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SOYSA *v.* WEERASURIYA.

D. C., Galle, 4,775.

Dowry from father to daughter—Gift to her by deed in pursuance of last will of parents—Merger of gift in inheritance—Insolvency of father—Power of administrator to sell immovable property for debt of testator—Irregularity of order of Court granting leave to sell—Right of creditors of the father to sell the land gifted, for payment of his debts.

W and G made a joint will in 1887, in which, after making certain bequests, they directed that "the immovable property belonging to their estate should devolve on their daughter J." After G's death, W made a deed of gift in favour of J, conveying certain lands which the testators had intended to give her, but the donor was to remain in possession of them till his death, and he reserved to himself the power of selling them, should circumstances compel him. W died in 1893, without revoking the will or exercising the power of sale under the deed of gift.

S, having been appointed administrator of W as regards the properties acquired by W after C's death, obtained the leave of Court to sell the intestate's property for the payment of his debts, but the order granting the leave did not specify the property to be sold. S sold to A a part of the property gifted by W to J.

In an action brought by A's vendors against J and her husband who were in possession of the land in question,—

Held, per BONSER, C.J.—That the sale by the administrator to the plaintiff's vendors could not be supported, as the order granting the leave to sell did not specify the property to be sold, and the sale was grossly mismanaged by the administrator.

The administrator put up Kittanduwebedde to public auction on 2nd June, 1894, but so grossly was the sale mismanaged that, although the property had been valued in the administrator's inventory at Rs. 10,000, he allowed it to be sold for Rs. 650. A conveyance was executed by the administrator to the purchasers, who were relations of his, on the 29th of June, and they on the 1st September following sold and conveyed the property to plaintiff, who is a connection by marriage of the administrator, for Rs. 1,000. The plaintiff himself in his plaint values the property at Rs. 5,000. Such a transaction as this should be very closely scrutinized, and ought not to be supported except on the strictest proof that it is in every respect in accordance with law; and no intendment should be made in its favour. I venture to think that it would be a serious blot on the administration of justice in this Island if we are obliged to uphold this transaction.

Held, also (MONCREIFF, J., and BROWNE, A.J., disagreeing), that so long as the deed of gift stood unreduced by a decree in a Paulian action, the administrator could not convey title to A; and that the only persons who could sue to recover property given in dowry are the creditors of the donor.

Held further, that a creditor could not sue a daughter, who had abstained from her father's inheritance, to make her dowry liable to pay her father's debts, except when the dowry deed was made in fraud of creditors, and that there was no evidence to show that the daughter in the present case had accepted her father's inheritance.

It is doubtful whether under our law it is possible to accept an inheritance in the sense in which that phrase is used in the Roman and Roman-Dutch Law seeing that the English Law of Executors and

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Administrators prevails in the island, and the Roman-Dutch Law of inheritance so far as it is inconsistent with that law is no longer in force.

Per MONCREIFF, J.—When a daughter accepts her father's succession and the estate of her father is insufficient to meet his debts, property given to her by way of dower by her father in his lifetime is available for administration.

It is true the remedy belongs to the creditors, but the administrator who was sued by them was justified in admitting and acting on their claim.

BROWNE, A.J.—Whether the gift is considered as merged in the inheritance or as invalid, it is open to the administrator, when the donee becomes liable to be called on to surrender the asset, to sue for it; or if a buyer is willing to undertake the burden and cost of the necessary litigation, to sell the asset to such person and leave him to vindicate the asset, as the plaintiff has done in the present case.

THIS was an action *rei vindicatio*. In appeal, Justices WITHERS and BROWNE affirmed the decree of the Court below in favour of the plaintiff. The defendants brought up the case in review before BONSER, C.J., and MONCREIFF, J., and BROWNE, A.J., preparatory to an appeal to the Privy Council.

