1901.
July 10, 15, and 23

THEODORIS FERNANDO *v.* ROSALIN FERNANDO.

D. C., Kandy, 12,959.

Action by creditor of deceased testator—Liability of heir or devisee of testator for his debt—Conveyance of land by his executrix to daughter in consideration of marriage—Right of creditor to follow such property.

As a general rule an heir or devisee under a will is liable for the testator's debts to the extent of the share of the inheritance or estate which has come into his hands, whether by operation of law or by conveyance from the executor, and a creditor of the deceased testator is entitled to follow the property in the hands of the heir.

But where the property sought to be followed was settled *bonâ fide* on the heir or devisee in consideration of marriage, it is not liable to the claims of the deceased's creditors.

IN this case the plaintiff prayed for a declaration that a deed of conveyance made by Carolina Fernando, as executrix of her deceased husband Juwanis Fernando, may be declared to have been made in fraud of the creditors of the said Juwanis Fernando, and that the estate called Spring Mount, sought to be conveyed thereby, may be made liable to be seized and sold in execution of a decree in favour of the plaintiff, pronounced in suit No. 11,034 in the District Court of Colombo against the said executrix.

It appeared that Juwanis Fernando had agreed with the second defendant (his intended son-in-law) that, in consideration of his marriage with the first defendant, he would at such marriage make over and convey to his daughter, the first defendant, lands of the value of Rs. 30,000; that in terms of the said agreement the second defendant married the first defendant; that as Juwanis Fernando had died prior to such marriage, Carolina, his widow and executrix, conveyed to the first defendant Spring Mount with other immovable property of the aggregate value of Rs. 30,000 in

fulfilment of the agreement; that Juwanis Fernando died on 21st June, 1897; that the first defendant married the second defendant on the 14th August, 1897; that plaintiff obtained a judgment against his executrix Carolina on 10th May, 1898, upon two promissory notes granted him by deceased on 11th December, 1896. for Rs. 2,400; that plaintiff sued out writs of execution and caused Spring Mount to be seized, whereupon the first defendant preferred a claim to it; that the District Court of Kandy investigated the claim and ordered the release of the seizure, and that thereafter the present action was instituted under section 247 of the Civil Procedure Code.

The District Judge dismissed plaintiff's action by the following judgment:—

"The issues are, (1) whether the transfer by Carolina Fernando to the first defendant is bad in law for any of the reasons stated in paragraph 4 of the plaint; and (2) whether the land in question is liable to be sold in execution of the decree in D. C., Colombo, No. 11,034.

"The law as to alienations in fraud of creditors is stated in the judgment of Berwick, D.J., in *Brodie's case* (*Rámanáthan, 1877, p. 89*). He there quotes a passage from *Voet* (42, 8, 14) where two conditions are laid down as necessary to make a conveyance fraudulent, namely, a fraudulent intent on the part of the debtor to defraud his creditors, not necessarily any particular creditor, and creditors having been prevented from recovering their debts.

"In the present case the plaintiff failed to make out either of these conditions. It has not been proved that Juwanis Fernando's estate was in fact insolvent, or that the transfer so diminished the assets as to render the estate insolvent. It has also not been shown that the executrix had notice of the debt to the plaintiff when she executed the transfer. I understand that the plaintiff's debt, which at the date of action was something over Rs. 2,400, has, by the sale of property belonging to the estate of Juwanis Fernando, been reduced to Rs. 867. There is no evidence to show that the conveyance was a fraud on creditors according to Roman-Dutch Law. (D. C., Matara, 427, *Civil Minutes*, 19th July, 1895.)

"The transfer to the first defendant was real. It was for valuable consideration, namely, the marriage of the testator's daughter, the first defendant, with the second defendant. The transfer is silent as to this, but the evidence is explicit, that the transfer was executed on the day of the marriage. I hold that the conveyance of the executrix vested a good title in the first defendant."

Plaintiff appealed.

