1872.
November 19.

KANNAPPEN *v.* MYLIPODY.

D. C., Batticaloa, 16,836.

Donation—Alienation of property with intent to defraud creditors—Grounds necessary for setting aside a deed of gift.

Under the Roman-Dutch Law acts of munificence are valid though prompted by an *inhonesta affectio* as *circa meretrices* equally with acts of munificence inspired by an *honesta affectio* as *erga bene merentes amicos ;* but the Civil Law, in order to protect creditors, has in effect provided that alienation by gift may be set aside when a man gives away the whole or a considerable part of his estate knowing that he is insolent, and that he is diminishing the substance out of which his debts might be paid.

He who acts thus will be considered to have intended the natural result of his acts, which is the defrauding of his creditors. And in such a case fraud on the part of the donor is sufficient to invalidate the donation, though the donee had no knowledge of the fraud or of the circumstances whence it is inferred.

But neither a donation nor a sale would be considered fraudulent if the donor or vendor were solvent at the time he made it, and if their disposition had not caused him to cease to be so. It is only when the property retained by the donor proves insufficient to meet the claims of creditors that they can follow the property which has been injuriously gifted away by him.

THE plaintiff averred that he obtained judgment against the estate of the late Kandapodi in cases Nos. 1,106 and 1,107 in the Court of Requests in Batticaloa and caused one-half of a certain land of his to be seized for sale in execution, but that defendants unlawfully opposed the sale on the 2nd August, 1871. Wherefore he prayed that their opposition to the sale may be set aside, and the land declared liable to be sold under the two writs above-mentioned.

The defendants denied that the undivided half share was the property of Kandapodi, and justified their opposition under a deed of gift dated 17th October, 1868, granted by Kandapodi to the defendants.

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On the trial day the parties were examined, but they called no witnesses. The District Judge's judgment appeared to rest upon facts gleaned from the statements of the plaintiff and the second defendant and the Court of Requests case books Nos. 1,106 and 1,107, but the facts themselves were nowhere expressly stated in his judgment or in any other part of the record. His judgment was as follows :—

" Neither party calling witnesses, the Court gives judgment for " plaintiff upon the arguments raised, it being quite clear that the " deed of gift could not exempt the land donated from liability to " plaintiff's claim as for a debt in existence at the date of gifting.

" The question of necessity for proof of fraud having been raised " by the defendants' counsel, the Court decides that such proof is " not necessary, since whether the gift were fraudulent or not, the " donation is liable to plaintiff's claim.

" It is therefore decreed that the land in question is liable to be " sold in execution under writs Nos. 1,106 and 1,107. Defendants' " opposition being set aside, they must pay all costs."

Defendants appealed.

Dias, for appellants.

Grenier, for respondent.

Cur. adv. vult.

19th November, 1872. The judgment of the Supreme Court was delivered as follows by CREASY, C.J. :—

The plaintiff in this case states that he is a judgment-creditor against the estate of Kandapodi, and he prays that certain land should be declared the property of Kandapodi and liable to be sold under his (the plaintiff's) writ, and that the opposition made by defendants to the sale should be set aside.

The defendants plead that they are owners of the said land and they annex a deed of gift of the said land dated 17th October, 1868. This deed purports to give the land to the defendants. They are required by it to deliver the produce to the donor during his lifetime : after his death they are to possess it according to their pleasure ; the deed says " for ever," but it gives estates in remainder after their deaths. One of the defendants is the nephew of the donor ; the other, at the date of the deed of gift, was living with him as his wife, but was not married to him.

The plaintiff replies that the said deed of gift was a fraudulent transfer.

At the trial two Court of Requests cases were put in, being the cases brought by plaintiff against the representatives of Kandapodi in which he obtained judgment.

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The parties were also examined at the trial, but no witnesses were called. From the pleadings, from the Court of Requests cases, from the deed, and from the examination of the parties we learn that the plaintiff was a creditor of Kandapodi's to the amount of £9. 2*s*. 6*d*. on two bonds, both of which had been granted for consideration by Kandapodi to the plaintiff before the deed of gift to the defendants. It also appears that at the time when the bonds were made to plaintiff Kandapodi had other property, besides the land subsequently gifted to defendants. The precise value of that other property does not appear, but it was clearly much more than the amount of Kandapodi's debt to plaintiff, and there is no proof that Kandapodi owed any other debts. It does not appear that Kandapodi had parted with any of that other property in the interval between his giving the last bond to plaintiff and his making the deed of gift to defendants.

