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Present : Ennis J. and Schneider A.J.

JAYASINGHE *et al. v.* JAYASUNDERA.

362—D. C. Galle, 15,510.

Gift by husband—Fraud on the community—Action by administrator of wife for cancellation of deed—Personal action.

An action for cancellation of a deed of gift by a husband on the ground that it was a fraud on the community does not lie with the administrator of the estate of the wife. "Such an action might have been open to the wife herself as a personal action, or possibly to her heirs after her death as a personal action."

THE facts are set out in the judgment of the District Judge (L. W. C. Schrader, Esq.) : —

Don David Jayasundera and his wife Egodage Gimarah were married together in community of property and died on May 6, 1914, and November 25, 1912, respectively, leaving four sons and two daughters.

[1] *(1909) 25 T. L. R. 478.* [2] *(1871) L. R. Q. B. 361.*

The sons are Eporis (first), Abraham (second), David (the original third defendant), and Soyadoris; and the daughters are the plaintiff's wife (added second plaintiff) and another, who married the Customs Arachchi.

2. By a series of deeds Don David bestowed the property of the community upon the children, except the plaintiffs. The latter married on November 26, 1891, and first plaintiff has been for thirty years a clerk in a merchant's office. First plaintiff says that his father and mother-in-law were worth Rs. 20,000, and complains that a deed No. 12,415 of March 4, 1912 (P 4), whereby Don David made a gift of a half share of Galagawakanda, a land of 4 acres 3 roods and 16 perches, was a fraud on the community, and ought to be set aside.

3. The issues are taken in order of apparent logical necessity. Was there consideration for the deed, and, if so, can it be set aside ?

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There was no consideration, it is a pure gift.

8. Next to take the issue " Was there a distribution of the common estate as set out in page 8 of the answer ?" This is a question of fact.

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There was, therefore, a distribution of the common estate, but it is also clear that in the last year of Gimarah's life, property to the value of Rs. 1,500 was alienated by Juwanis to his four sons ignoring the daughters.

9. Can the deed be set aside except in respect of half of the property. That issue is admittedly to be answered in the negative. The wife or her heirs can claim to have a deed revoked so far as she has been thereby defrauded. (*XIII. N. L. R., page 376.*)

10. There is no evidence in the case manifesting a clear intent on the part of the donor to avoid the community and defraud the other spouse. There were, for instance, no differences between the plaintiffs and their parents, no motive can be discovered for his wishing to deprive the plaintiffs of their just share. His argument can only have been one. The plaintiffs have been married thirty years, they are getting on very well, they were not in need of land, agriculture is not their vocation. I must provide for my sons whose livelihood depends upon it, and who have so far received only Rs. 500 worth each. I must make up their portions to be at least equal to their sisters. So all the remaining property must be divided between them.

11. I find, as a matter of fact, certain small lands left, but they are doubtfully included in the list of this estate, and particulars of them are not all available.

. . . . . .

I find, therefore, that the estate has practically been exhausted by deeds, and there is nothing for plaintiffs to inherit from the community.

12. Now fraud on the community seems to be contemplated, where the husband, at a time of his wife's illness and proximity to death, disposes of her share of the property by donating to his own relations (to the exclusion of hers) or even to an outsider (passage from Voet cited at page 382). It is impossible to hold, it seems to me, that this passage contemplates the case of donations and the heirs within the community. Still it will obviously be a fraud if the wife intended her property to devolve on the children equally, and the husband, without her knowledge during her illness, gifted it away to some heirs to the exclusion of others. I could have no difficulty in holding that this was a fraud on the community.

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13. But here the deed executed in March, 1912, was some months before the death of the wife. There is nothing to show that she was ailing then, or ignorant of the transaction. It is said like all the others. She actively took part in none. The old lady was however very old—80 years, and was ill sometime before her death. There is nothing to show that she approved the gift. And it is certain that the deeds executed on November 1, 1912 (five of them), within twenty-six days of her death, were executed with no other intention than to anticipate her approaching dissolution and prevent the division of the property at law. The question is, whether the deed of March, 1912, had the same object in view, and, if so, whether it was a fraud on the community, that is, on the wife or her heirs. If there was a fraud it was directed against both the daughters, not plaintiffs only, and it is therefore remarkable that the plaintiff did not get the daughter of the Customs Officer to join the case. He took action in the representative character of Gimarah's administrator. But I am bound to say that the evidence, as a whole, shows that the four sons who had already been provided for with Rs. 500 worth of property each for a long time, and which had been much appreciated, prevailed on their father to execute the deed in March for Rs. 1,000 in their favour, and the small remaining property they hurriedly had distributed shortly at the last moment before Gimarah's death. I cannot, however, see that there was anything unjust about it. The portions are fairly equal. Though the sons had portions of Rs. 500 in land long ago, plaintiffs had Rs. 500 in cash, and another Rs. 500 in cash and jewellery. And there was, besides, certainly the other perquisites mentioned before amounting to about Rs. 500 more. This is a complaint of one heir against others. I see no clear evidence of intent to defraud. I dismiss the action, with costs.

H. J. C. Pereira (with him *Samarawickrema* and *Croos-Dabrera*), for plaintiff, appellant.

E. W. Jayawardene (with him *J. S. Jayawardene*), for defendants respondents.

July 15, 1921. ENNIS J.—

This was an action by the administrator of the estate of one Gimara for the cancellation of a deed of gift by Gimara's husband in favour of three of his sons, the first, second, and third defendants in the case. It appears that at the trial of the action the wife of the administrator was added as a plaintiff, being one of the heirs of Gimara. The learned Judge dismissed the action, and the plaintiff appeals. It appears that the petition of appeal is somewhat vague as to the parties appealing. The caption shows an appeal by the administrator only, while some clauses in the petition of appeal seem to indicate that it was meant to be an appeal by both the plaintiffs. However, it transpires that the added plaintiff had never filed a proxy in the case, so that the appeal can be regarded as an appeal by the administrator only. The action was one for the cancellation of the deed on the ground, to use the expression of the

Roman-Dutch Jurist, that it was a "fraud on the community." Such an action might have been open to Gimara herself as a personal action, or possibly to her heirs after her death as a personal action. But it is not an action which would lie with the administrator of the estate of Gimara. In these circumstances I would dimiss the appeal, with costs.

SCHNEIDER A.J.—I agree.

Appeal dismissed.