1918.

Present : Pereira J. and Ennis J.

VAITIANATHEN *v.* MEENATCHI *et al.*

240—D. C. Colombo, 33,647.

Collation—Roman Dutch law—Ordinance No. 15 of 1876, s. 39.

The Roman-Dutch law as to collation was superseded by section 39 of Ordinance No. 15 of 1876, and now collation takes place only when a parent gives property to his children, either on the occasion of their marriage or to advance or establish them in life.

A decree can only be amended by a District Judge in terms of section 189 of the Civil Procedure Code. It cannot be amended on the ground that there is an inadvertent omission in the judgment, especially when the Judge is not prepared to recognize that there is any such omission.

THE facts are set out in the judgment of the Additional District Judge (L. Maartensz, Esq.):—

This is an action for declaration of title to an undivided half of (1) premises bearing assessment No. 29, situated in Chekku street, and (2) premises bearing assessment No. 176, Sea street.

The premises admittedly belonged to Mudaly Selvanayagam, who had two daughters, Sivamayam, mother of the plaintiff, and first defendant.

The plaintiff would, therefore, be ordinarily entitled to the share claimed by him.

The first defendant, however, alleges that her father, having gifted certain of his properties to her sister's husband by deed, made a verbal gift of the premises in dispute to her. She claims in the alternative half the premises gifted to her sister's husband, which she contends should be brought into hotchpot.

The following issues were agreed to, namely :—

(1) Were premises 177 and 178, Sea street, conveyed to Candappa Chetty, husband of Sivamayam, in pursuance of a division of property between Sivamayam *alias* Sivanasam and first defendant ?

(2) Were premises No. 29, Chekku street, and 176, Sea street, allotted to first defendant ?

(3) Has the first defendant acquired a title there to by prescription ?

(4) If not, is first defendant entitled to be declared entitled to a half share of premises 177 and 178, Sea street ?

(5) Damages ?

According to the first defendant, her father, before he died, told her that he had given two of his houses to her sister, and that she, first defendant, was to have the remaining two houses, and that since her mother's death in 1886 she was looked after by her cousin Murugappah, who collected the rents and applied the rents towards her maintenance. . . . . .

It was clear from the manner in which first defendant gave her evidence that the evidence regarding a verbal gift was fabricated for the purpose of setting up a title by prescription.

Undoubtedly the first defendant was allowed to retain possession of the premises in dispute after her father's death, but this possession is of no avail because she was a co-owner, and because plaintiff, who was born in 1886, was a minor until seven years ago.

I answer the first, second, and third issues in the negative.

As regards the fourth issue, I am of opinion that section 39 does not apply to the gift in favour of Candappa, as he was neither a grandchild or child of Selvanayagam.

I give judgment for plaintiff, &c.

There were three appeals in this case. The first defendant's appeal (A) raised the question as to collation.

E. W. Jayewardene (with him *Koch*), for first defendant, appellant.—The plaintiff must bring the lands 177 and 178 into collation. The question is whether the property was intended for the advancement of the child. Even grandchildren are bound to collate. (*4 Burge 699; Morice's R. D. Law 252; Voet 37, 6, 13; Grotius 2, 26, 14; Van Leeuwen R. D. L. 454.*) The Ordinance No. 15 of 1876 has merely re-enacted the Roman-Dutch law. (*Van der Straaten's Reports, Appendix A.*) The same principles still apply. (*5 S. C. C. 113.*)

The intention to advance the child in life is clear, and the presumption in law is in favour of such an intention. (*4 Burge 706; L. R. 20, Equity 155.*)

Meenatchi's possession commenced during her father's lifetime, and the issue of prescription should have been decided in her favour.

F. M. de Saram, for the respondents (appeals 240 A and B).—Ordinance No. 15 of 1876, section 39, now applies. It has supplanted the Roman-Dutch law. The gift was to the son-in-law; and a gift of that nature is not liable to collation. The child may obtain no benefit whatsover from such a gift.

H. A. Jayewardene, for appellant in appeal B.

Wadsworth, for respondent in appeal C.

Cur. adv. vult.

September 10, 1913. PEREIRA J.—

Appeal 240 A by the first defendant and appeal 240 B by the third defendant involve practically the same points. The two points pressed before us were (1) that the plaintiff should have brought into hotchpot or collation the lands 177 and 178, Sea street, given by Selvanayagam to his son-in-law Kandappa Chetty on the occasion of his marriage with Selvanayagam's daughter; and (2) that Meenatchi had prescriptive possession of the

1913.

Vaitianathen v. Meenatchi

property in claim in this action. As regards the first, a great deal of Roman-Dutch authority was cited, but, clearly, the Roman-Dutch law as to collation was superseded by section 39 of Ordinance No. 15 of 1876. Under that section collation takes place only when a parent gives property to his children, either on the occasion of their marriage or to advance or establish them in life. In the present case property was given by Selvanayagam, not to his daughter, but to his son-in-law. If he intended the property to go to his daughter, there was nothing easier than to execute the conveyance in her favour. It is in vain to speculate as to the motives that induced Selvanayagam to make a gift to his son-in-law. Suffice it to say that motives are conceivable which preclude the idea that it was intended that the daughter should not, in due time, get her fair share of the remaining property of the estate of Selvanayagam.

On the second point pressed, it is clear that prescription could not run against the plaintiff, as she was a minor. It was argued that Meenatchi's possession began in the lifetime of her father, but of this there is, in my opinion, no satisfactory evidence. I would dismiss appeals 240 A and 240 B with costs.

In appeal 240 C the appellant (plaintiff) appeals from an order of the District Judge, dated May 21, 1913, refusing to amend the decree already entered up in the case. A decree can only be amended by the District Judge in terms of section 189 of the Civil Procedure Code, but the appellant's application did not fall within the scope of that section. It was based on the assumption that there was an inadvertent omission in the judgment by the District Judge, but the order appealed from clearly shows that the District Judge was not prepared to recognize that there was any such omission. That being so, the present order is right. The appellant's remedy was to appeal from the decree or judgment. I would dismiss the appeal with costs.

ENNIS J.—I agree.

Appeal dismissed.