Present: Mr. Justice Middleton and Mr. Justice Wood Renton. *July 27, 1910*

WIJEMANNE *v.* SCHOKMAN *et al.*

34 and 35, D. C., Kalutara, 3,687.

Crown grant with a prohibition against alienation without written consent of Government — Restriction does not apply to Fiscal's sale — Purchaser at Fiscal's sale takes land subject to the condition as to inalienability—Estoppel.

X obtained a Crown grant for the land in dispute in 1835, subject to the following conditions:—

(1) That if at any time hereafter it shall happen and be made apparent, according to the opinion of a majority of nine competent persons to be assembled by the Government Agent for the purpose of inspecting the same, that the said land has been for one year neglected and uncultivated, then, and in such case, this grant shall be utterly void and of none effect.

(2) That X, or his heirs, executors, &c., shall not alienate or assign the said land without the consent of the Government in writing for that purpose, until the whole shall have been brought into a competent state of cultivation.

Under a writ issued against X the land was purchased by Y in 1881; Y sold it to Z in 1890.

In 1898 an assembly of nine persons summoned by the Government Agent declared the land had been neglected and left uncultivated for one year. and the Crown considered the grant forfeited, and offered the land for sale. Y acknowledged the title of the Crown to the land.

In 1900, A, a grandson of X, paid the Crown the value of the land and entered into possession of it, and obtained a certificate of quiet possession in 1903.

In an action for declaration of title by Z against A, it was *held*—

(*a*) That the alienation prohibited by the condition in clause 2 was restricted to voluntary alienations, and not to necessary alienation adversely to X at a Fiscal's sale.

(*b*) That although the purchase by Y at the Fiscal's sale was not invalid, yet Y bought the land subject to the condition of inalienability imposed by clause (2), and that the private sale by Y to Z conferred no title on Z.

(*c*) That the recognition of the title of the Crown by Y relieved the Crown from the necessity which would otherwise be imposed upon it of enforcing the verdict of the jury by a regular judicial decree.

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THE facts of this case are set out in the judgment of Wood Renton J. as follows:—

The material facts in these cases admit of being stated quite briefly. The plaintiff-appellant in No. 34, who is the respondent in No. 35, sues for a declaration of title to an undivided two-thirds share of a land called Batepottehena, which is described in his plaint. He derives his claim through a conveyance, No. 424 of December 6, 1906, to him of the share in question by one Don Cornelis Appuhamy. The land in which the share here in question is included originally belonged to one Hendrick Perera on a Crown grant, dated October 12, 1835. On two writs issued against his son Philippu Perera, in one case as heir in possession of his father's estate, and in the other for a debt of his own, it was sold to one Don Simon Appuhamy on Fiscal's conveyances of June 27, 1881, and September 20, 1897. On November 13, 1900, Don Simon Appuhamy sold the two-thirds share here in disqute to his brother Don Cornelis Appuhamy, and, as I have already mentioned, on December 6, 1906, he conveyed the property to the plaintiff-appellant. Don Simon Appuhamy is the second defendant-respondent to the appeal in No. 34; the third to eighth defendants-respondents to that appeal are the representatives of his six children. For the purposes of the appeal in No. 34 they associate themselves with the plaintiff-appellant, and make common cause with him against the first and the ninth defendants, who are the respondents in both appeals. It may be convenient to point out at this stage the manner in which the first and the ninth defendants-respondents meet the joint cases presented against them by the plaintiff-appellant and the second to eighth defendants-respondents. The first defendant-respondent is the son of the ninth; he disclaims all title in himself to the property in question, and sets up title in his mother, the ninth defendant-respondent, who denies the plaintiff-appellant's title, alleges that Hendrick Perera's interest in the property was avoided by reason of his failure to comply with a condition in the Crown grant, to which I will presently refer, and says that it thereafter, namely, in or about the month of July, 1900, passed to one J. R. Jayesinghe, a grandson of Hendrick Perera, who on October 3, 1901, sold and transferred it to Don Sarnelis Appuhamy, who in turn, by deed No. 2,076 dated August 3, 1906, conveyed it to the ninth defendant-respondent herself. I may add that a certificate of quiet possession, under section 7 of Ordinance No. 12 of 1840, for the land was granted to Jayesinghe in 1903, and that on January 19, 1909, after the institution of the present action, he obtained a formal Crown grant for it. In appeal No. 35 the second to eighth defendants-appellants, who, as I have said, are respondents to the appeal No. 34, set up title as against the plaintiff-respondent, who is the appellant in No. 34. Their claim, with which, in the view that I take of both these cases, it is not

necessary to deal in detail, may be stated thus. They say that Hendrick Perera had a daughter Katherina; that on February 14, 1878, she and her son Uraneris conveyed the land in suit to Don Simon Appuhamy; that he gifted it in 1907 to his six children, in whose shoes they stand, and claim a declaration of title in themselves as against both the plaintiff-respondent and the ninth defendant-respondent. Hendrick Perera's grant from the Crown in 1835 contained the following conditions:—

"That the said Hettigey Hendrick Perera, his heirs, executors, administrators, and assigns, shall from and after August 1, 1838, pay or cause to be duly paid to the use of His Majesty one full tenth part, and no more, of the produce thereof as the Government share of rent thereof, subject, nevertheless, to such general regulations as Government shall hereafter publish.

