1872.
December 3.

SUPRAMANIAN CHETTY *v.* GUNEWARDENE *et al.*

D. C., Matara, 26,193.

Deed of gift—Fraud on creditors—Donor in possession of property gifted—Solvency of donor—Gifting away all property belonging to donor—Secret execution—Effect of registration as disproving secrecy—Evidence of conspiracy against creditors.

Neither a donation nor a sale would be considered fraudulent if the donor or vendor were solvent at the time he made it; but the gift by a solvent person of the whole or of the bulk of his property made deliberately intending to contract debts with people who might believe him to be still the possessor of that property, and so to defraud them, should be held to be a fraudulent transaction.

The prompt and regular registration of a deed of gift is a circumstance which shows that the gift was not fraudulently made, inasmuch as it removes secrecy, which is the usual badge of fraud, and affords every opportunity for any party to ascertain that the property gifted by it has passed from the donor to the donee; and the fact of a donor remaining in possession with his children of a part of his property gifted by him to them, taking some of the nuts of the land, does not prove that the family were living in a state of conspiracy against creditors.

THIS action was raised by the plaintiff to have a deed granted by one Pugita Gunewardene to the defendants set aside as a fraud on the creditors of the grantor. Plaintiff alleged that he obtained judgment against the grantor in suit No. 24,086; that he caused the Fiscal to seize a garden called Battalawatta as the property of his judgment-debtor; that the first, second, and third

defendants, who are the sons of the grantor, and the fourth and fifth, who are the sons-in-law of the grantor, claim the land as theirs by virtue of the deed of gift above-mentioned. Plaintiff prayed that the deed may be set aside, and the land in question declared liable to be sold under his writ No. 24,086.

Defendants pleaded that their claim was good under the deed of gift and was not fraudulent. On the evidence led the District Judge found that the grantor was not heavily indebted, nor were all his properties gifted ; that the debt in question was not incurred till nearly two years had elapsed since the date of the deed of gift and that though the donor was in possession of the land gifted, yet such possession was with the permission of the donees. He therefore dismissed the plaintiff's case.

Plaintiff appealed.

Cayley, Q.A., for appellant

Cur. adv. vult.

3rd December, 1872. CREASY, C.J., delivered the judgment of the Court as follows :—

The distinct and sole issue in this case was whether (as alleged in the words of the libel) " the deed of gift was a fraudulent one got up for the purpose of defrauding creditors." The pleadings did not raise the question whether at the time of the plaintiff's execution there was not other property of the donor's to which the plaintiff ought to have resorted before he levied on the land which was the subject of the gift. The affidavits now tendered by the plaintiff apply to this irrelevant question, and have only a very remote bearing on the question, whether the donor at the date of the gift several years before had any other property, which last-mentioned question might certainly affect the inquiry as to the donor's motives when he gifted away this particular land.

The date of the gift of this land is 8th December, 1866. One of the donees personally accepted it on behalf of all ; on the 31st of the following month they all registered the deed of gift in the Registrar of Lands' Office for their district. This is a very important fact, and has weighed much with us in determining this case.

The plaintiff did not become a creditor of the donor until 14th November, 1867, when he lent him some money on a promissory note.

We entered very fully into the law as to donations in two judgments delivered by us during the present sittings in D. C., Batticaloa, 16,836 (reported at p. 274, *supra*), and in D. C., Jaffna, 20,463 (see p. 271 *supra*). In the first-mentioned judgment we cited a passage from

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Burge, vol. III., p. 607, that "neither a donation nor sale would "be considered fraudulent if the donor or vendor were solvent at "the time he made it, and if the disposition had not caused him "to cease to be so." Now it does not appear that the donor in the present case owed any man anything at the time of this deed of gift (we will mention presently what we consider to be the true sense of a certain phrase in the deed of gift, which might be quoted as implying indebtedness). The present plaintiff certainly did not become a creditor till nearly a year afterwards, and he is the only creditor whom we hear of. Unquestionably, if it were clearly proved that a deed of gift of the whole or of the bulk of his property had been made by a man solvent at the time, but deliberately intending to contract debts with people who might believe him to be still the possessor of that property and so to defraud them we should hold such a transaction to be fraudulent and void. But this does not appear to be a case of the kind. So far as the evidence goes (irrespectively of the list of property afterwards signed by the plaintiff, and as to which his affidavits are tendered), the deed did not gift away all the donor's property; and (what is most important of all) is the fact that the deed gifting this property was promptly and regularly registered by the parties, so that any one who chose could ascertain the fact of this deed's existence and of the land having passed by it from the donor to the donees. Secrecy, which is the usual badge of fraud, is proved not to have been practised on this occasion.