1901.
July 10, 15, and 23.

Seneviratne (with him *Walter Pereira*), for appellant.—The impeached deed of conveyance does not set out the consideration of the deed to be an agreement to marry, or the marriage itself. It declares that certain properties were vested in the grantor on trust to divide and convey the same to the children of Juwanis and Carolina, and that Carolina grants to Roslin certain properties. Such being the facts, the oral evidence let into the case as to the marriage agreement was inadmissible. The deed must be looked upon as a voluntary conveyance void as against creditors. *1 C. L. R. 101; 2 C. L. R. 72.* The executrix herself pointed out this property for seizure, which shows that there was no other property available to satisfy the decree in the plaintiff's favour.

E. Jayawardene, for respondent.—It has been proved that the conveyance was in consideration of marriage. The deed was granted on the very day of marriage. The settlement of the property on the bride need not have been made on the day of marriage except for the agreement pleaded by the defendants. Marriage is a valuable consideration, and a conveyance made for such a consideration has the same effect as a *bonâ fide* sale, and cannot be impeached. *Story on Equity, §354; 1 Stephen's Commentaries, 514.* The assets of a testator granted to a legatee or heir on marriage cannot be reached by the creditors of the testator. *Dilkes v. Broadmead, 2 D. F. and J. 566; Spackman v. Timbrell, 8 Sim. 253.* A donation or sale cannot be set aside if the donor were solvent at the time he made it, and the donation did not cause him to become insolvent. *3 Burge, 607; 3 N. L. R. 274 and 278; Brodie's Case, Rám., 1877, p. 90.* None of these circumstances is here present. The judgment of the Court below is well founded.

Cur. adv. vult.

23rd July, 1901. MONCREIFF, J.—

The plaintiff obtained judgment for Rs. 2,397.32 in an action against W. Carlina Fernando as executrix of the estate of her husband W. Juwanis Fernando, who died on the 21st June, 1897. Judgment was signed on the 10th May, 1898, and the defendant-executrix pointed out for seizure a property named "Spring Mount" *alias* Seranigahawatta.

The property was seized in execution. The first defendant in this action claimed it; her claim was allowed, and the plaintiff proceeded under section 247 of the Code to have the right which he claimed to the property established.

The District Judge, however, again decided in favour of the claimants, and the plaintiff appealed to this Court.

The property in dispute had been part of the estate of Juwanis Fernando. His executrix included it in the inventory of his estate, but on the 14th August, 1897,—a few weeks after his death,—she transferred it by deed to her daughter, the first defendant. On that same day (the 14th August, 1897) the daughter was married to Harry de Mel, the second defendant. No consideration for the transfer is stated in the deed, but the purport of the joint will of W. Juwanis Fernando and his wife is expressed, showing that the survivor was to hold the property on trust for division or conveyance (at his or her discretion) to the children of the marriage. And the transfer is made "in pursuance of the said trust." Although feeling the force of the scruples of the Chief Justice, in view of the second defendant's evidence, and the fact that the transfer was executed on the day of the marriage, I think that it was made in respect of the marriage, being prompted by natural love and affection and regard for the joint will of the executrix and her husband. There was therefore valuable consideration for it.

The second issue (the only issue we need notice) was whether the land in question is liable to be sold in execution of the decree in the plaintiff's action against the executrix.

All allegations of fraud were withdrawn, although the affirmative of the above issue would possibly impugn the transfer as being in fraud of creditors.

The defendants Harry de Mel and his wife recite the above facts in their answer, and add that there was and is other property belonging to the estate of W. Juwanis Fernando and available for seizure under the plaintiff's decree against the executrix. Their meaning is that that property should be exhausted before recourse is had to the property conveyed to the first defendant. In spite of this defence the plaintiff simply put in the papers relative to the case. He called witnesses, but made no effort to contradict the statement in the answer or to show that Juwanis Fernando's estate was insolvent at the date of the transfer. When the case for the defendants was closed, he proposed to call rebutting evidence, but the judge (in my opinion, properly) refused to admit it.

We were referred to both Roman-Dutch and English Law. If there had been fraud, the transfer would have been reducible under any system of law, but in most cases the Paulian Action would not lie without proof that the deceased's estate is insufficient and the transfer in fraud of creditors. There is no suggestion here of fraud on the part of the executrix or the alienee.