The facts of the case are as follows:—

One A. T. Weerasuriya and his wife Gimara Hamine made a joint will on 4th January, 1887, in which, after referring to the settlements already made on their two married daughters, they directed that the immovable property belonging to their estate, including high and low lands, gardens, houses, &c., should devolve on their unmarried daughter Jane Marie. The testatrix died on 9th August, 1888. The testator acquired title to the land in dispute, called Kittanduwebedde, consisting of about 29 acres, after the death of the testatrix by deed dated 16th February, 1889, He died on 1st July, 1893, without having revoked his will or renounced any benefit under it. Letters of administration were granted to one Samaravira on 23rd February, 1894 (in Testamentary Case No. 3,028), in respect of property acquired by the testator after the testatrix's death, and which did not form part of the common estate disposed of by the joint will.

About three years after the death of the testatrix the testator executed a deed of gift dated 21st November, 1891, in favour of his daughter Jane, which contained the following recital:—

"Whereas my daughter Jane, &c., was married to, &c., and at "the said marriage, according to native custom, no dowry in "landed property was given, although in the lifetime of my "beloved wife her desire was that certain properties appearing "in the schedule hereafter annexed should be given; now, as I am "desirous of fulfilling her wish, I hereby, by a formal deed, "convey the premises appearing in the schedule aforesaid;" and

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then the donor proceeded to "convey and assure as a donation, "*inter vivos*," to his daughter Jane "all the premises appearing in "the schedule hereafter mentioned, which are valued at Rs. 10,000, "to have and to hold the same," &c.

The schedule included portions of two gardens and "the Bright-"sun estate wherein I reside, together with all the buildings, soil, "plantation, low and high lands, and fields thereof, situated at "Hikkaduwa, Gonapennewella, and Ratgama Totawila, in the "Wellaboda pattu of Galle; bounded on the north, &c." The donor reserved to himself the right of possessing the properties till his death and of selling them if circumstances compelled him.

By deed dated 29th June, 1894, Samaravira, the administrator, who had the leave of Court to sell the intestate's property for the payment of his debts, sold Kittanduwebedde to Arthur Weera-suriya and Abanchia, and they sold it to Peter Soysa on 1st September, 1894.

Peter Soysa came into Court on the 3rd September, 1897, and sued for the recovery of Kittanduwebedde, which he averred was in the unlawful possession of Jane Weerasuriya and her husband, the first and second defendants.

It was contended for the defence that this property was included in the deed of gift and formed part of Brightsun estate, and that the administrator could not convey it over again to the plaintiff's vendors.

The District Judge (Mr. F. J. de Livera) entered judgment for plaintiff in these terms:—

"The question now arising for decision is, who has a better title, plaintiff as purchaser under the administrator, or first defendant as donee under her father, the testator. In the absence of anything like fraud in the sale of the land to plaintiff's vendors, it seems to me plaintiff has a superior title. No fraud on the part of the administrator has been proved.

"Let a declaration of title be entered in plaintiff's favour, with costs, subject to the payment of any compensation which the plaintiff may be ordered to pay to the defendants for any improvements made by the defendants."

Defendants appealed.

The case came on for argument before Justices WITHERS and BROWNE on the 24th July, 1899.

Wendt (with *Van Langenberg* and *Schneider*), for defendants, appellant.

Dornhorst, for plaintiff, respondent.

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16th August, 1899. WITHERS, J. (after setting forth the facts of the case and considering the question of the meets and bounds of Brightsun estate), said:—

If, as a fact, Kittanduwebedde is situate within the limits of what in the dotal deed is described as Brightsun estate, that seems to me to settle the question. If it is not situate within those limits, then it was never conveyed to the first defendant. If there is any doubt on this point the point must be settled, after further inquiry. But, if it is situate within those limits, why should not the settler call it Brightsun estate, and give it to his daughter? It was his at the time to give. The document, to my mind, is quite free from doubt. The schedule is incorporated in the conveyance, and the description in the schedule is as clear as words can make it.

If then the testator disposed of Kittanduwebedde in his lifetime, it formed no part of his estate which the administrator could deal with, unless the testator's assets were insufficient to satisfy the creditors of his estate. I thought there was room for argument that the donee was estopped by his conduct from saying that the administrator had no right to sell the property, and I said so. But this point was not taken in the Court below, and I do not think that any estoppel has been made out. To be effective, indeed, it should have been pleaded or settled as an issue.

