[FULL BENCH.]

1915.

Present: Wood Renton C.J., Shaw J., and De Sampayo A.J.

LOUIS *v.* DINGIRI.

447—D. C. Matara, 6,373.

Alienation in fraud of creditors—Action to set aside deed—Facta probanda—Donation by one spouse to another—Subject to donor's debts existing at date of donation only.

In an action to have a deed set aside on the ground that it was an alienation in fraud of creditors, the plaintiff must prove affirmatively that the alienor intended to defeat the claims of his creditors, that the alienation left him with practically no property out of which such claims could be met, and that particular creditors, including the creditors impeaching the alienation, had in fact been prevented by it from recovering what was their due.

The provision of section 13 of Ordinance No. 15 of 1876, that gifts by one spouse in favour of the other shall be subject to the debts and engagements of the donating spouse, must be limited (in the absence of fraud) to debts and engagements existing at the time of the alienation, and not to future debts.

THE facts appear from the judgment.

Bawa, K.C., and *Dias*, for defendants, appeallants.

A. St. V. Jayewardene (with him *Canekeratne*), for plaintiff, respondent.

The following authorities were cited at the argument:—*Laws of England, vol. XV., pp. 87-88, s. 180; McQueen's Husband and Wife, pp. 269, 271, 264, 265; Pereira's Laws of Ceylon, vol. II., p. 661; 1 N. L. R. 131: 4 A. C. R. 160; 4 N. L. R. 81; 2 Leader, pt. II., P. 11; 2 S. C. D. 55; 3 N. L. R. 287; 5 Bal. 32.*

Cur. adv. vult.

February 12, 1915. WOOD RENTON C.J.—

The plaintiff is the purchaser, on a Fiscal's transfer dated May 12, 1914, at a sale in execution against the 2nd defendant in case D.C. Matara, No. 5,676. That action was instituted on September 21, 1912. The 2nd defendant had previously, viz., on June 2, 1912, gifted his residing house and land to his wife, the 3rd defendant, and their children. The action D. C. Matara, No. 5,676, was dismissed with costs on the ground that the issue had already been decided against th 2nd deefendant in another case, C. R. Matara, No. 5,581, between the same parties. Writ issued for the recovery of costs in D. C. Matara, No. 5,676. The property in

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question in the present case was seized in execution of the writ. When the plaintiff, the execution purchaser, went to take possession, the 2nd defendant resisted him, alleging that the property belonged to his wife under the deed of gift of June 2, 1912. The plantiff, therefore, brought this action to have the deed set aside as fraudulent. The learned District Judge has given judgment in his favour, on the grounds, in the first place, that the alienation was fraudulent: and, in the second place, that even if it were not, the property seized was liable for the 2nd defendant's debts under section 13 of the Matrimonial Rights and Inheritance Ordinance, 1876, No. 15 of 1876. The case was referred by my brothers Shaw and De Sampayo to a Bench of three Judges for the consideration of this latter point. At the argument before us, however, counsel for the plaintiff stated that he desired to support, and we gave him the opportunity of supporting, the judgment of the learned District Judge, also on the ground that the donation by the 2nd defendant in favour of his wife was fraudulent. The appeal is, in my opinion, entitled to succeed on both grounds. The burden of establishing fraud rested on the plaintiff, and the *facta probanda* in such a case as this are well settled. It must be shown affirmatively that the alienor intended to defeat the claims of his creditors, that the ailenation left him with practically no property out of which such claims could be met, and that particular creditors, including the creditor impeaching the ailenation, had in fact been prevented by it from recovering what was their due. (*Silva v. Mack*,[1] *Podi Singho v. Appuhamy*.[2]) The criteria of fraudulent alienation adopted by the English Courts in interpreting the Statute of Elizabeth (13 Eliz. c. 5) have frequently been referred to in our local decisions (*Carpen Chetty v. Christinahami*,[3] *Saravanai Arumugam v. Kanthar Ponnampalam*), but constitute in this Colony merely *ratio scripta*. The rule of law is to be sought for in the common law, and not in the English decisions unde that Statute. (*Silva v. Mack, ubi sup.*) It seems to me that, in the present case, the evidence against the 2nd defendant cannot be put higher than this, that he desired to safeguard the property gifted to his wife against being made liable for his debts, or at any rate for the results of the litigation on which he was about to embark. That is not sufficient to make the alienation fraudulent, in the absence of affirmative proof that he had no other poperty against which his creditors could have recourse.

