1915.

Present: Wood Renton C.J. and De Sampayo A.J.

ABEYESINGHE *v.* PERERA *et al.*

1.—D. C. Colombo, 37,905.

Fiduciary donation—Prohibition against leasing land for a period exceeding ten years—Two leases for ten years each—Second to take effect after the first—Right of donor to consent to waiver of condition of gift without reference to reversioners.

James and Maria donated their land to their son John, with a reversion to his lawful children. The material clause in the deed of gift was as follows:—

"It is hereby stipulated that the aforesaid John shall only possess the aforesaid property, but not sell, mortgage, or lease for a period exceeding ten years at a time, or alienate the same in any other way. After his death his legitimate children shall be entitled to the same, and possess or dispose of the same according to their will and pleasure."

John executed two leases in favour of defendants, each for a period of ten years; the second was to take effect on the expiration of the first. The donors (James and Maria) consented to the leases. John died in 1909, during the pendency of the first lease.

Held, that the first lease was not valid after the death of the lessor, and that the second lease was bad altogether, and that it was not in the power of the donors to waive any of the conditions in favour of the donee without reference to the reversioners.

"In such a case as the present, where the reversioners are the legitimate descendants of the donees, acceptance of the gift by the fiduciary donee is a sufficient acceptance on behalf of the descendants, and precludes the donors from revoking it, even if such a consent as the original owners of the land gave to the execution of the second lease could be regarded as a revocation."

THE facts are set out in the judgment. The material portions of the deed of donation on which parties based their rights are as follows:—

In consideration of the love and affection we the aforesaid have towards one of our sons, John Henry Abrew Abeyesinghe, of Ragama aforesaid, and of his divers good qualities, and in view of his future welfare we do hereby grant convey and assure unto him, as an irrevocable gift, subject to the following conditions, in lieu of the share of inheritance which the said John Henry Abeyesinghe will be entitled to from us, for a sum of Rs. 1,000 of the lawful money of Ceylon, all the soil and plantations, &c., within the boundaries of the aforesaid land, held and possessed by virtue of deed of partition No. 1,958 dated January 26, 1886, attested by C. Anthony Wijesinghe Telakaratna, Notary Public, Colombo District, in favour of Maria Ejustina Perera Amarasekera Siriwardana Hamine, one of the aforesaid grantors, and containing in extent 10 acres 2 roods and 8 perches.

It is hereby stipulated that the aforesaid John Henry Abrew Abeyesinghe shall only possess the aforesaid property, but not sell, mortgage, or lease for a period exceeding ten years at a time, or alienate the same in any other way. After his death his legitimate children shall be entitled to the same, and possess or dispose of the same according to their will and pleasure. In the event of the Government acquiring the aforesaid land at any time, the said John Henry Abrew Abeyesinghe is authorized to receive the compensation that will be paid therefor by the Government.

Therefore, we do hereby declare that neither we, the grantors, nor our heirs, executors, administrators, nor assigns shall have any right or claim to the land and its appurtenance hereby granted.

I, John Henry Abrew Abeyesinghe aforesaid, do hereby declare that I have accepted with pleasure and thanks the grant hereof.

Allan Drieberg, for plaintiffs, appellants.

Samarawickrema, for defendants, respondents.

Cur. adv. vult.

February 3, 1915. Wood Renton C.J.—

The plaintiffs, the appellants, sue the defendants, the respondents, for a declaration of title to the land described in the plaint, for possession, and for damages. The defendants deny the plaintiffs' title and claim possession of the land in suit by virtue of two leases, No. 1,658 of December 22, 1904, and No. 14,609 of March 2, 1906. The original owners of the land, James de Abrew Abeyesinghe and his wife Maria, by deed No. 1,657 of December 22, donated it to their son John Henry Abrew Abeyesinghe, with a reversion to his lawful children. The first and second plaintiffs, who are minors, are his lawful children, and the third plaintiff is their next friend. The leases under which the defendants claim possession of the land were granted by John Henry Abrew Abeyesinghe. Each lease is for a period of ten years. The second is to take effect on the expiration of the first, and the original owners and donors of the land consented to it. The real question on which the parties are at issue is whether John Henry Abeyesinghe had power under the deed of gift to grant either of the leases in question. The learned District Judge has answered this question in the affirmative. In my opinion, it should have been answered in the negative. The material clause in the deed of gifts is as follows:—

> "It is hereby stipulated that the aforesaid John Henry Abrew Abeyesinghe shall only possess the aforesaid property, but not sell, mortgage, or lease for a period exceeding ten years at a time, or alienate the same in any other way. After his death his legitimate children shall be entitled to the same, and possess or dispose of the same according to their will and pleasure."

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WOOD RENTON C.J.

Abeyesinghe v. Perera

The learned District Judge holds that under this clause the donors intended that the donees should have power to grant leases for the full period of ten years, and that any lease so granted would be valid for that period, even if the lessor should die during its currency. I am unable to agree. The faculty of leasing is introduced into the clause in question merely as an exception to a general prohibition of leasing, and the words which follow, giving the legitimate heirs of the donee a right to " possess after " his death, seem to me to point to the conclusion that that right was to take effect whenever the death of the donee occurred.

These considerations are sufficient to dispose of the first lease. The second stands in an even less favourable position. The lessor died in 1909, some years before it could come into operation. It was not argued, nor did the learned District Judge hold, that this lease could be defended as a valid exercise of the power of leasing contained in the deed of gift. The view of the District Judge was that, as the heirs of the donee had not accepted the gift, it was in the power of the donors to waive any of its conditions in favour of the donee without reference to the reversioners. In such a case as the present, where the reversioners are the legitimate descendants of the donees, acceptance of the gift by the fiduciary donee is a sufficient acceptance on behalf of the descendants, and precludes the donors from revoking it, even if such a consent as the original owners of the land gave to the execution of the second lease could be regarded as a revocation. The law is expressly declared in this sense by the decision of this Court in *Soysa v. Mohideen*[1], and the defendants' counsel admitted in argument that it was so.

On these grounds I would set aside the decree of the District Court and direct judgment to be entered for the plaintiffs for a declaration of title to the premises in question, and for the ejectment of the defendants therefrom. In accordance with the agreement of the parties at the trial damages will be assessed by a commissioner to be appointed by the parties, whose decision will be final. If the parties are unable to agree to such an appointment, it must be made by the District Judge. The plaintiffs are entitled to the costs of the action and of the appeal.

DE SAMPAYO A.J.—I agree.

Set aside.

[1] (1914) *17 N. L. R. 279.*