1919.

Present: Ennis A.C.J. and Loos A.J.

FERNANDO *et al. v.* SOYSA.

117—D. C. Chilaw, 6,011.

Donation to take effect after donor's death—Donation inter vivos—Mortis causa—*Executrix* de son tort—*Widow selling property without joining the children—Debts.*

A gifted a property to B "as a gift that cannot be revoked at any time for any reason whatever, which is to be owned by him after my death."

Held, that was not a donation *mortis causa*, but a donation *inter vivos*.

"A donation *inter vivos* vests at once in the donee, and it is only the delivery of the property which is postponed till a later date; and with the consequence that the donation is transmitted to the donor's heirs if the donee happens to die before the donor."

THE facts appear from the judgment.

Samarawickreme, for the appellants.

A. St. V. Jayawardene, for the respondent.

July 7, 1919. ENNIS A.C.J.—

This was an action for declaration of title to a half of a defined one-fourteenth portion of a land called Davulkurundumukalana. It appears that the land was granted in 1889 by the Crown to one Domino Perera, who divided it into two portions, and sold

the western half on November 24, 1892, to Catherina Fernando. Catherina Fernando divided this western portion into seven portions, and gifted a separate one-seventh to each of her children. The deed of gift to Augustinu is P 2, No. 13,807 of July 28, 1894, and it conveyed to Augustinu for the love and affection she bore towards him, " as a gift that cannot be revoked at any time for any reason whatever, which is to be owned by him after my death. " Augustinu Fernando died before his mother, leaving as his heirs his widow Martha Perera and two children, the first and second plaintiff in the case. Martha Perera on June 18, 1902, joined in a deed with the six surviving children of Catherina, and conveyed to Domino Perera " all the right, title, and interest, which we, the said vendors, and our heirs and assigns, hold. " In the recital, Martha Perera, who was the seventh-named party in the deed, stated that " she was entitled to a share through my husband, and also mentioned in the deed of gift bearing No. 13,807. " In acknowledging receipt of the consideration, the deed, on behalf of Martha Perera, says: " I, the seventh named, received my share for the payment of a part of the amount payable unto the said two Chetties by my above-named deceased husband Augustinu Fernando upon mortgage bond bearing No. 15,014 dated May 7, 1898. " The learned Judge says that this document of 1902 conveyed to Domino Perera the whole of the one-seventh share gifted to Augustinu by his mother, if it conveyed anything at all. But the first issue in the case, which was as to whether the one-seventh gifted to Augustinu formed part of Augustinu's estate, was answered in the negative, on the ground that the gift was subject to the condition that the donee should become the owner after the donor's death, and that Augustinu predeceased his mother, that there was a revocation of the gift in his favour, and no title vested in the heirs. This conclusion is the first point challenged on the appeal. The respondent in this connection cited a passage from *Maasdorp, vol. 3, 9.* This passage was based on *Voet, 3, 5, 3,* and is only a small portion of the paragraph in *Voet.* It was " an incomplete donation is one, which is given with the intention that the thing is not to become the property of the donee until some other event has taken place, or that it is to become his property at once, but is to revert to the donor upon the happening of a certain event. " Voet in *39, 5, 3,* dealing with complete and incomplete donations, says that in the category of incomplete donations are donations *mortis causa* and donations *propter nuptias*, and such like, and in *39, 5, 4,* speaking of donations *mortis causa* and donations *non mortis causa*, he says that all donations *non mortis causa* are called donations *inter vivos*, and adds, " if a man says he gifts after his death, " or the like, he is considered to have made a donation *inter vivos*, and Maasdorp also, on page 90, says that the donation *inter vivos* is one which is not conditional upon the death of the donor, and that a donation would be *inter vivos*, even though mention may be made in

1919.

ENNIS A.C.J.

Fernando v. Soysa

it of the death of the donor. It appears from Voet that a donation *inter vivos* vests at once in the donee, and it is only the delivery of the property which is postponed till a later date, and with the consequence that the donation is transmitted to the donor's heirs if the donee happens to die before the donor. It follows, therefore, that the learned Judge was wrong in deciding the first issue in the negative. The deed P 2 is clearly a donation *inter vivos*. The property vested at once in Augustinu, and was transmitted to his heirs on his death.

The second point urged on the appeal was only touched on indirectly in the judgment, and that is, that the deed D 5 by Martha Perera conveyed the whole of the one-seventh of Augustinu's share, and that it was a *bona fide* transaction made by the widow for the purpose of paying the debt of the husband, and as such, on the principle enunciated in the case of *Silva v. Salman*,[1] was a good sale. It was on this point that the learned Judge appears to have considered that the document D 5 conveyed the whole of the one-seventh. I am, however, not satisfied that the deed can be so construed. Nowhere is it said in the deed that the whole of the lands within the boundary specified were conveyed. Moreover, Martha Perera in setting out her title does not purport to deal with her husband's share, but only that share to which she was entitled through her husband, and, finally when we come to the operative portion of the deed, there also no specific shares are mentioned, but each of the parties to the deed conveys his or her own right, title, or interest in the land. So that, strictly speaking, Martha Perera by this deed did not convey to the purchasers more than the share in Augustinu's estate, to which she was entitled as one of his heirs. But it is urged that she was an executrix *de son tort*. Now, this was the second issue in the case, and the point was raised by the defendants, so that the onus of proof would, therefore, be on the defendant. But on this point there is no evidence of any kind, so that the issue must be answered in the negative. As I have pointed out also, the deed itself does not create any inference that the widow dealt with any more than her own share in the land. As the plaintiffs were minors until June 20, 1914 and June 30, 1913, no question of prescription against them can possibly arise. Counsel for the parties have agreed on damages at the rate of Rs. 100 per year. I would set aside the decree, and enter judgment for the plaintiffs as prayed, with damages as agreed with costs both in the Court below and on the appeal.

LOOS A.J.—I agree.

Set aside.

[1] *(1916) 19 N. L. R. 305.*