There are cases in which, under Roman-Dutch Law, the Paulian Action was competent, even without proof of fraud, upon the

1901.
July 10, 15, and 23.
MONCREIFF, J.

simple proof that the creditors had not got what was theirs. Voet (*lib. XLII. tit. 8, § 9*) instances cases of legacies, donation *mortis causâ, and fidei commissum*. He says that is so *quatenus hæc non ante præstanda quam soluto prius ære alieno; sicut, si jam præstita fuerint, et reliqua æri alieno haud sufficiant, utilis actio danda sit*. From this it appears that, even in cases which do not involve fraud, the creditors cannot follow property belonging to the estate of the deceased, which has passed from the hands of the executrix, without showing that the rest of the estate is insufficient to meet their claims. In this case it does not appear that the deceased's estate was insolvent at the date of the transfer; it does not even appear that it is insolvent now.

We were referred by Mr. Jayawardene to two English cases. In the first (*Spackman v. Timbrell, 8 Sim. 261*) Timbrell the father by will devised leaseholds and freeholds to his son, appointing his son and the plaintiff executors. Three years after the father's death the son settled part of the property upon his wife and children in consideration of marriage. It was held that the settlement was for valuable consideration, and that the case must be governed by the decision of Lord Eldon in *Macleod v. Drummond* (*17 Ves. 152*).

In *Dilkes v. Broadmead* (*2 D. F. and J. 576*) decided in 1860, when personalty of the value of £6,497 had been left by the deceased in trust, and was afterwards settled on his daughter's marriage to the separate use of the daughter, Lord Campbell, C.J., was at considerable pains to show that the settlement was to the husband's advantage, and that marriage was a valuable consideration for it. On the case itself he said (*p. 574*), "*Spackman* "*v. Timbrell* and the other cases relied on by the Vice-Chancellor "satisfactorily establish the doctrine that assets of a deceased debtor "or convenantor settled *bonâ fide* in consideration of marriage "are no longer specifically liable to the claims of creditors. And "where personal property can be indentified, I do not think that in "reason, or according to the authorities, any distinction can be made "for this purpose between personal property and real property."

The liabilities of the deceased's estate are now charged upon both real and personal assets. But it is said (Williams, *Executors, 9th ed., p 1,560*—in reference to Lord Laydale's decision that, if the specialty creditors do not proceed against the heir or devisee, the latter may alienate; and in the hands of the alienee the land is not liable, though the devisee or heir remains liable, to the extent of the value of the land alienated)—that "there does "not appear to be any reason why this decision should not be "applied to the construction of the statutes now in operation."

It would appear that a conveyance of real estate by an executrix *bonâ fide* in consideration of marriage—the estate of the deceased for example not being insolvent—cannot be set aside at the instance of creditors. From no point of view therefore does it appear that this action can succeed.

I think that the appeal should be dismissed, and the judgment appealed from is affirmed with costs.

LAWRIE, A.C.J.—

This is an action under section 247 to have it declared that the land seized is the property of the judgment-debtor in the present case.

The judgment-debtor was the executrix of the last will of the present defendant's father. She had conveyed land to her daughter, the first defendant, in pursuance of the directions of the will. As a general rule an heir or devisee under a will is liable for the ancestor's or testator's debts to the extent of the share of the inheritance or estate which has come into his hands, whether that share has passed to the heir by operation of the law of inheritance or through the interposition of a conveyance by the executor of the deceased's will, so that at first sight it appeared to me that the creditors of the deceased were entitled to disregard the conveyance and follow this property when in the hands of one of the heirs of the deceased debtor. But the defendant urges that the conveyance by the executrix to her was for valuable consideration, because the land was transferred to her on the occasion of her marriage. Certainly if a land be conveyed before marriage by a bridegroom to his bride or to marriage settlement trustees, or if the parents of the bride convey land to her and to the bridegroom or to trustees in consideration of the marriage, then such conveyance would be for valuable causes.

But my difficulty here was that the conveyance says nothing about a marriage.

The executrix purports to give effect to the testator's intention. If she had executed similar deeds in favour of her other children on the same day, I think the land conveyed to them would not have been put beyond the reach of their later creditors, and I doubt whether the fact that the occasion of making this division of the family estate was the approaching marriage of the daughter, and made it a conveyance for valuable consideration.

But relying on the authority of the English cases cited to us and referred to in the judgment of my brother, I agree with him in affirming this judgment.