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

1908. May 29.

GOVERNMENT AGENT, WESTERN PROVINCE *v.* PALANIAPPA CHETTY.

D. C., Colombo, 2,266.

Donation—Reservation of power to revoke—Validity—Roman-Dutch Law—Ordinance No. 7 of 1840, s. 2.

It is lawful for the donor in a deed of gift to reserve to himself the power to revoke the gift; and a revocation made in the exercise of such power is valid.

APPEAL from a judgment of the District Judge of Colombo.

The facts sufficiently appear in the judgment of the Chief Justice.

Bawa, for the second claimant, appellant.

F. M. de Saram, for the respondent.

Cur. adv. vult.

May 29, 1908. HUTCHINSON C.J.—

This is an appeal by two claimants against an order disallowing their claim to a sum of money which had been awarded and paid into Court as compensation for a piece of land which the Crown had taken for public purposes.

1908.
May 29.

HUTCHINSON C.J.

There were three claimants to the money. Palaniappa Chetty, Maria Moraes, and Maria de Wett. It was admitted that Simon Moraes had been the owner of the land, and that he had executed two deeds, the first dated June 22, 1894, in favour of Maria Moraes, and the second dated July 30, 1897, in favour of the plaintiff's predecessors in title; each of these deeds purported to dispose of the land; and the only issue is, which of the two deeds is to prevail.

By the deed of June 22, 1894, Simon Moraes, reciting that he was desirous of granting certain properties by way of gift to Mary, the daughter of Maria de Wett, subject to the conditions and restrictions thereinafter contained, granted this land to the said Mary and her heirs as a gift to hold to her and her heirs for ever, " subject, however, that the said Mary shall have no power or liberty to sell, mortgage, grant, or alienate the said several premises or any part thereof during her lifetime; that the said Maria de Wett, the mother of the said Mary, shall have the right to take and use the rents and profits of the said premises during the period and until the said Mary shall remain a minor or unmarried for the sole maintenance of the said Mary and herself; .... that if the said Mary leave no issue or die unmarried, the said premises shall revert and devolve to the common estate of me, the said Simon Moraes; and further, that during the lifetime of me, the said S. Moraes, I hereby reserve to myself the full control of the said premises, the rents and profits thereof, and the right to mortgage, sell, grant, or otherwise deal with the said premises as if these presents had not been made and executed." Maria de Wett and her daughter Mary are the two appellants. The daughter was a minor at the date of this deed, and the mother in the deed accepts the foregoing gift in her behalf, subject to the conditions and restrictions thereinbefore recited.

By the deed of July 30, 1897, Simon Moraes, without mentioning the former deed, but reciting that he is entitled to the property and is desirous of granting it to the persons therein named, subject to the conditions thereinafter mentioned, granted various properties to four persons, the land, the compensation for which is now in question, being granted to M. M. Silvestry Perera, to hold to them and their heirs for ever, subject to the following conditions; and then follows a restraint on alienation during the lifetime of the grantees and a reservation to the grantor and his wife, during the lifetime of himself and his wife, of power to deal with the property as if that deed had not been made. Simon Moraes died in September, 1897, without issue, and his widow afterwards purported to make an absolute gift of the land to the same Silvestry Perera. Whether she had power to do so or not is immaterial. The first claimant traces his title from Silvestry Perera.

The District Judge held that the gift made by the deed of 1894 was revoked by that of 1897, and that the first claimant was entitled

to the money in Court. The appellants contend, first, that it is not lawful for a grantor in a deed of gift to reserve to himself a power to revoke the gift; and secondly, that if such a reservation is lawful, the execution of the deed of revocation has no effect on the property which was by the original deed vested in the original grantee, and can only be divested by a notarial writing executed by that grantee, and that all that the revocation effects is to give the grantor a right to sue the grantee for an order requiring him to re-transfer the property.

I can see nothing in such power of revocation which is opposed to any enactment or to public policy or to morality. Mr. Bawa referred us to passages in *Voet, bk. 39, tit. 5, s. 522*, and in *Nathan, ss. 1028, 1089, 1090;* but I agree with the District Judge that those passages refer only to gifts in which no power of revocation is reserved. This is not like those difficult cases which sometimes occur in gifts, and especially in home-made wills, where there is an absolute gift, followed by a condition which is inconsistent with an absolute gift, without any provision as to what is to happen in case the condition is broken, and where the Court having to decide what is to happen when the condition has been broken, sometimes feels compelled to say that no effect at all can be given to the condition.

With regard to the second point, I am of opinion that all that is required by Ordinance No. 7 of 1840 is that the transfer, that is, in a case like this, the revocation, should be in writing signed by the person making it and attested in the manner required by section 2. The Ordinance merely provides for the form in which the transfer is to be made; whether the transferor has power to make the transfer at all is another matter.

In my opinion the order appealed from is right, and this appeal should be dismissed with costs.

GRENIER A.J.—

I entirely agree.

Appeal dismissed.