanding how the donor if he divested himself of the capital fund in the first deed, could thereafter again dispose of it in a second. As, however, the contingent rights of those who might appear in the future to be beneficiaries were as fully protected under the amended as under the unamended deed, it was unnecessary to decide upon the validity of the amendment. The judgment proceeded to affirm that trusts may be created inter vivos in our law. It is true that, after stating that to ascertain the legal incidents attached to trusts it was necessary that the constituent act should be "broken down to its essential elements in order to ascertain "the legal incidents which according to our law, attach to "them", van den HEEVER J.A. rejected the applicability of the notion of fideicommissum inter vivos and said, "At the "same time we have a contract between two persons in which

"one/.....

"one stipulates a benefit for third persons. Difficulties "arising from the requisite of acceptance by a third party "need not exercise us, since the deceased has undoubtedly "accepted." There were other beneficiaries, unascertained as well as ascertained, apart from the deceased, but, however that may be, it appears that, as in Crewe's case, and possibly because of Crewe's case, so in Smollan's case the assumption was made that an inter vivos trust can be treated as or likened to a contract for the benefit of a third person. Neither case is, however, in my view authority for the proposition that unless a trust conforms in all respects, and particularly in relation to acceptance by the beneficiaries, to such a contract it in no way binds the settlor or the trustee.

What is for present purposes significant is that both in Smollan's case (loc.cit.) and in Crewe's case, at page 678, it is recognised that under our law the dominium of property may be vested by a trust deed in trustees the ultimate destination of the property or of interests in it being left in abeyance to be determined by the course of future events. Such a disposition, which is properly called a trust in our law (Marks v. Estate Gluckman, 1946 A.D. 289 at pages 310,311), actually effects a transfer of the property the subject of the trust and seems clearly to transcend the limits of contracts for the benefit of third

persons./.....

persons.

It should, furthermore, be noted that if the trust property consists of money the disposition is a trust for the purposes of Act 34 of 1934, irrespective, it seems, of acceptance by the beneficiaries whether existent or ascertained at the date of the creation of the trust or not. In terms of the statute certain consequences follow; for instance the trustee has to give security to the Master for the faithful administration of the settled moneys. Prima facie such security would be enforceable against a trustee who has agreed with the settlor, whether for consideration or not, to the cancellation of the trust before acceptance, since it could not be successfully contended that if acceptance is necessary to complete the trust at common law there is no lack of faithful administration under the statute if the trustee bargains so as to prevent acceptance from taking place. The statute makes no point of acceptance and neither, in my view, does the common law.

The above considerations render it unnecessary to examine the alternative route by which BROOME J.P. arrived at the same conclusion as MILNE J. That route accepts the position that "the true juristic "nature of the transaction is a contract for the benefit

"of third parties having the effect of a fideicommissum."
Starting from this basis BROOME J.P. held that there is in our law a general rule that beneficiaries acquire no rights under such trust as the one presently in question until they have accepted, but that, under what was referred to as "the "Perezius exception", "in the case of the settlement of "property in a family the acceptance of the first donee "enures for the benefit of and is considered an acceptance "by all the beneficiaries." The passage in Perezius Ad Cod.Bk.8 Tit.55 is dealing with the creation of perpetual fideicommissa, as is that in Zoezius Ad Dig.39 Tit V , to which we were also referred. The reason for making the acceptance by the first beneficiary enure for the benefit of all is stated to be that it would be absurd to require the acceptance even of those who have not yet been born. If this is a sufficient reason it would seem to provide ample support for a wider conclusion, such as that no acceptance at all is required either where there are beneficiaries who could not possibly accept or, perhaps more reasonably, where from the terms of the agreement it is to be inferred that no acceptance by beneficiaries was contemplated. Perezius and Zoezius were not dealing with trust agreements as we understand them; if their reasoning were to be applied to such agreements it would be reasonable to hold that, if

someone's/.....

someone's acceptance had to be found it would be the acceptance of the trustee that would enure for the benefit of all the beneficiaries and so perfect the transaction.

As I see the matter, however, it is unnecessary to pursue the inquiry further on the lines suggested by the references to Perezius and Zoezius .

In my view, where property has been delivered by a settlor to a trustee under an agreement of trust in favour of third persons, and where there is no provision for acceptance by such persons but the agreement is expressly or by necessary implication made irrevocable, there is no power in the settlor, acting alone or with the concurrence of the trustee, to cancel or amend the trust agreement. For these reasons I think that the appeal should be dismissed [redacted].