1930

Present : **Garvin S.P.J. and Drieberg J.**

WAAS *v.* PERERA *et al.*

417—*D. C. Chilaw*, 8,815.

Donation—Life interest reserved—Gift inter vivos—*Death of donee before donor.*

Where a deed of gift was expressed in the following terms :—

I, ..., have granted, conveyed and set over to them the donees, that I, the grantor, shall not hereafter at any time or in whatsoever manner alter or change the said gift, and besides it is hereby ordained that. after the death of me, the grantor, this gift shall be owned and possessed by them . . . There full power is hereby granted to the five donees and their heirs, assigns, and representatives so as to enable them to possess and enjoy for ever all the right and power which I, donor, my heirs, assigns, and representatives have and hold subject to the aforementioned conditions and agreements.

Held, that the gift amounted to a *donation inter vivos* and that the subject of the gift vested at once on the donees.

APPEAL from a judgment of the District Judge of Chilaw.

Ranawake, for defendant, appellant.

E. G. P. Jayatileke, for plaintiff, respondent.

April 16, 1930. DRIEBERG J.—

By deed (D1) of 1894 Margida Fernando gifted a land to Eusenia Fernando and four others reserving to herself a life-interest. Eusenia died leaving three children, Germanu, Maximian, and Stephen.

Germanu sold his interest by deed (P1) of June 24, 1916, to Juwan Fernando, who sold to the respondent by deed (P2) of July 18, 1918.

The respondent bought Maximian's interests by deed (P3) No. 7,368 of September 4, 1919.

The respondent says that with the consent of Margida the land was partitioned and a divided portion of about 1 rood was allotted to Eusenia. The respondent claims an undivided two-thirds of this portion.

The appellants are the children of Maximian. They say that as Eusenia predeceased Margida the deed failed ; that it was a gift conditional on Eusenia surviving the donor and the condition having failed the gift failed so far as Eusenia was concerned.

The appellants claim by intestate succession from Maximian, and they assumed that Eusenia inherited an interest in the lapsed share from Margida ; but that this is so has not been proved. There is no evidence or averment in the answer of the relationship of Margida to Eusenia. The learned District Judge in his judgment says, apparently on statement of counsel, that the donees were the brother and sisters of Margida, but this would not make Eusenia an heir unless Margida died intestate and without issue, and of this there is no proof.

However, as the respondent had to prove title, an adjudication was sought on the construction of the deed of gift. The material words of the deed are : " I, ..., have granted, conveyed, and set over to them (the donees), by way of gift, subject to the condition and promises," that I, the grantor, shall not, herafter, at any time or in whatsoever manner alter or change the said gift ; and besides it is hereby ordained that after the death of me, the grantor, this gift shall be owned and possessed by them, but shall not sell, mortgage, gift, exchange, or alienate in any other manner whatsoever.

There full power is hereby granted to the five donees and their heirs, assigns, and representatives so as to enable them to possess and enjoy for ever all the right and power which I, the donor, and my heirs, assigns, and representatives have and hold subject to the aforementioned conditions and agreements."

Donations in these terms are frequent and there is abundant authority that they are donations *inter vivos*, and as such the subject of the gift vests at once in the donee and it is only the delivery of the property which is postponed to a later date, and the consequence is that the property is transmitted to the donee's heirs if the donee happens to die before the donor. This was so held in the case of *Fernando v. Soysa*,[1] where property was gifted "as a gift that cannot be revoked at any time for any reason whatever which is to be owned by him after my death".

It is not necessary to repeat the reasons set out in the judgment in *Fernando v. Soysa* (*supra*). The earlier cases in which this has been held will be found in the judgment in *Uduma Levvai v. Mayatin Vava*.[2]

It is sought to give this the same effect as a donation *mortis causa*, and this it clearly is not.

The appeal is dismissed with costs.

GARVIN J.—I agree.

Appeal dismissed.