"That if the said Hettigey Hendrick Perera, his heirs, executors, &c., shall not within three years from the date of this grant well and truly bring the said piece of ground into full and fair cultivation, according to the opinion of a majority of nine competent persons to be assembled by the Government Agent for the purpose of inspecting the same at the expiration of the said period, the said Hettigey Hendrick Perera, his heirs, or administrators, or assigns, shall pay and make good on the estimate and appraisement of a majority of the same persons the full value of one-tenth share of produce to which Government would have been entitled, if the land had been duly cultivated for each year from the date of this grant, and the said grant shall be utterly void and of none effect.

"That if at any time hereafter it shall happen and be made apparent, according to the opinion of a majority of nine competent persons to be assembled in the manner described, that the said land has been for one year neglected and uncultivated, then, and in such case, this grant shall be utterly void and of none effect.

"That the said Hettigey Hendrick Perera, his heirs, executors, administrators, and assigns, shall not alienate or assign the said land or any part thereof without the consent of Government in writing for that purpose until the whole shall have been brought into a competent state of cultivation."

A. St. V. Jayewardene, for the plaintiff-appellant in No. 34 and plaintiff-respondent in No. 35.

(1) The prohibition against alienation in the Crown grant does not affect Fiscals' sales. The principle enunciated in *Perera v. Perera* [1] applies to the present case. See also *Stroud's Judicial Dictionary, p. 65; Sande's "Restraints upon Alienation," part 3, ch. 3, sec. 44; part 3, ch. 8, sec. 13.*

[1] *(1906) 9 N. L. R. 217.*

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(2) The clause of forfeiture in the Crown grant cannot be enforced except by judicial proceedings. *Perera v. Samaranayake;* [1] *Perera v. Perera;* [2] *(1871) Vanderstraaten's Reports 279; Attorney-General v. Kudatchy;* [3] *Abeyasekera v. Seneviratna;* [4] *Woodfall, 15th ed., p. 706.*

(3) The Crown never attempted to resume possession of the property on the ground that the condition of the grant had been violated. The Crown has waived in this case the right to enforce forfeiture by its conduct by not enforcing the clause in the case of previous breaches of the second condition. *Goodright v. David.*[5]

(4) The ninth defendant could not plead the Crown grant of 1909, because the Crown grant bears a date later than the date of the action. See *Silva v. Nona Hamine,*[6] *Ponnamma v. Weerasuriya,*[7] *Silva v. Hendric Appu.*[8]

H. A. Jayawardene (with him *Prins*), for the second to eighth defendants-respondents in No. 34, and appellants in No. 35.—The breach of the second condition of the Crown grant has been going on for very many years; the Crown has by its conduct waived its right to enforce the clause as to forfeiture.

Bawa (with him *Illangakoon*), for the first and ninth defendants-respondents in Nos. 34 and 35.—Conditional grants similar to the present one were recognized by the Roman-Dutch Law. See *3 Maasdorp 138; (1871) Vanderstraaten 250.* The condition in this grant is like a " covenant running with the land." See *Voet 18, 1, 15.* Title to property could not pass to any one without the consent of the Crown. Even a Fiscal's sale would be obnoxious to the condition in the Crown grant. In any event the purchaser at the Fiscal's sale could not pass title to any one without the consent of the Crown. The Fiscal's sale is void; there is no necessity for a judicial decree declaring the Fiscal's conveyance void; the Fiscal's conveyance is as void as a deed by a *fiduciarus* in breach of the *fidei commissum.* The deed is void, and the *fidei commissarius* need not get a judicial decree to have the deed declared void. [WOOD RENTON J.—Is it possible for the Crown to tie up property in such a way as to prevent third parties from realizing their debts by a Fiscal's sale ?] The Crown can attach a condition to its grant, which is in the nature of a covenant running with the land.

Counsel cited *Voet 18, 3, 24.*

The cases cited do not support the contention that the Crown grant in favour of the ninth defendant could not be pleaded by him in this action. In the cases referred to by appellant the plaintiffs who were unsuccessful claimants came into Court without having any title at the date of action.

