

1944*Present: Keuneman J.*

TISSERA, Appellant, and WILLIAM, Respondent.

235—C. R. Panadure, 9,121.

*Donation—Donee in possession of property—Claim by donor's heirs—
Exceptio doli.*

A donee, who is in possession of property gifted to him may avail himself of the *exceptio doli* when he is sued by the donor or by any person claiming under him.

¹ *13 N. L. R. 264.*² *29 N. L. R. 411.*³ *(1904) A. C. 179.*

A PPEAL from a judgment of the Commissioner of Requests, Panadure.

G. P. J. Kurukulasuriya for plaintiff, appellant.

L. A. Rajapakse, K.C. (with him *D. Abeywickreme*) for defendants, respondents.

Cur. adv. vult.

June 13, 1944. KEUNEMAN J.—

The facts of this case are as follows:—The premises in question belonged originally to Dona Agnes Hamine, who mortgaged the property on December 15, 1929, by Mortgage Bond 1305 to Babunhamy. Thereafter Dona Agnes Hamine and her husband Marthelis Tissera by deed D 1, No. 1,351 of July 21, 1930, donated the premises to their daughter, the second defendant, and her husband, who entered into possession of the premises. The donation was made in consideration of natural love and affection for the second defendant, and also in consideration of the marriage which was shortly to be solemnised. Thereafter Babunhamy put the mortgage bond 1,305 in suit and purchased the property himself by P 1, No. 1,449 of November 1, 1935. We may take it that the title of Dona Agnes Hamine was thus determined. But Babunhamy by deed P 2—No. 1626 of November 10, 1936—transferred the premises to Marthelis Tissera, husband of Dona Agnes Hamine, and one of the donors in D 1.

Marthelis Tissera died thereafter, leaving his widow, Dona Agnes Hamine and several children including the plaintiff and the second defendant. Dona Agnes Hamine by deed P 3, No. 571 of March 29, 1941, purported to transfer a half share of the premises to the plaintiff who now sues the second defendant for this as well as for the inherited share from Marthelis Tissera.

The only issue which has been determined in the case is issue 9: “Does the purchase by Marthelis Tissera on deed 1626 of November 10, 1936 (P 2) accrue to the benefit of the defendants?”

The learned Commissioner decided this issue in the affirmative. Counsel for the appellant argued that under this issue the Commissioner has utilized the *exceptio rei venditae et traditae*, and that this exception is not applicable to the case of a donation. Certainly no authority has been cited to me to show that this exception applies in the case of a donation, nor am I satisfied that a donation of this kind can be regarded as a sale.

Voet (*XXXIX 5, 10*) dealing with donations states as follows:—“When a donation of all one’s property is made simply, without any express mention of future property, it is the better opinion that the donation is understood to be of the present property only and not of future property also, first because . . . in case of doubt the presumption should not be in favour of a donation, secondly because a donation is *stricti juris* and on that account should receive a stricter construction so as to burden the donor as little as possible . . . and lastly because with regard to legacies also the same rule of interpretation is applied, viz.,

that in the case of doubt present property only and not future property is included therein". See *Voet's Commentaries, de Sampayo's Translation, p. 15*).

But even if this particular point is decided in favour of the appellant, I do not think it is the end of the matter. Voet (XXI 3, 2)—see *Berwick's Voet, 1902 edn., p. 544*—points out that while the purchaser still possesses the thing and the same persons that are liable to be sued by him bring an action to evict the property from him, he may repel the vendor and other like persons either by the *exceptio rei venditae et traditae* or by the *exceptio doli*.

As regards the latter plea Voet states that "One acts dishonestly who tries to evict a thing sold by himself and to stultify his own act; equity dictating that a plaintiff should be all the more liable to be repelled by an equitable plea (*exceptio*) when he is himself liable to be sued on account of the eviction." Berwick's note makes it clear that not only the vendor but those claiming under him, such as persons to whom he has subsequently sold the land, can be repelled by this plea.

Can the *exceptio doli* be raised by a donee? *Perezus on Donations 8.54.14* (Wickramanayake's Translation, p. 10) states as follows:— "Nor can the property of another be effectually gifted inasmuch as it can be recovered and the ownership therefore is not acquired by him to whom the gift was made . . . wherefore if a father donates the property of his son, the son can lawfully claim it back unless he is the heir of his father, for if he succeeds to his father and wishes to claim back the property gifted from the other man he will be repelled by the *exceptio doli mali*".

This is not the identical case we are considering, but I think the present case is stronger. Here Marthelis Tissera had no title at the time he donated. He subsequently obtained title. If he had brought the action, I think he could have been repelled by the donees in possession by virtue of the *exceptio doli*. I think the same fate must befall the plaintiff who claims under Marthelis Tissera.

I may add that the case of *Don Mathes v. Punchihamy*¹ deals with a different state of facts. There the original owner Siman, who had title only to a fractional share gifted the whole property to the plaintiff. Thereafter Siman acquired title to the remainder of the property. Plaintiff who had not obtained possession sued for the whole property, but his title was only upheld to the fractional share which Siman had at the date of the gift. Clarence J. added that "the conveyance being merely a voluntary one, we are disposed to think that Siman's subsequently acquired title cannot be availed of by the plaintiff, and that the plaintiff must take the subject-matter of the gift as it stood at the date of the conveyance". With respect I agree with this decision. But there is a considerable difference between the rights of a plaintiff in a case and those of a defendant in possession, and I am of opinion that a defendant in possession can avail himself of the *exceptio doli*.

The appeal is dismissed with costs.

Appeal dismissed.

¹ *Wendt's Reps. 122.*