The ground taken by the District Judge is that the voluntary gift must yield to the official sale.

This raises an important and difficult question. Is a dower by a father to his child in the same category as property acquired by a lucrative title, and such as must be given up to creditors of an insolvent estate? I think not, unless the daughter succeeds to her father's estate.

Voet, 23, 3, 15, says, that it is the duty of parents to dower their children. The father in giving a dowry to his daughter was fulfilling a recognized obligation.

However, in *lib. 42, t. 8*, § *6*, the same author says, that a daughter who abstains from taking up her father's estate cannot be forced to give up her dower to her father's creditors, unless it be proved that he dowered her in fraud of his creditors. But it seems that the first defendant did take under the joint will of her parents what formed the common estate at the date of the mother's death. This included Brightsun estate, as distinguished from Kittanduwebedde. Therefore, in my opinion, Kittanduwebedde was available for her father's separate estate creditors, if his other assets were not sufficient to satisfy their claims. That

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was one of the issues expressed in different terms, which the District Judge has not decided.

If Kittanduwebedde had to be sold for Mr. Weerasuriya's debts, then I think the judgment should be affirmed to that extent.

But another important issue was settled at the trial, which the District Judge has not determined, and that is this. If it is held that plaintiff is entitled to the land, are defendants entitled to compensation, and, if so, how much? This point was not discussed at the argument, and I think we ought to hear counsel on that point.

Since the above was written, we have had the advantage of hearing further argument on the proposition of Roman-Dutch Law to which I have referred above. Assuming the proposition to be true, it was argued by Mr. Wendt that the widower took old Brightsun estate as it was in the joint will, and made a present of it by his dotal deed to his daughter. Hence, it must be regarded as a gift, and not as a devise. and therefore not available for either the creditors of the joint estate or the creditors of Weerasuriya's separate estate, unless it can be shown, which has not been shown, that the dotal deed was made in fraud of creditors. This argument was met by Mr. Dornhorst in this way. He contended that, as Weerasuriya took the benefit of a life interest in the devises made by the joint will, and confirmed that benefit in his dotal deed, he could not affect the operation of the joint will by giving the devises to his daughter, subject to his life interest in those devises. I prefer to consider the acceptance of the gift of what remained of the parental common estate as an acceptance by the daughter of the benefits of her parents' joint will.

I think we must take it that the first defendant has accepted her inheritance under the joint will, and that, unless other reasons are given why she should not yield Kittanduwebedde for the benefit of her father's separate estate creditors, the plaintiff's purchase must be assured to him.

It was, however, argued that the sale by the administrator was not valid and effectual. because it had not been made with the leave of the Court, or rather under the conditions imposed by the Court when it sanctioned the sale of the intestate's property for the benefit of the intestate's creditors. The condition imposed by the Court was that thirty days' notice should be given to the heirs before any particular property was sold. It would appear that the administrator did not comply with this condition in the first instance, for on reference to the testamentary proceedings it

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will be seen that on the 24th April, 1894, the then District Judge of Galle "discharged the notice," as it was insufficient. But the sale of this property was re-advertised on the 28th May, 1899, and I must assume, unless the contrary is shown, that due notice was given by the administrator in compliance with the orders of the District Judge. The contrary not having been shown, we must conclude that the sale in June, 1894, was in order.

Then it was argued that there was no proof of the necessity for the sale, but the Court below having given leave to the administrator to sell the property of the deceased Weerasuriya, it must be taken for granted that the Court was satisfied of the necessity for a sale.

There being no material for deciding whether the defendants are entitled to retain Kittanduwebedde until their *impensæ* have been repaid them. they should have an opportunity of adducing evidence on the fifth issue made by Mr. Van Langenberg, and accepted by the Court below, if they so desire it. If they do not desire to proffer on this issue, the judgment will be affirmed. The case will go back to the Court below with this intimation.

