Present : Schneider and Dalton JJ. 1925

ARUMOGAM VALLIAMMA *et al.* *v.* KANAGARATNAM.

107—D. C. Batticaloa, 5,396.

Donatio propter nuptias—*Acceptance—Marriage of donees—Registration of marriage—Postponement of possession—Refusal to give notice—Condition precedent.*

Acceptance is necessary for the validity of a *donatio propter nuptias.* Where a *donatio propter nuptias* has not been accepted at the time of its execution the subsequent marriage of the donees may amount to acceptance.

Where such a donation was expressed in the following terms :— "We hereby give, endorse, assign, and set over the immovable property, hereinafter described to our daughter, Sellatangam, and Kanagaratnam (defendant), the bridegroom-elect ; "

After which came the following clause :—"The immovable property shall be taken charge of by our daughter, the said Sellatangam, and bridegroom, Kanagaratnam, from the day of registration and consummation of their marriage lawfully."

Held, that the deed gave an absolute grant, and that it did not make registration of the marriage a condition precedent to the transfer of title under it ; the effect of the latter clause being to deprive the donees of the right of possession to the property immediately.

Held, further, that where the marriage could not be registered owing to the refusal of the father (one of the donors) to give his consent to it the donors were not entitled to withhold possession of the property from the donees.

1925.

Arumogam Valliamma v. Kanagaratnam

THE plaintiffs in this action sued the defendant for the cancellation of deed of gift No. 5,111 dated September 11, 1919. Sellatangam, the daughter of the plaintiffs, was married to the defendant, and on the date of the marriage the said deed of gift was executed in their favour.

The deed itself contained the provision that the property was to be taken in charge of by the donors' daughter and son-in-law from the day of registration and consummation of their marriage lawfully.

Thereafter defendant and Sellatangam continued to live as husband and wife for several years, during which time the husband repeatedly requested his father-in-law the first plaintiff to give the requisite consent to the registration of the marriage, but the father-in-law put him off on various pretexts.

Sellatangam died on May 28, 1922, and in the administration of her estate the present lands were included. Objection was then taken by the plaintiffs that the deed was of no effect inasmuch as the marriage was not registered.

The present action was brought to set the deed aside, and the learned District Judge gave judgment in favour of the plaintiffs, holding that, as the marriage had not been reigstered, title to the land had not passed to the defendant.

Hayley (with him *Soertsz*), for defendant, appellant.—This is an action by the parents to oust the defendant out of dowried lands. Plaintiffs by deed No. 5,111 of September 11, 1919, conveyed this among other lands to defendant and his wife, their daughter. She died on May 28, 1922, leaving the husband and one child as heirs to her estate. Plaintiffs now claim that the deed is of no effect inasmuch as a condition precedent to its taking effect, viz., registration of the marriage has not taken place.

The real purport of the deed was to make a settlement on the marriage, and the mere fact that registration is mentioned, perhaps by the notary, cannot take away the effect of the deed. It seems to be that, now that the daughter is dead, plaintiffs wish to deprive the defendant of the property. What the deed really required was a lawful marriage and that has been consummated and there is a child of that marriage.

Besides, registration is merely an incident in the marriage. The parties have been married according to custom, and that is sufficient compliance with the condition in the deed.

Even if registration be a condition precedent, the condition is still ineffective as non-fulfilment thereof was due to plaintiffs' default. The wife was a minor at the date of the marriage and was so till her death. The father's consent was necessary and there is evidence that he repeatedly put off the registration.

There is an implied covenant in a condition of this kind that the other party must do all that is necessary to put the party charged with default in a position to fulfil the condition (*vide 10 Hal. 479 ;* also *Welb v. Plummer*,[1] *Shrewsbury v. Gould* [2]).

To put the argument in another way, plaintiffs having originally prevented registration are now estopped from relying on it and turning it against us. *Spencer Bower on Estoppel, p. 214.*

In the actual course of things registration takes place after the marriage and hence may even be treated as a condition subsequent which is now no longer possible of accomplishment. In any event full dominion having been conveyed by the deed and possession of the lands also granted to the defendant, if there was such a condition it must be deemed to have been waived.

