1936 *Present :* **Moseley J. and Fernando A.J.**

JAYAWARDENE *et al. v.* JAYAWARDENE.

*238—D. C. Kalutara, 19,043.*

*Lease—Covenant prohibiting the lessee from alienating, subletting, donating, &c.—Donation by lessee without consent of lessor—Donation voidable and not void—Donation binding on donor and his heir—Executor has no right to vindicate the property.*

**Where the Crown leased property subject to the condition that the lessee shall not sublet, sell, donate, mortgage, or otherwise dispose of or deal with his interest without the written consent of the Crown, and that every such sublease, sale, donation, &c., without such consent shall be absolutely void,—**

***Held*, that a donation by the lessee without the written consent of the Crown was voidable at the instance of the Crown and not absolutely void.**

***Held further*, that the executor and residuary legatee under the last will of the lessee is bound by the donation and cannot vindicate the property from the donees.**

THIS was an action brought by the executor of the last will of the late Mudaliyar J. V. G. Jayawardene to vindicate title to a property leased in 1910 to the Mudaliyar by the Crown in perpetuity subject to the condition that the lessee should not sublet, sell, donate, mortgage, &c., without the written consent of the Crown ; the lease further provided that every such sub-lease, sale, donation, &c., without such consent shall be absolutely void. On May 16, 1927, the Mudaliyar applied for permission to donate the property to his four sons but before he obtained permission which the Crown was willing to grant on certain conditions, executed four deeds of gift to his sons. On October 18, 1928, the Mudaliyar executed a last will by which he bequeathed all his property movable and immovable to the plaintiff. The plaintiff brought the present action to vindicate title to the property on the ground that the deeds of gift executed without the written consent of the lessor were void. The learned District Judge held that the deeds of gift were absolutely null and void.

*H. V. Perera* (with him *Colvin R. de Silva* and *G. E. Chitty*), for the defendants, appellants.—The plaintiff is the privy of his father, the donor, therefore he cannot seek to set aside his own gift. Prohibition against alienation is a limitation on one's right, and can be availed of by one of the parties for whose benefit the prohibition is included. In the case of a fideicommissary donation, only the person intended to benefit by the condition can bring an action. (See Sande's *Restraints on Alienation, pp. 253, 265, 269*). Such prohibitions on alienation do not create a law which binds the whole world ; they only put a fetter on the parties to the contract. A contract cannot go beyond the contracting parties. Plaintiff is in the shoes of Mudaliyar Jayawardene. Mudaliyar Jayawardene could not repudiate his gift, therefore plaintiff cannot. Plaintiff himself accepted under the gift which he now attacks. If Mudaliyar Jayawardene committed a breach of a convenant under the lease, then the property reverts to the Crown, see clause 6, sub-section (2) of lease bond. Therefore there were no rights to pass under the will. On a construction of the will, even leaving by will is void. It is only the Crown that can seek to set aside the deeds of gift. If Crown does not seek to set aside the gifts, then the property reverts to the Crown. The plaintiff, in the place of Mudaliyar Jayewardene must warrant and defend title.

*N. E. Weerasooria* (with him *J. R. Jayewardene*), for plaintiff, respondent.—The facts must be looked into. No legal argument can take away the effect of the plain English words "absolutely void", contained in the lease bond. The deeds of gift are nullities. One cannot escape from that position. It is not important who applies to Courts to declare them nullities.

Donations by a minor would be analogous. Such donations are null and void. (*Gunesekere Hamine v. Don Baron*[1].) See also *Silva v. Mohammadu*[2].) *Burge* refers to a void act as being void absolutely and relatively.

Krause's *Voet* (39.5.6. p. 16 and 39.5.10. p. 24) mentions the persons who can donate. Mudaliyar Jayawardene could not donate. The Crown did not consent to the donations. The Crown further does not wish to

[1] *5 N. L. R. 273.* [2] *19 N. L. R. 426.*

act on the forfeifture, but the letters to Mudaliyar Jayawardene show that the Crown considered the gifts void. Whether the prohibition against alienation is by statute, or common law, or deed, a violation of such prohibition under the alienation is void.

