1942 *Present:* **Wijeyewardene J.**

PODIMAHATMAYA *et al.* *v.* HENDRICK APPUHAMY *et al.*

159—C. R. Teldeniya, 10,069.

Prescription—Property gifted subject to life—interest of donor—Adverse possession—Death of donor—Interruption of prescription—Prescription Ordinance (Cap. 55), s. 3.

Where property is gifted to a person subject to the donor's life-interest, adverse possession of the property by a third party during the donor's life-time is interrupted by the death of the donor and the period of adverse possession does not enure to the benefit of such party against the donee.

Geddes v. Vairavy (9 N. L. R. 126) followed.

APPEAL from a judgment of the Commissioner of Requests, Teldeniya.

J. E. M. Obeyesekere (with him *Ivor Misso*), for plaintiffs, appellants.

L. A. Rajapakse, for defendant, respondents.

Cur. adv. vult.

November 13, 1942. WIJEYEWARDENE J.

The plaintiffs filed this action against one Francina, in February, 1940, as an action for rent and ejectment. Later, the plaintiffs filed an amended plaint in July, 1941, asking for a declaration of title to the house A on Lot 2, shown in plan P 1, and the plot of ground on which the house stood. Francina having died in the meantime, her husband, Hendrick, and children were substituted as defendants. They filed answer setting up prescriptive title.

One Philippu de Silva was admittedly the original owner of lots 1 and 2 in plan P 1. He conveyed Lot 1 by deed D 2 of 1909, to his daughter, Francina. He gifted Lot 2 by deed P 2 of 1928, to two other children, Juwan and Carlina, subject to a life-interest in his favour. Philippu died in 1932. The plaintiffs are the heirs of Juwan, who died in 1939. The Commissioner of Requests held that Hendrick and Francina and their children have been in possession of the house for 10 years after 1923, and have acquired prescriptive title.

The evidence in support of the prescriptive title of the defendants is that of Hendrick, the 1st substituted defendant, and his witness, Karunaratne. Hendrick stated that as Lot 1 was not suitable for erecting a building, his father-in-law, Philippu, asked him to put up the thatched house A on lot 2. He said he got the permit D 3 from the Government Agent in October, 1923, and then built the house A and that he and his family have lived there up to date. He admitted, however, in cross-examination, that up to the time of Philippu's death in 1932 he lived in that house "with Philippu's permission" and added that after Philippu's death he "possessed the thatched house", without any dispute, up to Juwanis's death in 1939, when Juwanis's widow began to dispute his possession. He admitted further that there was no fence separating his compound from the rest of lot 2 where admittedly Juwanis's family have lived for a long period in a tiled house. In re-examination, he said,

"Philippu gave me the ground on which to build the house". No attempt was made in re-examination to explain his previous statement as to his occupation with Philippu's permission. The witness, Karunaratne, stated that Hendrick paid him for building the house but admitted that he built the house at the request of Hendrick, Juwan and Philippu and that Juwan himself used to bring materials for the house in the absence of Hendrick.

The plaintiffs denied that Hendrick got the house built and led evidence to prove that Juwan put up the house A for his parents, who lived there at first before Francina and her husband were permitted to occupy it.

On this evidence, the Commissioner of Requests has held in favour of the defendant on the ground that there was evidence of "possession for over 10 years by defendants, unaccompanied by payment of rent or any acknowledgment of any others' rights". It is difficult to ascertain from the judgment whether the Commissioner addressed his mind to the question whether Hendrick commenced his possession adversely to Philippu or with his permission and if such possession was permissive at the start, whether there was any evidence that Hendrick and his family made known to Philippu or Juwan that they were changing the character of their possession at any time ten years before the filing of the action.

The learned Judge has not referred in his judgment to the admission of Hendrick that he lived in the house up to 1932, with Philippu's permission. In the absence of any explanation it is dfficult to see how the defendants could be held to have acquired prescriptive title, as the action was filed within the ten years. The Commissioner himself seems to have been aware of the meagre nature of the evidence of possession but he misdirected himself when he said that "the evidence of both parties cannot be considered satisfactory" and then proceeded to adjudicate on the question of prescriptive title. The question he had to decide was whether the defendants have led satisfactory evidence to prove prescriptive title. If that evidence is unsatisfactory the defendants must fail and it does not matter whether the evidence of the plaintiffs' possession is unsatisfactory, as plaintiffs have documentary title to the property.