Lastly, the action as at present constituted cannot stand. The plaintiffs in the present action seek to vindicate title to one of the lands in the deed. Therefore the deed itself cannot be set aside as it will affect other lands as well.

Drieberg, K.C. (with him *H. H. Bartholomeusz*), for plaintiffs, respondents.—When the full terms of the deed are referred to it becomes quite clear that both defendant and his wife had an interest in getting the condition fulfilled. She does not seem to have been keen in getting the marriage registered. If consent was unreasonably withheld application could have been made to the District Judge. What would appear to have taken place is that the period of probation was not gone through satisfactorily by the defendant. In 1920 a property appears to have been gifted to the daughter alone with a *fidei commissum.*

The condition regarding registration is a condition going to the root of the matter, and even if it lies entirely with the plaintiff, still he can refuse to fulfi the condition and the deed loses its validity.

Besides, there is no acceptance on this deed sufficient in law to constitute an acceptance. The learned Judge has not dealt with this matter. Maternal uncle's acceptance is no acceptance. The only acceptance then is marriage. But what marriage ? A registered marriage.

[SCHNEIDER J.—The operative part gives an unfettered grant. The registration is only the point of time at which possession is given.]

On the question of the waiver of the condition it must be noticed that it is a condition affecting interest in land and therefore cannot be lightly varied. Certainly not by an oral agreement or by conduct implied from the circumstances of the case.[3]

[1] *2 B. & A. 746.* [2] *B. & A. 487.*

[3] *Ameer Ali s. 92 and 22 Madras 261.*

1925.

Arumogam Valliamma v. Kanagaratnam

Hayley, in reply.—Possession was to be given on the registration. If this is to be deemed a condition precedent it must be deemed to have been waived as defendant was put in possession of this and several of the other lands soon after the marriage, and has been in possession since.

September 11, 1925. SCHNEIDER J.—

Sellatangam, the daughter of the plaintiffs, was married according to Hindu custom to the defendant on September 11, 1919. On that day, presumably before the marriage ceremonies were performed, the plaintiffs executed deed No. 5,111 in Tamil. Of three translations of it which are in the record, I accept the two which are both marked D 1. They are almost identical. One is by a sworn translator. I quote below from the other translation which is by the Interpreter Mudaliyar of the lower court. The deed commences : " On the 11th day of September, 1919, we (plaintiffs) do hereby give, endorse, assign, and set over the immovable property hereinafter described to our daughter, Sellatangam, and Kanagaratnam (defendant), the bridegroom-elect." This is followed by the description of nine allotments of land immediately after which comes the following clause :—

> " The immovable property above described with all plantations and rights appertaining to them shall be taken charge of by our daughter, the said Notary Karuwathamby Sellatangam, and " bridegroom " Kadramatamby Udair Kanagaratnam from the day of registration and consummation of their marriage lawfully, and they, their heirs, and assigns for ever shall possess and enjoy as dowry property ; and consenting to deliver annexed the deeds aforesaid, together with this, we set our signatures and granted this deed. The said Notary Karuwathamby Sellatangam being a minor, her maternal uncle Arumakam Kandappen of Navatkadu on her behalf and Kadramatamby Udair Kanagaratnam, have gladly accepted the deed."

The contention of the plaintiffs is that the deed never took effect for two reasons. One reason being that the registration of the marriage was a condition precedent to its taking effect. The second being that the donation required acceptance, and there was no acceptance.

The defendant's contention is that the dominion of the properties transferred passed to the transferees immediately upon the execution of the deed, and it was only the right to possess which was postponed till the registration of the marriage. He also contended that the registration of the marriage was expressly waived by the plaintiffs, and that the plaintiffs thereafter delivered possession of the properties to him. Although no issue was expressly formulated to

that effect, the defendant appears to have contended in the lower court, and did, in fact, contend on appeal that the second plaintiff's refusal to give his consent to the notice of marriage to the Registrar of Marriages had rendered it impossible to effect a registration of the marriage of the defendant and his wife who is now dead.