BROWNE, A.J.—

Throughout the argument of this appeal before us, it appeared to me that there were two principles which we should seek severally to guard in their fullest effect, and, if they conflicted, to seek, if possible, to harmonize. One was that the intention of the testators and especially the testatrix made at the date of their will when their solvency was unquestionable should be carried into effect to ensure to defendant a benefit equal to that which her sisters had been given. The other was to see the creditors of the testator of later date paid to the full their claims against his estate.

I desired to regard the joint will, under which the husband took benefit, as a fixed settlement upon the defendant of the capital of all her parents' estate at her mother's death, and that the creditors should not be allowed to resort against it, except to the extent of what might be found to be extant at his death of the life interest of the father therein. But it was only just to the creditors that all his sole estate of his widowerhood should pay its liabilities ere it was applied to purposes of generosity.

It might be that the doctrines laid down in 16,836, D. C., Batticaloa (*Rámanáthan, 1875, 69*), if carried out to their full extent, might benefit the defendant to the prejudice of those creditors, if it were shown that the father was solvent when he donated any of

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his after-acquired property to defendant ere he incurred the liabilities to his creditors. But when any such question should arise between the heir or donee and the creditors, I would be disposed to regard the onus of proof to be on the former, for though the onus of proving fraud in the gift lies on those who assert it, the paramount principle should be held to be that of the necessity for a man's being just, before he was generous. And granted that here the dates of the incurring of the liabilities proved was subsequent to that of the gift deed, I consider it not impossible that the deficiency of the estate thereby evidenced may have had its origin in the acquirement or the development of the after-acquired property, and so to be properly chargeable against it till the donee should prove the contrary.

In the present instance, we have to consider the contention only in regard to such after-acquired property of the intestate estate of the father, and I, therefore, agree in the order proposed.

Preparatory to the judgment thus pronounced by the Supreme Court being taken in appeal to the Privy Council, the defendants brought up the case in review before the Collective Court.

In review, *H. A. Jayawardena* appeared for the appellant.

Sampayo and *Peiris*, for respondent.

Cur. adv. vult.

15th October, 1900. BONSER, C.J.—

This is an action *rei vindicatio*, pure and simple, The plaintiff seeks to recover, as being the true owner thereof, a piece of land known as Kittanduwebedde, of which the defendants are in possession. In order to succeed, he must prove that the legal title is in himself.

It is common ground that this property belonged to one A. T. Weerasuriya, who died on 1st July, 1893. He had, with his wife who predeceased him, and with whom he was married in community, made a joint will of the common property. After her death he acquired other property. As he died intestate as to the after-acquired property, administration was taken out to his estate by the executor of the joint will.

It appears that the intestate left some debts, and the administrator obtained the leave of the District Court of Galle to "realize "the amount of Rs. 2,852.72, the liabilities of the deceased, and the "sum of Rs. 1,742.29, being the amount of certain disbursements "made and debts incurred by the administrator for and on behalf "of the estate by sale of so much of the estate property as might "be necessary to meet the said amount."

It is the practice in this Island to insert in grants of administration a clause forbidding the administrator to sell immovable property without the leave of the Court. It would appear that the order granting leave in the present case was irregular, inasmuch as it did not specify the property to be sold.

The administrator put up Kittanduwebedde to public auction on 2nd June, 1894, but so grossly was the sale mismanaged, that, although the property had been valued in the administrator's inventory at Rs. 10,000, he allowed it to be sold for Rs. 650. A conveyance was executed by the administrator to the purchasers, who were relations of his, on the 29th of June, and they on the 1st September following sold and conveyed the property to plaintiff, who is a connection by marriage of the administrator, for Rs. 1,000. The plaintiff himself in his plaint values the property at Rs. 5,000. Such a transaction as this should be very closely scrutinized, and ought not to be supported except on the strictest proof that it is in every respect in accordance with law; and no intendment should be made in its favour. I venture to think that it would be a serious blot on the administration of justice in this Island if we are obliged to uphold this transaction.

The defendants who had entered into possession on Weerasuriya's death refused to give up possession to the purchaser, who on the 3rd September, 1897, after a delay of three years, commenced this action.

