1959 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

T. LESIN, Appellant, *and* P. S. KARUNARATNE, Respondent

S. C. 188—D. C. Balapitiya, 1,013/P

Prescription—Donation of immovable property—Reservation of life interest in donor—Donee's position as remainder-man—Prescription Ordinance (Cap. 55), proviso to section 3.

Where a person donates immovable property reserving to himself a life interest. prescription does not begin to run against the donee until the death of the donor. In such a case, the donee, as remainder-man, is entitled to the benefit of the proviso to section 3 of the Prescription Ordinance, and adverse possession against the donor cannot be counted against the donee.

APPEAL from a judgment of the District Court, Balapitiya.

Sir Lalita Rajapakse, Q. C., with *D. C. W. Wickremesekera*, for the 3rd Defendant-Appellant.

A. C. Nadarajah, with *J. N. David*, for the Plaintiff-Respondent.

Cur. adv. vult.

June 22, 1959. SANSONI, J.—

It is common ground that one Noisa was entitled to the lots A and B 1 depicted in plan X : they now form the subject matter of this partition action. His rights devolved on Babun Appuhamy in 1913, and the latter by deed P4 of 1939 donated the land to his son William, reserving to himself a life interest. William by deed P 5 of 1950 transferred the land to the plaintiff and the 1st defendant.

The 3rd defendant claimed that lot A belonged solely to him by prescriptive possession. His case was that Charles, one of the six children of Noisa, was allotted this lot by arrangement among the six children, land Charles in 1950 sold the land to the 3rd defendant.

The learned District Judge held on the evidence that the land was possessed by Charles from about the year 1943 as the plaintiff himself had admitted. Since this action was filed in 1950, such possession would in any event be insufficient to enable the 3rd defendant to set up a title by prescription.

The appellant's counsel urged that he could show that possession by Charles started even prior to 1943, but he did not suggest that such possession began prior to the execution of the deed of gift P 4 ; even if it did, so long as he had not been in adverse possession against Babun Appuhamy for 10 years prior to the execution of deed P 4, the 3rd defendant cannot claim title by prescription. The reason is that from the

date of the execution of the deed P 4 no possession by Charles or any other person could affect the rights of William, who was entitled to the benefit of the proviso to section 3 of the Prescription Ordinance, Cap. 55. Under that proviso, prescription begins to run against parties claiming estates in remainder or reversion only from the time when such parties acquire a right of possession to the property in dispute. William was such a party, and since Babun Appuhamy did not die till 1944 William had no right of possession till then.

The appellant's counsel relied on the well-known rule that where time has once begun to run, no subsequent disability will suspend the operation of the statute. But this is not a case of disability. We are dealing with a particular provision relating to future interests. The proviso enacts that time in such cases runs only from the actual date when the claimant's right to possession has been infringed, for the right of action does not accrue to him till then. Whether the prior interest is that of a fiduciary, a lessee, or a donor who has a life interest, the fidei commissary, the lessor and the donee must wait till that interest terminates before he can sue. Of course, prescription can run against those who have the present interest, that is the fiduciary, the lessee and the donor, but only against them.

The proviso was to be found even in the earlier Prescription Ordinance No. 8 of 1834 and it has been applied in numerous cases. In one of the earliest reported cases [1] the plaintiff and the defendant were children of a deceased proprietor who also left his widow surviving him. The widow had a life interest which only ceased on her death within 10 years of the filing of the action. As the plaintiff acquired the right of possession only on her death, it was held that the defendant could not acquire a prescriptive title against the plaintiff. The proviso was sought to be applied also in *Nonai v. Appuhamy* [2] in the case of a donation which reserved a life interest. But the difficulty there was that there had been no valid acceptance of the donation, and in such a case the donee could not be said to have an estate in remainder or reversion.

I might refer finally to *Geddes v. Vairavy* [3] which was the case of a fidei commissary. The moment the fidei commissary's right to possession accrues, the term of prescriptive possession must begin over again, even though the fiduciary may have lost his right of possession through permitting an outsider to possess the land adversely to him. As Wendt J. said in that case, an owner can render nugatory the possession of a trespasser by creating a fidei commissum even after the trespasser has had possession for nine years.

I would therefore dismiss this appeal with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.

[1] *(1842) Morg. Dig. 328.*

[2] *(1919) 21 N. L. R. 165.*

[3] *(1906) 9 N. L. R. 126.*