If the plaintiff had been a creditor at the time of the deed of gift, this would have been to a great extent immaterial; but it is very important when we have to consider whether the donor intended to trap and defraud future creditors by pretending to be still owner of the land.

It is said that the donor continued to be in possession. But it seems to us that the children, the donees, had possession; and the fact that the donor, their father or father-in-law, continued to live on part of the land and sometimes had some of the fruits of the land does not prove that the family were living in a state of conspiracy against creditors.

It is urged that the father, the donor, held himself out to the world as continuing owner by giving a certain notice to the District Road Committee about opening a road over this land. But when the whole passage of the examination is read, and when it is remembered that this was a hostile examination, during which words are almost put into a party's mouth without there being any opportunity for him to explain them, there seems to be little force in this objection. The defendant said: "I

"remember the District Road Committee opening a road over "this land after the gift deed. My father-in-law gave Mr. Liesching "notice of action; we took steps in the matter." Here, again, the fact of the registration of the deed is most important. The donor and his family could not expect that the execution of this deed would remain unknown to the authorities if any litigation about this land ensued.

It is also urged that the peculiar phraseology of this deed, where it speaks of the land not being liable for the donor's debts, shows a fraudulent intention, and also that the donor could have had no honest intention in gifting the lands to these five donees, inasmuch as after the donor's death it would have become theirs by inheritance without the necessity of any deed.

These arguments deserved and have received consideration, but a careful examination of the special clause of the deed in question has by no means satisfied us that the donor framed it with a design of defrauding his creditors.

We will cite the material parts of the deed. The father and mother appear in the deed as donors. They give the land to be possessed as follows: "to be possessed by our said five children "according to the manner appointed by us from generation to "generation; and have agreed that the shares of the said Battala-"watta or Gedarawatta may be possessed by the said five children "or their heirs; and in case if any of the said persons happen or "their heirs happen to die having no issue, their shares should "devolve on the surviving persons or their heirs, and no person "becoming possessed of any tree or ground of said land can sell, "gift over, mortgage, or lease beyond a term of five years; "besides these restrictions after this our gift, this land cannot be "subjected to any for our debts, or that of those who is to be the "owners hereafter, or securities, or fines of Government or the "public, neither can it be sold under a writ; besides of the five "persons who obtain this gift, should there happen not to survive "any person by blood relationship, it should then revert to the "then reigning Government, and cannot happen otherwise."

It seems to us that this donor's great object was to create an entail of this land, so that it should continue to belong to his family without the possibility of any part of it being alienated or encumbered or taken away from them. He winds up by making an ultimate remainder man of the Government, as if he thereby secured what we should call an effective protection of the settlement. Whether the donor was a good conveyancing lawyer or not, matters nothing. But we think it clear that the desire of leaving an inalienable and thoroughly secured family estate,

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the desire that has been so common in all nations and all ages, was the ruling idea in the mind of this Sinhalese landowner. He wished seemingly to have the satisfaction of feeling that he was the founder of a family, and to have that satisfaction at once. His mention of " our debts " among the things that were not to affect the entail does not argue a consciousness of insolvency or a design to become insolvent, but is no more than the expression of a purpose that the land should not, like the rest of his estate, be subject to contribution for any liabilities which he might be under at his death, but that it should pass at once intact as family property, and that it should remain intact to support the family as long as any of the family existed. Whether he was not assuming entailing powers beyond the limits of law is immaterial; the question is whether he made the gift for the purpose of defrauding his creditors and that does not appear to have been the case.