[1] *(1872) Ram. 58.*
[2] *(1907) 10 N. L. R. 230.*
[3] *(1903) 7. N. L. R. 235.*
[4] *(1886) 7 S. C. C. 171.*
[5] *(1778) 2 Cowper 803.*
[6] *(1906) 10 N. L. R. 44, 49.*
[7] *(1908) 11 N. L. R. 217.*
[8] *(1895) 1 N. L. R. 13.*

H. A. Jayewardene, in reply.—The purchaser at the Fiscal's sale did not buy the land subject to the conditions of the grant. The purchaser is not a privy to the judgment-debtor.

The non-cultivation of the land merely gave the Crown a cause of action. The Crown did not take proper steps to have the grant forfeited.

A. St. V. Jayewardene, in reply, cited *Woodfall, Landlord and Tenant, p. 703; Voet 12, 2, 5; Ramanathan, 1820-33, p. 62.*

Cur. adv. vult.

July 27, 1910. MIDDLETON J.—

His Lordship set out the facts, and continued:—

On the issue as to alienation the District Judge held on the authority of D. C., Colombo, No. 55,394,[1] that the alienation by Hendrick without the written consent of the Government was void, and that plaintiff had no title, and dismissed his action with costs. I am not sure what the learned Judge means by the alienation of Hendrick, as the alienation to Don Simon was a forced sale under a writ of execution, and was not by Hendrick. If, however, he means the involuntary sale by the Fiscal in virtue of a writ, I think, following the principle upheld in the Full Court case of *Perera v. Perera*,[2] that the sale by the Fiscal to Don Simon was not a breach of the condition in the Crown grant. Under the Crown grant, I think that the purchaser at the Fiscal's sale, Don Simon, would take Hendrick's interest subject to the conditions of the grant. The sale, however, by Don Simon to Don Cornelis was a voluntary sale, and clearly without the consent of the Government, and on the authority of the case in *Vanderstraaten, ubi supra*, relied on by the District Judge, the alienation by Don Simon to Don Cornelis must be held to be void, and the plaintiff's title to two-thirds through Don Cornelis barred.

In my opinion the positive ultimate prohibition against alienation in the grant applies only to voluntary alienation, and its repugnancy to the sense of the habeedum clause, where the word " assigns " is used, clearly over-rides that sense unless the sense is applicable to an involuntary assignment.

The right of the Government to issue conditional grants of this kind seems to me to be unquestionable, and it was clearly done in the interests of the community as promoting the cultivation of the soil and the obtainment of revenue. Up to this point, then, the title is in Don Simon, second defendant, and the question arises as to his rights to the land as against the ninth defendant.

In *Perera v. Samaranayake* [3] this very grant was construed, and it was held by a Court of three Judges, presided over by Creasy C.J., that the right of the Crown with regard to non-cultivation for one

[1] *(1871) Vanderstraaten's Reports 250.* [2] *(1906) 9 N. L. R. 217.*
[3] *(1872) Ram. 58.*

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year had not been waived by omitting to enforce it for a long time, and that it might be enforced by the inquisition provided for in the grant.

I think it is clear on the evidence that the second defendant had notice of the inquisition here, and that he acquiesced in and accepted the decision of the jury of nine, and further, that he agreed and offered to pay the sum demanded by the Government, and sought for and obtained time to do so. It is impossible to say that he did not accept and assent to the decision obtained by the Crown that he had incurred a forfeiture of his rights.

In my opinion, therefore, as he acquiesced in the finding of the jury involving a forfeiture declared upon the inquisition, and offered to pay the money demanded by the Crown which could have no other object than to enable his reinstatement, he intentionally caused the Crown to believe that he assented to such forfeiture, without requiring legal proceedings to be taken and to act upon such belief, and I think he is now estopped from asserting that such legal proceedings were necessary.

In my opinion, therefore, the plaintiff's title is barred by the clause against alienation in the grant, and Don Simon is estopped from asserting his rights. With Don Simon's title must pass also the alleged title of the third to eighth defendants. This disposes of the appeal under both numbers, which, in my opinion, must be dismissed with costs.

WOOD RENTON J.—

His Lordship set out the facts, and continued:—

It is found by the learned District Judge, and the evidence supports his finding, that the Crown did in the year 1898 take the steps prescribed in the grant by the assembly of a jury of nine persons to have it declared that the land had been neglected and left uncultivated for one year in breach of the second condition above quoted; that the jury so assembled returned a verdict to that effect; and that Don Simon Appuhamy thereafter recognized the title of the Crown. The District Judge points out, however, and I agree with him, that this recognition by Don Simon Appuhamy of the title of the Crown, while it might relieve the Crown, from the necessity which would otherwise be imposed upon it of enforcing the verdict of the jury by a regular judicial decree (see *Abeysekera v. Seneviratne;* [1] D. C., Colombo, No. 55,522; [2] and *Rex v. Vanderstraaten* [3]) cannot bind the plaintiff-appellant, inasmuch as, long prior to the inquiry by the jury, Don Simon Appuhamy had transferred the land to Don Cornelis Appuhamy, through whom the plaintiff-appellant claims. The District Judge holds, however,

