Present: Mr. Justice Middleton and Mr. Justice Grenier.

1907.
October 15.

UDUMA LEVVAI *v.* MAYATIN VAVA *et al.*

D. C., Batticaloa, 2,786.

Donation to take effect after donor's death—Acceptance—Irrevocability—Testamentary disposition—Roman-Dutch Law.

A deed of donation which is to take effect after the death of the donor and which is accepted by the donee is irrevocable and cannot be treated as a testamentary disposition which must be admitted to probate.

Idagappa Chetty v. Peeri Beebee[1] and *In the Matter of the Estate of Neina Mohammado*[2] followed.

Vaitty v. Jaccova[3] disapproved.

APPEAL from a judgment of the District Judge of Batticaloa (G. W. Woodhouse, Esq.). The facts are fully stated in the following judgment of the District Judge (February 18, 1907):—

"The plaintiff seeks to recover from the defendants twenty-seven head of cattle, admitted to be worth Rs. 200, and Rs. 25 damages. The plaintiff rests his title on the document marked P 1. It purports to be a 'donation deed,' by which one Awwakker Lebbe Aliar Lebbe, 'for and in consideration of the confidence, love, and affection I have towards my son Aliar Lebbe Odoema Lebbe,' donates, assigns, and sets over unto him the seventy-three head of oxen and cows. 'Therefore,' the document proceeds, 'by virtue of this instrument my son, the aforesaid Aliar Levvai Uduma Levvai, shall accept, after my death, the aforesaid seventy-three head of cattle.' Then he goes on to say what shares he is to give certain parties, and winds up thus: 'and he, my son, shall take over his share and possess and enjoy the same as his own property for ever.'

"I think it is clear that, whatever Aliar Levvai chose to call the instrument, it is a testamentary disposition, and the instrument must be proved in a Court of law before it can be given effect to. I have had the original document read to me, and the wording is so clear that no doubt whatever exists in my mind that 'death was the event which was to give effect to the document.' This view of the matter is borne out by the fact that this very plaintiff in D. C., Testamentary, Batticaloa, No. 421, produced and proved an exactly similarly worded instrument, by which the same Aliar Levvai disposed of his immovable property.

[1] (1883) 6 *S. C. C.* 13. [2] (1891) 2 *C. L. R.* 52.
[3] (1907) 2 *App. Court Reports* 45.

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"The words 'donate, assign, and set over' possess no special virtue, nor does the absence of any reference to an intention on the part of the testator to revoke the deed and resume the property make it a deed *inter vivos*, especially in view of the fact that Aliar Levvai retained possession of the cattle until his death.

"I need hardly comment on the burden which lies on our Courts to discourage, where possible, the various devices adopted by people to avoid payment of testamentary and legacy duties. On the first issue, therefore, I hold against the plaintiff.

"It appears that second defendant, who is a minor, resided with the plaintiff for about three years after his (first defendant's) father's death. The plaintiff of course retained the cattle that should go to him. Since the plaintiff omitted to seek the interference of the Court, it must be presumed that when he divided the cattle and gave certain of the legatees their shares he tacitly apportioned second defendant his share of the cattle too, and merely retained them because he had constituted himself his guardian (also, it must be noted, without the interference of the Court). There is nothing in the deed to say that plaintiff should have the use of the cattle until second defendant attained his majority. Then the second defendant went away and lived with first defendant. Naturally he wanted his cattle, and appears to have taken them away. But he appears to have taken more than he should have, and the plaintiff and his men detained six of them. The action seems simply to be the outcome of spite between the plaintiff and the first defendant.

"If the plaintiff could distribute the cattle to the daughters of the deceased without authority of Court, why not to the minor sons by the deceased's last wife?

"I dismiss plaintiff's action with costs. The plaintiff should now take steps to prove the instrument P 1 and take out probate in due course."

The deed of gift referred to by the District Judge was as follows:—

"On the 20th day of February, 1902, I, Awwakker Lebbe Aliar Lebbe of Cattancuddyiroppoo, for and in consideration of the confidence, love, and affection I have towards my son Aliar Lebbe Odoema Lebbe of the same place, hereby donate, assign, and set over unto him the seventy-three head of oxen and cows of the name, colour, brandmarks, age, and other descriptions appearing in the herein attached schedule, also in the list of cattle and certificates Nos. 29 and 30, dated 3rd August, 1901, attested by S. T. Odoema Lebbe, Registrar of Cattle of Chillycodeyaar, in my favour, and also as per report of P. H. A. Ahamado Lebbepody of the 19th instant fixing value of them as Rs. 1,000, subject to the hereinafter described conditions and directions which are to take place after my death.