The defendants are the daughter of the intestate and her husband. They rest their defence not only on their possession, which they are entitled to keep until evicted by superior title, but they alleged that the legal title is in themselves.

By a deed of donation, dated the 21st November, 1891, the intestate gave this with other land to the defendants in dowry, and they duly accepted the donation. No question was raised in the Court below or on either of the hearings in this Court as to the validity of the donation deed, but the plaintiff contended that, although the deed was a valid deed, the administrator could make a good title to this property, and that contention has been upheld by the District Court, and this Court on appeal.

I must say, I do not agree with or perhaps understand the reasons advanced by either Court in support of its decision. The District Judge merely says this: "The question now aris-"ing for decision is, who has a better title? Plaintiff, who derives "his title by purchase from the administrator, or first defendant, "a volunteer claiming under a donation? In the absence of any-"thing like fraud in the sale of the land to plaintiff's vendors, it

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" seems plaintiff has a superior title. No fraud on the part of " the administrator has been proved."

It seems to me that this judgment is based on the assumption that an administrator has power to dispose of any property which was once his intestate's, and which the intestate has donated. Such an assumption is inconsistent with principle and authority alike.

But this Court on appeal, though affirming the judgment, did not adopt this doctrine in its entirety. Withers, J., says: " The " ground taken by the District Judge is that the voluntary gift " must yield to the official sale. This raises an important and " difficult question. Is a dower by a father to his child in the " same category as property acquired by a lucrative title, and such " as must be given up to creditors of an insolvent estate? I " think not, unless the daughter succeeds to her father's estate. " *Voet, 23, 3, 15*, says, that it is the duty of parents to dower their " children. The father, in giving a dowry to his daughter, was " fulfilling a recognized obligation. However, in *lib. 42, t. 8, § 6.* " the same author says, that a daughter who abstains from taking " up her father's estate cannot be forced to give up her dower " to her father's creditors, unless it be proved that he dowered " her in fraud of his creditors. But it seems that the first " defendant did take under the joint will of her parents what " formed the common estate at the date of the mother's death. " This included Brightsun estate as distinguished from Kittan- " duwebedde. Therefore, in my opinion, Kittanduwebedde was " available for the father's separate estate creditors, if his other " assets were not sufficient to satisfy their claims. If Kittan- " duwebedde had to be sold for Mr. Weerasuriya's debts, then I " think the judgment should be affirmed to that extent."

I must confess that I cannot follow this reasoning. The learned Judge seems to forget that the only persons who could sue to recover the dowry are the creditors, as indeed is stated by Voet in the passage referred to. Voet is there discussing the *Actio Pauliana*, which was the recognized form of action for creditors who sought to make property, which had been fraudulently alienated by their debtor, available for payment of their debts; and he lays down the proposition that a creditor cannot sue a daughter who has abstained from her father's inheritance to make her dowry liable to pay her father's debts, except in the case where the dowry deed was made in fraud of creditors.

Of course, if she had accepted her father's inheritance no question of fraud would arise, for whether the dowry was fraudulent or not, it, with all the rest of her property, would be

liable to her father's debts. But the only persons who could make a claim would be the creditors, and they would have to get the deed of donation out of the way before they could seize the property. So long as the donation deed stands unreduced, the title is in the donee.

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I asked in vain for any authority for the proposition that an administrator can in such a case convey the title as though the deed had been reduced by a decree in a Paulian action, or even that an administrator could institute such an action.

It will be noticed that Withers, J., speaks hypothetically, and that the judgment is to be affirmed to a limited extent only, which is not specified. But I venture to doubt whether it is proved that the daughter in this case "took up her father's estate." She took and could take nothing but what the executor of the joint will allowed her to take, and if the joint estate were liable for the father's debts, she could get nothing till those debts were paid. But it seems to me that it is doubtful whether under our law it is possible to "accept an inheritance" in the sense in which that phrase is used in the Roman and Roman-Dutch Law. It must be remembered that the English Law of Executors and Administrators prevails in this Island, and that the Roman-Dutch Law of Inheritance, so far as it is inconsistent with that law, is no longer in force.