[1] *(1886) 7 S. C. C. 171.*
[2] *(1871) Vanderstraaten's Reports 279.*
[3] *(1823) Ram. 1820–23, 62.*

that the " alienation by Hendrick without the written consent of Government was void, " and that, therefore, the plaintiff-appellant has no title; he has, therefore, dismissed the plaintiff-appellant's action, and has left undecided the issue of title as between the plaintiff-appellant and the ninth defendant-respondent on the one hand, and the second to eighth defendants-respondents in No. 35 on the other. It was practically conceded at the argument that the only alienation by Hendrick Perera, on which the ninth defendant-respondent can rely here, is to be found in the Fiscal's sales against his estate and against his son Philippu, and the argument was conducted before us on that basis. I am clearly of opinion that the alienation prohibited by the third above-cited condition in the Crown grant must be restricted to voluntary alienation, and would not include necessary alienation, adversely to the grantee, at a Fiscal's sale (see *Perera v. Perera* [1]), and that Don Simon Appuhamy cannot be regarded as an " assign " of Hendrick Perera within the meaning of the prohibition that we have here to interpret. On the other hand, all that Don Simon Appuhamy could take at the Fiscal's sale was the right, title, and interest of his judgment-debtor. In the present case that right, title, and interest was subject to the condition of inalienability imposed by the Crown in the grant of 1835. Even if we assume, therefore, that the property passed into the hands of Don Simon Appuhamy adversely to the judgment-debtor and by operation of law, he could take nothing but what the judgment-debtor had to give that is to say, property to which a conditional prohibition of alienation—a prohibition which in the present case had been brought into force by a breach of the condition—had been attached. He had, therefore, no right to dispose of the property to Don Cornelis Appuhamy, and Don Cornelis in turn could give no right to it to the plaintiff-appellant.

I think, therefore, although on grounds different from those adpoted by the learned District Judge, that the present action has been rightly dismissed. As regards the position of the second to the eighth defendants-respondents in No. 34, I entirely agree, as I have already said, with the finding of the District Judge on the evidence, that Don Simon Appuhamy did in fact acknowledge the title of the Crown to the property in suit subsequent to the inquisition of 1898. A clear ground of forfeiture had been established; an inquiry within the meaning of the Crown grant had been held. The result was notified to Don Simon. The land was offered to him by the Crown at the appraised value of Rs. 30 an acre; he petitioned the Governor, asking for a month's time to pay at the rate of Rs. 20 an acre. It was clearly intimated to him by the Government that, in the event of default, other claimants would be allowed to pay for the land. Taking all these circumstances

[1] *(1906) 9 N. L. R. 217.*

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together—the inquisition, the offer of the land to Don Simon Appuhamy, his own attitude to that offer, the intimation to him that if he made default the land would be sold to some one else, and the subsequent sale in fact to Jayasinghe—I have no hesitation in holding that they clearly show both the intention of the Crown throughout these proceedings to treat the breach of condition as a forfeiture of the grant, and Don Simon Appuhamy's full knowledge of and acquiescence in these facts. I think that Mr. Hector Jayewardene's argument that these proceedings disclose a waiver of the forfeiture on the part of the Crown, or at the worst a mere claim on Don Simon Appuhamy for damages, is untenable. No authority was cited to us, and I am aware of none, which imposes upon the Crown the duty of taking formal legal proceedings on the ground of forfeiture against a grantee, who himself acknowledges by his conduct that a forfeiture has been committed, and proceeds to treat with the Crown on a basis entirely different from that on which the original grant rests. I should, perhaps, add that it clearly results from the case of *Perera v. Samaranayake* [1]—a case turning on the construction of the very grant with which we are here concerned—that the right of the Crown to avail itself of a forfeiture on breach of the second condition is enforceable at any time by the procedure provided by the grant, continuing non-cultivation being a continuing cause of forfeiture.

On the whole, I would hold, first, that the plaintiff-appellant could derive no title through Don Cornelis Appuhamy and Don Simon Appuhamy, in view of the condition of inalienability and the clear evidence that all the circumstances necessary to bring that condition into operation were present; and in the second place, that Don Simon Appuhamy and all the other defendants-respondents who claim under him are estopped from denying the title of the Crown to grant the land to Jayesinghe, of Jayesinghe in turn to dispose of it to Sarnelis Appuhamy, and of the latter to transfer it to the ninth defendant-respondent. In these circumstances, there is no need to consider the other questions raised in appeal No. 35. I would dismiss both appeals with costs.

Appeals dismissed.

[1] *(1872) Ram. 58.*