There is another difficulty in the way of the defendants setting up prescriptive title against the appellants. Even assuming that the defendants commenced their adverse possession from October, 1923, they had only five years' possession in 1928, when Philippu executed deed P 2, reserving a life-interest in his favour. Could they rely on that possession or on the adverse possession from 1928, till Philippu's death in 1932, in support of their prescriptive title? Juwan, the predecessor in title of the plaintiff, "acquired a right of possession" only in 1932, and as the defendants had not acquired a prescriptive title before 1928, do they not require 10 years adverse possession from 1932, in order to defeat the claim of the plaintiffs? The answers to these questions will depend on the construction of the proviso to section 3 of Ordinance No. 22 of 1871, which reads :—

> "Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

This Court considered the effect of that proviso in *Geddes v. Vairavy (supra)*. The facts of that case were briefly as follows :—Ramalingam, the admitted owner of the property, mortgaged it with Geddes in 1875. The executors of the last will of Geddes purchased the property in 1884, in satisfaction of the mortgage decree. In terms of the last will of Geddes the property thereupon vested in his widow, subject to a *fidei commissum* in favour of her children. The widow died in 1901. The defendant pleaded prescriptive title to the property against the children of Geddes on the ground of adverse possession from 1875. Wendt and Wood-Renton, JJ. rejected that plea and held that where a property was burdened with a *fidei commissum*, a third party could not acquire title by prescription to such property against the *fidei commissarii* durng the lifetime of the *fiduciarius*, as prescription did not begin to run against the *fidei commissarii* until after the death of the *fiduciarius*. In the course of his judgment, Wendt J. said :

"Appellants questioned the right of an owner against whom a person has held adversely for (say) nine years, to render that adverse possession nugatory by creating *fidei commissum*, but we fail to see any injustice in upholding that right. *Ex hypothesi*, the owner is full *dominus* until the completion of ten years. He may at once himself try to vindicate the land, or sell it outright and enable the purchaser to do so. Why then may he not alienate it by way of *fidei commissum ?* And on what ground can the wrongful possessor complain that his attempt to steal the land has been frustrated ?"

There are some earlier decisions where this Court considered the effect of the corresponding provision in Ordinance No. 8 of 1834 vide *Kiri Menike v. Mirapettia* [1]; *Unga v. Tikiri Duraya* [2]. In all these cases it was held that prescription did not run against an heir, pending the life interest of a Kandyan widow. In some at least of these cases, however, the adverse possession appears to have commenced to run after the accrual of the lifeinterest of the widow.

After I reserved judgment my attention was drawn by Counsel for the defendants to the following passage in *Lightwood's Time Limit on Actions*" :—

"An owner entitled to possession against whom the statute is already running, cannot, by settling the land, postpone the operation of the statute as to persons taking future interests under the settlement."

That statement of the law appears at first sight to be against the view taken in *Geddes v. Vairavy (supra)*. The authorities on which that statement is based are *Stackpoole v. Stackpool* [3] and *Doe v. Moor* [4]. The decision in *Stackpoole v. Stackpoole* is not available to me. The later case was a decision given with special reference to section 15 of the Real Property Limitation Act, 1833. That Act had the effect of abolishing the old doctrines of adverse possession and it laid down special rules for ascertaining in various cases the date of accrual of the right of action. Section 15 was enacted in order to give some relief in those cases where

[1] *(1842) Morgan's Digest 328.*
[2] *(1858) 3 Lorenz 101.*
[3] *(1843) 4 Drury and Warren 320.*
[4] *115 English Reports (King's Bench) 1387.*

by the operation of these rules a possession which was not adverse before 1833 would have become adverse on the passing of the Act and this would have immediately deprived the owner of his right to the property. Section 15 provided for the suspension of the Act in such cases for a period of five years. I do not think that a decision construing such an enactment is of much assistance in interpreting our Ordinance.

According to the decision in *Geddes v. Vairavy* (*supra*) the defendants could not in any event acquire title by prescriptive possession as Philippu's title was not lost by the adverse possession of Francina and Hendrick when he executed the deed P 2 in 1928, and as the defendants have not had 10 years' possession after the death of Philippu in 1932.

At the hearing of the appeal before me the defendants' Counsel urged that he would be entitled to claim compensation for improvements in respect of the house. According to the Surveyor's report this house is a wattle-and-daub building with a thatched roof. I think it will be in the interests of the parties not to send the case back for the determination of this question but to take this claim into consideration and make an appropriate order as to costs.

I set aside the decree appealed against and direct that decree be entered—

(*a*) declaring the plaintiffs entitled to "the house and premises" referred to in clause (*a*) of the prayer in the amended plaint;

(*b*) restoring the plaintiffs to the possession of "the house and premises" referred to and the ejectment of the defendants therefrom;

(*c*) granting plaintiff half costs of appeal.

Neither the appellants nor the respondents will be entitled to costs so far incurred in the lower Court.

Appeal allowed.