1939

Present : **Soertsz S.P.J. and de Kretser J.**

JAYASEKERE *v.* JAYASEKERE.

231—D. C. Galle, 36,317.

Deed—Execution of three gifts at the same time—Property donated by one gift included in another—Earlier deed entitled to priority.

Where a person executed three deeds of gift in favour of three sons on the same day and where certain lands donated by one deed were included in another,—

Held, that the earlier deed must prevail and that there was a presumption that the Notary did his duty properly and that he numbered them in the order in which they were executed.

APPEAL from a judgment of the District Judge of Galle.

N. E. Weerasooria, K.C. (with him *H. A. Wijemanne*), for first defendant, appellant.

H. V. Perera, K.C. (with him *L. A. Rajapakse, E. B. Wikremanayake* and *H. A. Chandrasena*), for plaintiff, respondent.

March 30, 1939. DE KRETSER J.—

This is an unusual type of case. One Dona Gimara Gunasekere Hamine, whom I shall call Dona Gimara, was entitled on three Crown grants to three allotments of land called Wahugalahena and Wahugalakandedeniya. These three allotments formed part of an estate called Weihena Estate in Baddegama. Dona Gimara lived on the estate. She had three sons, namely, Edwin, the plaintiff, Alexander whose estate is being administered by his widow the first defendant, and Francis.

Edwin had contracted a marriage which his mother disapproved of, and at one stage she had made a last will cutting him off from her property and only providing for an allowance. Thereafter Edwin divorced his wife and became reconciled to his mother and took up his residence with her, and after her death is still on the land. Alexander was her eldest son, and seems to have attended to her business affairs.

On October 3, 1929, Dona Gimara executed three deeds of gift in favour of her three sons. Of these the one in favour of the plaintiff bears the earliest number. The three deeds of gift were registered but no question arises with regard to some irregularity in the registration of Alexander's deed as these were deeds of gift.

It seems to have been common ground at the trial that the deed of gift conveyed to Edwin the extents shown in the three Crown grants, which would amount to 22 acres and 4 perches, and that the deed of gift in favour of Alexander conveyed almost 20 acres from this very extent, leaving therefore only about two acres for Edwin the plaintiff.

It would appear that at one time Dona Gimara had occasion to mortgage her property and that for the purpose of the mortgage a survey had been made.

The deed of gift in favour of Edwin recited the Crown grants and placed these three allotments in the forefront of the deed, whereas the deed in favour of Alexander placed the two allotments he claims as numbers 13 and 14 in a gift referring to 16 allotments, and his deed of gift referred to the plan made in 1922 for the purpose of mortgage and in a general way referred to the title as being by virtue of purchase from the Crown and by virtue of a certain last will.

It would appear that after Dona Gimara's death, it was Edwin who possessed the property now in dispute. The defendant claimed tea coupons and was issued coupons, and plaintiff therefore brought this action.

The Notary who attested the deeds of gift is dead and no attempt has been made to prove the instructions given to him. The defendant seems to have realized that the order of numbering the deeds was of importance and accordingly alleged that a mistake had been made and claimed a rectification of the numbers.

Francis gave evidence for the plaintiff. The defendant gave evidence for herself and called the Notary's clerk. The clerk's evidence was to the effect that he did the numbering of these deeds and that he could not say that he numbered them in any particular order. He says the deeds were brought tied together, one upon another, and he could not remember a single instance where he had numbered deeds at random or taken a deed from the bottom and given it the first number.

It so happens that all parties are agreed that the deed in favour of Francis was executed last, and it does bear the last of the three numbers. The defendant's theory is that as Alexander was the eldest, therefore his deed was executed first. But though Alexander was the eldest, he got lands to the value of Rs. 24,000, whereas the other two got lands to the value of Rs. 34,000 each, and besides, it was the most natural thing to deal with the lots on which the residential bungalow stood before dealing with lots which were farther away.

The defendant alleges that she was present and personally aware that the deed in favour of Alexander was executed first. On the other hand, Francis is sure that the deed in favour of Edwin was executed first.

Now, with regard to the presence of Francis there can be no manner of doubt, and Francis had reason to be specially interested in the deed to Edwin because that deed provided that no Edwin's death the property gifted should pass to Alexander and Francis. Francis is more likely also to be a much less interested party than the defendant.

The defendant seems to have been satisfied with the clerk's unsatisfactory evidence because it was felt that in the event of the numbering being no reliable guide the plaintiff would fail because he was plaintiff. It seems to have been forgotten that the plaintiff was in actual occupation and that the burden of proof would really be on the first defendant. Her obtaining of the coupons would not affect the situation, both because coupons are not actual produce and because she obtained them through the judgment of the Tea Controller with which judgment the Court is not concerned.

But the plaintiff's case rests on higher grounds, for there is a presumption that the Notary did his duty properly and numbered his documents correctly as he is required to do by the Notary's Ordinance. Even if he left the numbering to be done at the time when he completed the deed by attestation, one may assume that he would see to it that the deeds had been properly numbered before he handed them over.

There is thus in favour of the plaintiff more than one circumstance that shows that the gift to him was prior in fact and was intended to be effective. None of the parties could have failed to be interested in their own home and none of them could have failed to realize to whom that was going. That was dealt with in the first instance, and Dona Gimara not only reserved a life-interest to herself but she provided a life-interest for Edwin and it was after his death that the other two sons were to have it.

The learned District Judge treated the case on the footing that it was impossible to decide which deed had been executed first and treated all the dispositions as if they were contained in one document but in no

particular order, and he attempted to ascertain what Dona Gimara's intentions had been. He further stated that as Alexander had the management of her affairs and was the person who selected and instructed the Notary, it was not likely that he would have given to Edwin the allotments which he was himself going to have. He believed that Alexander had been guilty of fraud and probably thought that Alexander, being anxious to have those particular lots and finding he could not get them, let everyone into the belief that Edwin was getting them and then smuggled in the lots into his deed in such a way and at such a time that all parties, including the Notary, would not have realized what was happening. That, of course, is possible, but it is not necessary to go so far, for it is equally possible that a mistake was made owing to confusion in the course of dealing with a very large number of lands.

That Dona Gimara intended to give the plaintiff the allotments is plain, but the case can be decided on the footing that the transfer to Edwin was prior and therefore must prevail.

The appeal is therefore dismissed with costs.

SOERTSZ S.P.J.—I agree.

Appeal dismissed.