Therefore, by virtue of this instrument, my son, the aforesaid Aliar Lebbe Odoema Lebbe, shall accept after my death the aforesaid seventy-three head of cattle, and out of them he shall give over in writing to A. Mohamedu Ebraim, A. Awwakker, A. Kumude Lebbe, and A. Aminaummah, children of my second bed, eight head of cattle, as they (the said persons) are now minors, directly they attain their age. Of the remaining cattle, he shall according to our creed divide them at the rate of two shares to the male and one share to the female child, and give over to A. Asiatoumah, widow of Meera Lebbe, A. Kalimatommah, A. Cadesaommah, and A. Ragomatommah (born with him), who are the children of my first bed, in writing, and he my son, this Aliar Lebbe Odoema Lebbe, shall take over his share and possess and enjoy the same as his own property for ever," &c.

The deed was accepted by the donee.

The plaintiff appealed from the judgment of the District Judge.

A. St. V. Jayewardene, for the plaintiff, appellant.

H. A. Jayawardene, for the defendants, respondents.

Cur. adv. vult.

October 15, 1907. GRENIER A.J.—

The principal question argued on this appeal was whether deed No. 1,856, dated February 25, 1902, on which the plaintiff based his title to the several head of cattle described in the schedule annexed to the deed, was a testamentary disposition or a deed of donation. When the deed was first read to us by appellant's counsel I was certainly of opinion that it was in the nature of a last will, and that the appellant could make no use of it until he had taken out probate; but at the close of the argument our attention was drawn to a portion of the deed which clearly showed that the person who executed it and the person in whose favour it was executed regarded the instrument as a deed of donation *inter vivos*, to take effect after the death of the donor.

The presence of clear words of acceptance on the part of the donee indicated beyond all doubt that neither party regarded the deed as containing a testamentary disposition. Possibly, had there not been this clause of acceptance in the deed, there would have been much room for controversy as to its real character. I need hardly say that the Roman-Dutch Law recognizes donations *inter vivos*, which are to take effect after the death of the donor; the gift is a present, one taking effect immediately on due acceptance by the donee, but the possession of the thing donated is postponed till the death of the donor.

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It is manifest that there are no words in this deed from which it may be inferred that the donor had any intention to revoke it and to take back what was gifted at any time before his death. But that really makes no difference one way or the other in view of the attitude which both the parties to it took up at its execution. A donation *inter vivos* is in its nature irrevocable once it is accepted; and in that respect it differs from a last will, which the testator may revoke at any time he likes.

There is nothing in this deed to show that the donor intended it to be other than an irrevocable gift; and this being so, we think the District Judge was in error in regarding the deed as a testamentary disposition requiring probate in order to give it vitality. In the course of the argument we were referred to *Vaitty v. Jaccova* [1] in support of the contention that the deed in question was a testamentary disposition. With much respect for the learned Judge who decided that case, I think he went too far in holding that the deed then before him was a testamentary disposition. To my mind it was, applying the principles of the Roman-Dutch Law to it, a donation *inter vivos*, which was to take effect after the death of the donor.

The principles underlying donations *inter vivos* are so clear that it seems unnecessary to refer to any decided cases on the point, but I would cite *Adagappa Chetty v. Peeri Beebee* [2] and *In the Matter of the Estate of Neina Mohammado*.[3] On the facts, we think that the plaintiffs are entitled to succeed in view of our decision on the law. The plaintiff is entitled to the possession of the animals in question, which are the subject of this action, and the respondents had no right to remove them from his custody.

The judgment of the Court below will be set aside, and the respondents will be ordered to restore the cattle removed by them to the plaintiff, such cattle to remain with the plaintiff until the second defendant attains his majority.

MIDDLETON J.—

I agree that, looking at the terms of the deed No. 1,856, dated February 20, 1902, from the translation at page 27 of the record and the fact that it is signed by the plaintiff, it must be construed as being a donation *inter vivos*, to take effect after death, duly accepted by the donee at its execution, and therefore irrevocable in the eye of the Roman-Dutch Law, which governs us in these matters.

Voet 39, 5, 4 (Mr. Sampayo's translation), *Burge*, vol. II., p. 143, and the decisions reported in 4 *N. L. R.* 288, 6 *S. C. C.* 13, and 2 *C. L. R.* 52 show that this is one of a class of deeds well known in Roman-Dutch Law, as Dias J. said in 6 *S. C. C.* 15.

[1] (1907) 2 *App. Court Reports* 45. [2] (1888) 6 *S. C. C.* 13.
[3] (1891) 2 *C. L. R.* 52.

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I agree, therefore, with my brother Grenier that it is not to be treated as a testamentary document, the revocability of which is an undisputed element in it, and that consequently the judgment of the learned District Judge must be set aside and judgment entered for the plaintiff on the basis proposed by my brother.

Appeal allowed.