Present : Ennis A.C.J. and De Sampayo J. **1919.**

NONAI *et al. v.* APPUHAMY *et al.*

94—D. C. Nuwara Eliya, 401.

Gift by husband and wife—Life interest reserved—Prohibition against alienation by survivor—No acceptance by donee—Gift to another person by survivor—Prescription.

A and his wife B jointly executed deed of gift in favour of plaintiffs in 1895, reserving life interest in donors and survivor, and further prohibiting alienation by survivor.

A died in 1896. On September 4, 1902, B gifted the land to C, who accepted the same and possessed the land. On September 26, 1912, B confirmed the earlier gift of 1895 by deed. The deed of 1895 was not accepted during the lifetime of A.

Held, that C's title was good.

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The acceptance by plaintiffs did not relate back to vest a right of ownership in the property in the donees from the date of the deed.

Until acceptance the plaintiffs had no estate in remainder, reversion, or otherwise which would prevent prescription running against them.

DE SAMPAYO J.—The effect of non-acceptance of a gift by a donee is to entitle the donor to revoke the gift and make any other disposition of the property. The clause in the deed of 1895 prohibiting alienation by the survivor did not stand in the way of B giving her share to C.

In the case of a gift *in presenti* (possession alone being postponed to the death of the donor) the acceptance cannot take place after the death of the donor.

THE facts are fully set out in the judgment of De Sampayo J.

Bawa, K.C. (with him *Hayley*), for appellants.

A. St. V. Jayawardene (with him *Samarawickreme* and *Zoysa*), for respondents.

Cur. adv. vult.

September 2, 1919. ENNIS A.C.J.—

The property in dispute in this case originally belonged to John Appu and his wife Justinahamy by right of purchase. On December 13, 1895, they jointly executed deed No. 18,053 gifting the land to the plaintiffs and added parties. The deed recited that the donors had no children, and reserved a life interest in the donors and survivor. The plaintiffs and added parties are the nephews and nieces of John Appu and an adopted daughter. An endorsement on the deed states that the donors kept it after its execution. John Appu died on January 10, 1896, without having revoked the gift.

On September 4, 1902, Justina executed the deed D 1, No. 7,337, by which she gifted the land absolutely to her daughter by an earlier marriage, Carlinahamy, the wife of the first defendant. Carlinahamy died in 1904, and the first defendant was appointed administrator of her estate, and as such conveyed the property to the heirs, himself and the added defendants in the case.

On September 26, 1912, Justina executed the document No. 54, in which she confirmed the earlier gift of 1895, and recited that certain persons had accepted the gift during the lifetime of her husband.

Justina died in 1914, and the present action was instituted on July 4, 1916. The learned Judge found as a fact that the earlier gift of 1895 was never accepted; that Carlina did accept the gift of 1902, and she and her family have been in possession ever since, have lived on the land, and built substantial houses. There is no evidence that Carlinahamy was aware of the earlier deed of gift, and her husband, the first defendant, has given evidence that he never

heard of it. It appears further that the earlier deed of gift was not registered till 1918, and then only a copy of it, not the original, which has not been produced. The learned Judge dismissed the action, and the plaintiffs and added parties appeal.

I see no reason to interfere with the finding of fact that there was no acceptance of the earlier gift.

On appeal, it was urged, on the authority of *Voet 39, 5, 13*, that a gift which reserved a life interest in the donors could be accepted after their death. Assuming this to be so (I do not consider it necessary to decide the point), the next argument was that the acceptance related back to the gift to vest a right of ownership in the property in the donees from that date; and as they were not entitled to possession till the death of the donors, no prescription could run against them in favour of the donors or any subsequent donee. I am unable to see how any right of property could vest in the donees till acceptance. Until acceptance the plaintiffs had no estate in remainder, reversion, or otherwise which would, under the proviso in section 3 of the Ordinance No. 23 of 1871, prevent prescription from running against them. That being so, the issue of prescription raised in the case is conclusive. There is no definite finding on this issue in the judgment, but the defendants led evidence on it, and the Judge has found that the defendants have been in possession ever since the gift to Carlina in 1902. It is clear that they held *ut dominus* for over ten years before Justina executed the deed No. 54, and were still so holding at the date of action. In my opinion the defendants have a clear prescriptive title, and it is unnecessary to go further into the case. I would dismiss the appeal, with costs.

DE SAMPAYO J.—

John Appu and his wife Justinahamy became entitled to the property in question by right of purchase upon a deed dated November 27, 1885. By deed of gift dated December 13, 1895, they donated the property to the plaintiffs and the added parties, Benjamin Talalla and Pranso, who are John Appu's nephews and nieces, " to be possessed by them, their children, grandchildren, and descendants." The gift purported to be subject to the following conditions:—

(1) ' That in the event of any one of us, the said two donors, predeceasing the other of them, it shall not be lawful for the survivor to lease the said land, buildings, plantations, and premises for a period exceeding three months, or to mortgage, tender as security, transfer, or in any other manner encumber the same, but may possess the said land and premises and appropriate and enjoy the produce and income thereof.