*H. V. Perera,* in reply.—The capacity of minors to deal with their property is dependent on the law of the land. A restriction contained in a satute binds the world. A restriction by deed binds only the parties. The words "null and void" are covenants by covenantor. Only be can rely on them. The party in default cannot rely on these words. This is not a question of interpretation, but a clause in a contract. The contract cannot go beyond the contracting parties. (*Norton on Deeds p. 28.*)

*Cur. adv. vult.*

December 4, 1936. FERNANDO A.J.—

The plaintiff and first to third defendants are brothers—all four being sons of the late Mudaliyar J. V. G. Jayawardene. In 1919, lease P 1 was entered into between the Crown and Mudaliyar Jayawardene, and by that lease the Crown leased the land referred to therein to the Mudaliyar in perpetuity, subject to various conditions among which was convenant No. 10 in P 1 to the effect that the lessee shall not sublet, sell, donate, mortgage, or otherwise dispose of or deal with his interest in the lease without the written consent of the lessor and that every such sublease, sale, donation, &c., without such consent shall be absolutely void.

On May 16, 1927, the Mudaliyar by letter P 3 applied for permission to gift his rights under the lease to his four sons, and certain correspondence followed between him and the Assistant Government Agent of Kalutara. On May 30, 1927, the Mudaliyar executed four deeds of gift in terms similar to P 4 in favour of his four sons giving each a one-fourth share of his interest in the leased premises, and on August 15, 1927, by letter P 6, the Mudaliyar sent to the Assistant Government Agent a copy of one of the deeds executed by him. On March 8, 1928, the Assistant Government Agent wrote to the Mudaliyar letter P 12 stating *inter alia* that the deeds of gift already executed are invalid by reason of the fact that consent of Government had not been given. Government, however, was willing to consent to the donation on certain conditions, but the Mudaliyar did not comply with the requirements set out in the correspondence between him and the Assistant Government Agent. On October 28, 1928, the Mudaliyar executed a last will P 2 by which he devised and bequeathed all his property of whatever kind, movable and immovable nothing excepted to the plaintiff, but no express mention is made in that document of the lease in question, and the Mudaliyar died on January 19, 1930, leaving this last will. The plaintiff now brings this action to have it declared that he as executor of the will and as devisee under it, is entitled to the possession of the land which is the subject of the lease, on the footing that the deeds of gift in favour of himself and the three defendants were executed without the written consent of the lessor, and are therefore void in view of the condition which has been referred to above. He also asked that the defendants be ejected, and claimed certain damages.

The learned District Judge held that the deeds of gift were absolutely null and void in view of the clause referred to, that the plaintiff was entitled to the premises as claimed by him, and he entered judgment in

his favour accordingly, with damages and costs. The main contention put forward by Counsel on behalf of the appellants was that the deeds of gift did not become absolutely void by the operation of covenant No. 10, and that it was necessary for the Crown to ask for a cancellation of those deeds before the deeds would cease to be operative. In other words, Counsel argued that covenant No. 10 in effect merely provided that any donation without the consent of the lessor would be voidable at the lessor's instance. He also argued that the plaintiff as executor represents the deceased Mudaliyar and would be considered his heir under the Roman-Dutch law, and that as such heir he is bound to abide by the donation and cannot himself impeach it. Counsel for the respondent on the other hand argued that by the operation of covenant No. 10, the donation would be a nullity.

Wille in *Landlord and Tenant (1st ed.), p. 156,* states that where there has been an express agreement between the landlord and the tenant, that the tenant may not sublet or assign without the consent of the landlord in writing, a sublease or assignment made by the tenant without having first obtained the written consent of the landlord is of no effect *as against the landlord* who will be entitled to cancellation of the alleged sublease or assignment. Such an agreement may however be waived by the landlord to the extent that his verbal consent will be sufficient to render a sublease or assignment effectual, and in page 155 he states that, "if the tenant purports to sublet or assign, such sublease or assignment is of no force or effect whatever *against* the landlord, and the landlord is entitled to cancel the sublease or assignment whether the lease contained a special agreement to that effect or not." This being the law in South Africa it would appear that it is left to the lessor to take appropriate action on a breach of the covenant, and that it is open to him to consider the donation without his consent as of no effect, but the question that arises here is whether the donor himself or his executor can claim that the donation made by the lessee is inoperative. Sande in his treatise on *Restraints on Alienation* at page 269 states that the heir of a person who has alienated property which he is by will prohibited from alienating is bound to abide by such alienation, and cannot impeach it according to the rule, "the heir must take upon himself all acts of the person whom he succeeds for he receives his wealth from him," and the heir is regarded as one and the same person with the deceased, and Counsel argued that a gift would come under the same principles. Of course Sande is here dealing with restraints upon alienation of immovable property created by a will, but there does not seem to be any reason why the same principles should not apply in the case of a donation contrary to the provisions of a lease for the reason that the proposition of law stated by him is based on the rule, and the rule itself that the heir must take upon himself all acts of the person whom he succeeds is expressed in the widest possible meaning. Counsel also referred to a passage from Sampson's *Translation of Voet (tit. 6, ch. 1, ss. 17 and 18)* to the effect that the seller cannot himself vindicate property belonging to another, but which had been sold by him, on the ground that he is not the owner, even if the seller had subsequently become the owner, or is heir of the true owner, and here again the rule is that no one ought to gainsay his own act. It must also