It remains to consider the effect of section 13 of the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876. That section is as follows: "It shall be lawful for any husband or wife, whether married before or after the proclamation of this Ordinance, notwithstanding the relation of marriage and notwithstanding the existence of any community of goods between them, to make or join each

[1] (1875) 1 *N. L. R. 131.*
[2] (1900) 4 *N. L. R. 81.*
[3] 2 *S. C. D. 55.*
[4] (1909) 2 *Leader L. R., Part 2, p. 11.*

other in making, during the marriage, any voluntary grant, gift, or settlement of any property, whether movable or immovable, to, upon, or in favour of the other; but all property so granted, gifted, or settled, and all acquisitions made by a husband or wife out of or by means of the moneys or property of the other, shall, except as otherwise provided by section 11, be subject to the debts and engagements of each spouse in the same manner and to the same extent as if such grant, gift, settlement, or acquisition had not been made or occurred."

Section 11 declares a married woman's personal ornaments, wearing apparel, and implements of trade or husbandry to be her separate property. The scope of the liability for the debts and engagements of the donating spouse has not, so far as I am aware, been the subject of judicial decision hitherto in this Colony. But it must, I think, be limited to debts and engagements existing at the time of the alienation. We are not now concerned, of course, with the effect of fraud. The object of the Legislature in section 18 of the Ordinance of 1876 was to relax the common law in favour of spouses. It cannot reasonably be supposed to have intended that property donated by one spouse to another should be earmarked for all time with a liability to meet all the debts and engagements incurred by the donor at any subsequent period, and that the spouses should be in a worse position than that which they occupied under the old law of community. I would set aside the decree of the District Court, and direct that plaintiff's action be dismissed with the costs of the action and the appeal.

DE SAMPAYO A.J.—

I am of the same opinion on both the points submitted for decision.

SHAW J.—

I agree on both points. With regard to the first point I do not think the evidence of fraud given in this case would be sufficient under the English law to bring the case within the dictum in *Halsbury, vol. XV., p. 84*, upon which the District Judge largely based his decision. The authorities cited in that passage, and in somewhat similar passages on the following page, disclose much stronger evidence of fraud than in the case before us. But this case is to be decided by Roman-Dutch law, not English, and it appears that two essentials for setting aside the deed have not been complied with, namely, no evidence has been given that at the time of the conveyance the appellant was rendering himself practically insolvent, and no evidence has been given of any attempt to execute the decree on his other property.

With regard to the other point, the words of the section are ambiguous, and might, I think, equally be read as imposing a liability on the prpoperty either for debts incurred at the time of the conveyance only, or for all debts whensoever incurred.

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When we look at the intention, however, I think the meaning is clear. The intention of the section, although it refers to gifts by either spouse, is, with various other sections in the Ordinance, aimed at giving the wife certain rights of property, somewhat in the nature of those conferred by the earlier English Married Woman's Property Acts, and are intended to improve the position of the wife with regard to property. As the Chief Justice had pointed out, the position of a wife married in community receiving a gift under this section would, if the respondent's contention was accepted, be worse than before. Moreover, if this reading were adopted, it would render the property gifted to a spouse liable throughout the marriage and until the debts of the donor are all paid, for any particular debt at the caprice of the creditor, although there might be ample other property on which to levy for his debt. It would also enable a husband, who wished to avoid his gift, by arrangement with any creditor, to defeat the donation he had made. Such unreasonable results cannot, I think, have been intended by the Legislature.

Set aside.