(2) " That during our joint lifetime we reserve to ourselves the right to possess the said land and premises in manner aforesaid. "

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The gift was not accepted by the donees on the face of the deed, or in any shape or form. John Appu died on January 10, 1896, and Justinahamy, who survived him, by deed dated December 4, 1902, reciting that she was entitled to the property by virtue of the deed of purchase of 1885 and by right of inheritance from her husband John Appu, gifted the property to Carlinahamy, her daughter by a previous husband, who accepted the gift on the face of the deed. The defendants claim the property under Carlinahamy. Notwithstanding the deed of gift in favour of Carlinahamy, Justinahamy by deed dated September 26, 1912, reciting that the deed of gift of 1895 in favour of the plaintiffs and added parties was accepted during the lifetime of John Appu on behalf of the added parties, Benjamin Talalla and Pranso, who were then minors, by their mother and brother, and also reciting that she was deceived into executing the deed of gift in favour of Carlinahamy, purported to confirm and ratify the joint gift of her husband John Appu and herself in favour of the plaintiffs and the added parties, and Benjamin Talalla, the first of these added parties, purported to accept the same on behalf of himself and the other donees.

Apart from the question whether the recitals in the last deed by Justinahamy as to the acceptance of the original gift are legal evidence, and apart from the fact that even these recitals do not state that the gift was accepted by or on behalf of the plaintiffs, these recitals have no evidentiary value whatsoever. Justinahamy was a very old woman at this time, and it is obvious that she came under the influence of those interested in upholding the old deed of gift, and was not personally responsible for the declarations contained in the deed of ratification, and I agree with the learned District Judge in refusing to accept them as true. This case should, therefore, be decided on the footing that there was no acceptance of the gift of 1895 during the lifetime of John Appu.

The effect of non-acceptance of a gift by a donee is to entitle the donor to revoke the gift and make any other disposition of the property. Consequently Justinahamy's subsequent gift to her daughter Carlinahamy was effective so far as her half share of the property is concerned, and the plaintiff's action must fail to that extent. Counsel for the plaintiffs and the added parties, who are the appellants, however, maintained the proposition that the clause in the deed of gift of 1895 prohibiting an alienation by the survivor of the donors constituted a contract between them and prevented Justinahamy from making any disposition even of her half share after John Appu's death, and the analogy of a joint will by husband and wife massing their property was referred to. I fail to see any analogy between the two cases, and no authority was cited in support of this contention. Nor can I understand how the provision reserving a life interest in the donors and prohibiting the survivor from alienating the property can be said to constitute a contract

between the donors. In my view the prohibition against alienation was intended, from abundance of caution, to emphasize the fact that the donors were to have a life interest only. Moreover, that provision was, as the deed itself describes it, a condition of the gift, and if by non-acceptance the gift becomes inoperative, it seems to me that the condition must vanish with it, and the parties must be relegated to their original rights.

I, therefore, think that the plaintiffs' and the added parties' claim must in any case be restricted to John Appu's half share of the property. The main argument on this appeal accordingly centred round the claim to that half share. The question of acceptance still remains. The argument on behalf of the appellants is that acceptance may be made even after the death of the donor, and that this action, though brought twenty years after John Appu's death, amounts to an acceptance. It may be conceded that the claiming of the subject of a gift by action amounts to an acceptance of the gift, but I doubt whether there is no time limit for that purpose, and whether such acceptance has the effect of defeating the claims of third parties who have acquired title in the meantime. As regards the possibility of acceptance after death of the donor, the authority relied on is *Voet 39, 5, 13*. There Voet distinctly states the general rule that acceptance should be made by the donee during the lifetime of the donor, inasmuch as otherwise the will of the donor and that of the donee would not be united as required in the case of a contract of donation, but he proceeds to point out a distinction, and states that, unless the *executio* of the donation is postponed to the death of the donor, the donee is not prevented from accepting the donation even after the donor's death. The word "*executio*" is difficult to construe, but I think it expresses the idea of the donation being completed by the vesting of title. This appears to be a little clearer from Van Leeuwen *Cen. For. 1, 4, 12, 16*, where the expression is *effectus donationis*, the taking effect of the donation. If this is the meaning, then Voet is no authority in support of the plaintiffs' claim, because the gift in their favour is a gift *in presenti*, possession alone being postponed to the death of the donors. However, in *Lokuhamy v. Juan*,[1] which was followed in *Tissera v. Tissera*,[2] this passage was taken to cover a case where the donor, though he made an immediate gift, reserved the right of possession during life. Even so, we have still to consider the effect of prescriptive possession on the part of a third party. In this case there is very good evidence, which the learned District Judge entirely accepted, that Carlinahamy during her lifetime and the defendants after her have possessed the property as exclusively their own ever since the gift by Justinahamy in 1902, and they must be taken to have acquired a new and independent title by prescription, unless by acceptance of the original gift the appellants can be regarded as having defeated

[1] *Ram. (1872-76) 215.*

[2] *(1908) 2 S. C. D. 36.*

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that title. I cannot hold, and there is no authority for saying, that such acceptance has relation back to the date of the gift so as to vest title in the appellants as from that date, and to wipe out the intervening prescriptive title of the defendants. As regards this, Mr. Bawa further argued that as the life interest of Justinahamy only terminated in 1914 when she died, the appellants came under the proviso to section 3 of the Prescription Ordinance, which provides for prescription beginning to run against parties claiming estates in remainder or in reversion only from the time when the parties so claiming acquired a right of possession to the property in dispute. In my view this language is wholly inapplicable to the circumstances of this case. To say that the appellants had an estate in remainder or in reversion is to beg the question. They had no title whatsoever to the property until acceptance, and had no right to possession on Justinahamy's death, when the life interest terminated, and I think the proviso in no way helps them. In my opinion the defendants' plea of prescription as regards John Appu's share of the property must prevail.

I therefore agree that this appeal should be dismissed, with costs.

Appeal dismissed.