Then, a contention which had not been raised before was raised at the hearing in review. The donation deed contained the following clause: "Should circumstances compel me, which "God forbid, I reserve to myself the power of disposing the said "properties according to my wish."

It was said that, inasmuch as the donor had power to appoint this property to himself, the Court would treat it as his property, and that it would descend on the administrator as assets. And it was pointed out that section 218 of the Civil Procedure Code renders such property executable by a judgment-creditor as against a judgment debtor. But equity never aids the non-execution of a power. The argument amounts to this, that the administrator can exercise the power of disposing of the property which the intestate reserved to himself. No authority was cited in support of this contention, and I am unable to accede to it.

I cannot help thinking that, in this case, both Courts lost sight of the fact that this was an action which can only succeed on proof of title in the plaintiff. It may be that the creditors of the intestate will be able successfully to impeach the dowry deed in an action brought for that purpose (see *2 Burge, p. 145*), but I am clearly of opinion that it was not competent for the administrator

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to treat this property as part of his intestate's estate, and that his sale and conveyance passed no title, and that the appeal should be allowed. But as my brothers are of a different opinion the judgment in review will be affirmed.

MONCREIFF, J.—

This claim is in respect of a property known as Kittanduwe-hedde, part of the Brightsun estate which the deceased A. T. Weerasuriya gave in dower to his daughter by deed of gift dated 21st November, 1891. Kittanduwe was property acquired by the deceased after the death of his wife, whereas the remainder of the Brightsun estate had been dealt with in the joint and mutual will of himself and his wife, dated 4th January, 1887.

The defendants ground their title upon the deed of gift, and its value and effect are intended to be put in question by the second issue. Did the land vest in the administrator ?

I have some doubts as to the validity of the deed of gift. The donor was to remain in possession for life, and the donee to take possession after his death. The donor reserved to himself the power of disposing of the estate according to his wish "should circumstances compel him." Lastly, the donee was not to sell or otherwise encumber the property "so as to alienate it from my estate."

Under this donation, the donee had no action against the donor to put her in possession. Moreover, the gift was revocable whenever the donor should choose to think that circumstances compelled him. There are certain exceptions to the rule that donations are irrevocable, but this case does not come within them. I have some difficulty in regarding as a valid donation a gift which was revocable, which excluded delivery in the lifetime of the donor, and forbade the donee to sell or encumber the property so as to alienate it from the donor's estate. The position of the first petitioner seems to me more that of a legatee than of a donee.

But, assume that the donation is valid. Can the property be taken to meet the debts of the deceased donor on a deficiency of assets? To use the words of his own deed, it had not been alienated from his estate. It was urged upon us that, even if the donation was undeniable, the property was liable for the debts of the donor. A passage was quoted from Voet (*42, 8, 6*), from which the following principle was deduced for our guidance, viz., that, when a daughter does not accept her father's succession, the property given to her by way of dower cannot, after the father's death, be brought into the administration of his estate.

unless the rest of the estate is insufficient to meet the debts of the father, and it is proved that the dower was given in fraud of creditors.

The exact proposition which we are asked to accept in this case is not stated, namely, that, when a daughter does accept her father's succession, and the estate of her father is insufficient to meet his debts, property given to her by way of dower by her father in his lifetime is available for administration.

But the chapter in *Voet* is only dealing with the Paulian action, which might be brought by creditors for fraudulent alienation of the debtor's property, and it would have been foreign to the subject in hand to pursue the principle further. The meaning of the passage I take to be that it is necessary to show that the donation was made in fraud of creditors, if the daughter does not accept the succession. The non-acceptance of succession seems to be the emphatic condition of the proposition that the property is not to be available for administration without proof of fraud.

The proposition we are asked to adopt seems to be involved in the passage quoted; if it were not, I cannot understand why any reference should be made to the daughter's abstention from the succession. The daughter in this case did accept the succession, and if the proposition contended for (which I believe to be correct) is the Common Law of the country, I think that the plot of land called Kittanduwebedde is available for the debts of the deceased donor, which the rest of his estate is unable to satisfy. It is true that the remedy appears to belong to the creditors, but I think that the administrator who was sued by them was justified in admitting and acting on their claim, if he believed it to be well founded in law.