The issue which the parties were to try was clearly as to whether the deed of gift was or was not fraudulent and void as against plaintiff, who was a creditor for value at the time of its execution.

The District Court has given no judgment whether the deed was fraudulent or not, but has held the donation to be in any event "liable to plaintiff's claim," and has therefore given judgment in favour of the plaintiff.

We think this judgment erroneous. We hold that the deed could not be successfully impeached, unless it were shown that Kandapodi, in gifting away this land, defrauded his creditors; and we think that not only is this left unproved, but that there is proof the other way, and consequently we should not be justified in sending the case back for further hearing.

The District Judge seems to have held absolutely that if a man owes any debt at all he cannot make any valid gift at all, but the property which he affects to give away will always be liable to the claim of the donor's creditors. If this be true, a man with thousands of pounds cannot make a perfectly valid gift of property worth a five-pound note, if he happen at the time to owe that amount to his tailor or any other of his tradespeople. But there is no such absurdity in our law. The authorities cited in support of this theory are, first, a case in *Austin, p. 23.* On examining that case it appears that there were many special circumstances in it. The claimant under the alleged donation had allowed the land to be sold by the executors, and had himself been a bidder at the sale without saying a word about this deed of gift. Moreover, for all that appears in the report the gift might have been extended to the bulk of the donor's property. It is not surprising that under such

circumstances the donee's claim was dismissed with costs. The other authority cited is a passage in *Thomson, vol. I., p. 345*, which is founded solely on this case in *Austin*, and has no weight beyond it.

Dismissing the general proposition that gifted property, whether small or great, remains always liable to creditors, whether the debts were small or great, we are by no means obliged to adopt the equally monstrous theory that all gifts are valid as against all creditors; and that a man in a state of insolvency may cheat all who have trusted him by giving away his estate or even any considerable part of it. The Roman-Dutch Law will be found to follow a just and equitable middle course between extremes.

In the present case, as in a Jaffna case decided by us this morning (D. C., Jaffna, 20,463, reported *supra* at *p. 271*), sufficient attention has not been paid in the Court below to the Roman Law *De Donationibus*.

We pointed out in the Jaffna case the generally full liberty given by that law to a man in the gratuitous exercise of munificence, and we showed how acts of munificence are valid though prompted by an *inhonesta affectio* as *circa meretrices* equally with acts of munificence inspired by an *honesta affectio* as *erga bene merentes amicos* (see *Digest, XXXIX., tit. 5, section 5*). A copy of that judgment is annexed to the present judgment, and may be referred to as part of it. But besides the points common to this case and the Jaffna case, we have here to consider the effects of the provisions in the Civil Law to protect creditors. They are chiefly contained in the *Digest, XLII., tit. 8, "Quæ in fraudem creditorum "facta sunt, ut restituantur."* They are commented on by *Voet, p. 682* of his second volume, and by *Burge, vol. III., p. 605*. See also *Voet's Commentary on book XXXIX. of the Digest, tit. 5, sections 6, 19, and 2.*

Their effect, so far as is material to the present case, may be stated thus:—An alienation by gift may be set aside when a man gives away the whole or a considerable portion of his estate knowing that he is insolvent and that he is diminishing the substance out of which his debts might be paid. He who acts thus will be considered to have intended the natural result of his acts, which is the defrauding of his creditors. And in such a case fraud on the part of the donor is sufficient to invalidate the donation, though the donee had no knowledge of the fraud or of the circumstances whence it is inferred. *"Si cui donatum sit, "non esse quærendum an sciente eo cui donatum gestum sit sed hoc "tantum an fraudentur creditores? nec videtur injuria affici "is qui ignoravit quum lucrum extorqueatur non domnum infli-"gatur"* (*Digest, XLII., tit. 8, section 6*).

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But in the present case the first element necessary for restitution on account of fraud is wanting.

Kandapodi was not insolvent at the time of the deed of gift, nor did the gift leave him insolvent.

Burge says expressly as to this :—" Neither a donation nor sale " would be considered fraudulent if the donor or vendor were " solvent at the time he made it, and if their disposition had not " caused him to cease to be so." It does not even appear that Kandapodi ever became insolvent, or that his estate in not perfectly solvent at the present time without having recourse to the land in question ; and it would seem from *Voet's Commentary on Digest XLII., tit. 8, section 1*, that it is only when the property retained by the donor proves insufficient to meet the claims of creditors that they can follow the property which has been injuriously gifted away by him.