be noted that by clause 2 of the general provisions of the lease, it is provided that if any breach is committed by the lessee of any of the covenants on the lessee's part (and covenant 10 comes within the lessee's covenants) then this demise and the privileges thereby reserved shall forthwith cease and determine, and the lessor may thereupon enter into the said premises, and the said premises shall forthwith revert to the Crown, and this clause was relied on by Counsel for the appellants as showing that it was for the Crown to claim that the donations were contrary to the covenant, and that therefore, the land had reverted to the Crown. The evidence in this case indicates that the Crown does not propose to claim a reversion as a result of the donations by the Mudaliyar, and Counsel then argues that in the absence of any claim by the Crown, the donations must be regarded as good and operative between the parties. It may also be mentioned here that the Crown has accepted the rent due on the lease in some instances from the plaintiff, and in some instances from the defendants, being apparently contented to leave the question to be decided as between the parties themselves.

In the case of *Perera v. Perera*[1] this Court dealing with a clause of forfeiture in a lease for non-payment of rent on the due date, stated that such a clause was only intended as security for the due payment of the rent, and that both under the English law and the Roman-Dutch law, a lessee was entitled to relief against such forfeiture, and reference was made to the earlier case of *Perera v. Thaliff*[2]. It was there held, that the Court would grant a lessee relief against a provision in the lease giving the lessor a right to claim cancellation in the event of a breach of a stipulation by the lessee, in a case where the breach thereof did not involve a notably grave and damnifying misuse of the property leased, and went on to state that the nature of the misuse, and the question whether it should be punished by a cancellation or by condemnation in damages is entirely a matter that must be left to the discretion of the Court. It is not necessary to refer to all the cases, but I might refer to the case of *Banda v. Fernando*[3] where it was held that the failure of a party to carry out an express stipulation in a lease which provided that such failure shall entitle the lessor to cancellation would ordinarily be looked upon by the Court as the breach of an essential stipulation which would entitle the lessor to an order cancelling the lease, unless there are equitable grounds for allowing relief against such cancellation. There in fact, this Court in appeal gave relief to the defendant whose lease had become liable to be set aside subject, however, to certain terms which were laid down by the Court. Considering the principles laid down in these cases, and the authorities cited, I come to the conclusion that the effect of a clause in terms of covenant No. 10 is not of itself to affect the operation of a deed of gift like the one we are considering, but merely to provide that in appropriate circumstances, such a deed may be set aside by a Court of law, and that appropriate steps to secure such an order from Court must be taken by one of the parties to the lease. The lessor may bring an action to secure a cancellation of the lease if he so desires, but till the lease is cancelled, the deed of gift must remain operative as between the parties. I would also hold

[1] *10 N. L. R. 230.*

[2] *8 N. L. R. 118*

[3] *6 C. W. R. 161.*

that under our law, a person in the position of the plaintiff who is the executor under the will of the Mudaliyar, and the devisee of his residuary estate, is bound to abide by a donation made by the deceased and cannot vindicate the property from the donee.

With regard to the effect of the covenant in question, I might also refer to the judgment of De Sampayo J. in *Silva v. Mohamadu.*[1] He refers at length to the South African case of *Braytenback v. Frankil*[2] and observes that even in the case of void contracts (as distinguished from those that are merely voidable) the universal practice in Holland was to apply for *restitutio*, and as Lord de Villiers observed in the course of the argument what was the universal practice in Holland must be taken to be law with us. Thus it appears that the Roman-Dutch law is quite in accordance with the general principles that a person cannot be judge in his own cause, and that where he wishes to get rid of the effect of his own act, he must seek the assistance of the Court.

In view of the conclusion at which I have arrived, it is not necessary to discuss the other questions that were argued before us. The appeal of the first to third defendants is allowed, the decree of the District Court is set aside, and plaintiff's action is dismissed with costs, here and in the Court below.

MOSELEY J.—I agree.

*Appeal allowed.*