BROWNE, A.J.—

In view of the fact that at the argument before Withers, J., and myself, Mr. Dornhorst said that Kittanduwebedde "never was in the postnuptial settlement of Brightsun," and of the remarks in his judgment of Withers, J., which followed thereon, and also of the doubts which in my mind arise from a comparison of the southern boundary of the donation deed, I could have wished there had been evidence and decision on the issues at first framed, whether it was or not, since if it was not, all the contention herein would be at an end. But as by reason of the admissions made at the trial in the lower Court and before us at the hearing in review, it must be assumed that Kittanduwebedde was included

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in the dowry deed, I would certainly consider that the defendants by their presence and contentions in the testamentary and administration proceedings have put forward claims as heirs to the estate, which have all the effect of an acceptance of inheritance by heirs under the Roman-Dutch Law. They left nothing undone of all procedure incumbent presently upon heirs to take the benefit of inheritance, with the consequent liability to pay the testator's debts so far as the assets in their hands should extend, and the Paulian action does not fall to be considered. Coming in to claim the benefit of inheritance generally, they would as regards other heirs have to collate what had been received in advancement as dowry, and the effect of the passage in *Voet* I take to be that the dowried daughter claiming by inheritance foregoes any privilege by the special gift. I venture, therefore, to remain of opinion that the administrator had right in himself to reclaim Kittanduwebedde from the donee in possession of those lands when she had originally acquired or subsequently held them under such circumstances or conditions that she could be called upon to surrender them to satisfy the claims of creditors, and that they could not be so reclaimed only by the acts of the creditors themselves.

The judgment of this Court pronounced in 43,213, D. C., Colombo (*Rámanáthan*, 1867, p. 265), and repeated in 28,256, D. C., Galle (*Vanderstraaten*, 273), has pointed out that though "the "office of executor was not unknown to the Roman-Dutch Law "in its later times, the executor was a very different functionary "from the one who bears that name under the English system. "He was little more than the agent of the heir appointed by the "will. He could not alienate or sell without the heir's consent, "and if the heirs would not accept the inheritance, the executor-"ship became a nullity." I am unable to find anywhere a copy of Herbert's *Dutch Executor's Guide*, to which reference is there made, but I would apprehend that under the Roman-Dutch Law there was every necessity, when an estate might be abandoned by the heir, that the creditors should have the Paulian action given them to enforce payment of their claims, but that under English testamentary procedure this remedy though not taken away will become necessary when an administrator undertakes on oath the duty that he will pay the debts of the intestate so far as the assets will suffice and the law bind. Hence, in conditions like the present, when (if either the views of Withers, J., as to the necessary merger of the gift in the inheritance be accepted, or of my brother as to the invalidity of the gift be correct) the donee is liable to be called on to surrender the asset, the

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administrator might sue for it, or if he could find a buyer willing to undertake the burden and cost of the necessary litigation, he might sell the asset and his claim thereon to such person, and leave it to him to vindicate the asset as the plaintiff here seeks to do. The procedure of such an action against one who has taken by deed would not be so very different from that by heirs who have not received their due share of inheritance against a purchaser from the survivor of their parents. In form in each instance it would possibly, to clear the title, be necessary or advisable to declare that the deed of sale or donation respectively by the survivor was no impediment to the enforcement of the rights of the creditors or the donees in the respective cases, and though in his plaint here the plaintiff entirely ignored the donation and the defendants' rights claimed thereunder, and did not pray any such declaratory reduction of its efficacy, such declaration would always be construed out of the decree, which in this action dispossessed the donee and vindicated the rights of the purchaser-plaintiff, and could if necessary be formally expressed.

While entirely agreeing in the views of my Lord as to the desirability, and indeed duty, that District Courts should see that assets are realized to the best advantage of heirs and creditors alike, no defence in relation to any insufficiency of value appears to have been here advanced, nor do I see how it well could have been, against the purchaser. It would be material for claim possibly against the administrator.

I, therefore, would affirm the decree.