The learned District Judge held in favour of the first contention of the plaintiffs, namely, that as the marriage had not been registered title to the land in claim in this action had not passed to the defendant and his wife by virtue of deed No. 5,111. He also held that the deed was not one which required acceptance inasmuch as it was for valuable consideration.

It would be convenient to deal first with the question whether the deed required acceptance to render it effectual. I venture to differ from the learned District Judge on this point. Under the Roman-Dutch law the transaction would be a *donatio propter nuptias*. Speaking of donations generally, Voet says : " Donations are therefore not valid unless they are accepted by the donee and thus receive his assent. For, benefits or gifts are not acquired by an unwilling person so that, without acceptance, donations are ineffectual for lack of the *duorum consensus* which donations in common with other kinds of agreements and alienations require.[1]" It would, therefore, appear that the donations to the defendant and his wife required acceptance to render it effectual. Voet referring to a special case of a donation made to donees, who are absent, in contemplation of their marriage lays down that the subsequent marriage of the donees would be considered as an acceptance of the donation. He says : " In one case, however, acceptance of the donation is not by our law required for its perfection ; namely, when a donation is made by means of dotal pacts to a bridegroom or bride who happens to be absent at the time, inasmuch as, where the marriage with a view to which the donation is made has taken place, acceptance is from the very circumstances considered to have intervened." Although the evidence in this case might be regarded as proving that neither of the donees was absent at the time the donation was made, yet, arguing from analogy, the marriage of the donees in this case subsequent to the execution of the deed might be regarded as an acceptance by them. Even if the subsequent marriage of the defendant and his wife cannot be regarded as an acceptance of the donation by them, there are other circumstances in the case which prove that they accepted the donation. As regards the defendant himself there is the acceptance by him on the face of the deed itself. There is also on the face of the deed the acceptance on behalf of the defendant's wife by her maternal uncle, as the defendant's wife was a minor at the time. This is not a valid acceptance, but it at least indicates that she was

[1] *Voet (de Sampayo's Trans.) XXXIX. tit. 5. p. 15.*

1925.

SCHNEIDER J.

Arumogam Valliamma v. Kanagaratnam

willing to accept the gift. Subsequent to the marriage of the defendant and his wife, there is evidence that they entered into possession of some of the lands which were gifted, and I even accept the evidence as proving that they entered into possession of the very land which is in dispute in this case. I would hold, therefore, that the donation was accepted by the defendant and his wife. Accordingly if it were acceptance only that was necessary to give effect to the deed I would hold that title had passed under the deed to the defendant and his wife.

I will now proceed to consider the facts in the case. It is well proved that the defendant and his wife after their marriage in September, 1919, continued to live together as husband and wife in the house of the wife's parents, the plaintiffs. In January, 1920, they were in possession of a coconut land which was said to have been included in the deed of donation. In July, 1920, the defendant asked his father-in-law for possession of the field which is in claim in this case, and was told that he could obtain the produce of it from a man called Kangany who was looking after the lands of his father-in-law. The defendant applied to the Kangany but received a refusal. In September, 1920, a child was born to him and his wife. After the birth of this child the defendant wanted the marriage registered. He brought the Registrar of Marriages to the house of the plaintiffs, but his father-in-law, the second plaintiff, said that the marriage should be registered on an auspicious day. The defendant registered the birth of the child on October 25, 1920, naming himself as the father and stating that the parents of the child were married according to the " custom of the country." The insistence of the defendant upon the marriage being registered led to a quarrel between him and the second plaintiff, and he left the house. In January, 1921, he went to India to attend some festival there and returned in March to his own mother's house. His wife and her mother, the first plaintiff, came to him and wanted him to go back to his wife's house. He refused unless the marriage would be registered. They promised to have it done and he went to the house of his parents-in-law. About the month of March, 1921, the defendant once again brought the Registrar of Marriages to the house and both plaintiffs said that registration was not necessary as the child's birth had been registered. The defendant appears to have accepted this statement of the plaintiffs, and it would seem that a reconciliation of the parties had taken place. In April, 1921, the second plaintiff by deed D 3 donated three allotments of paddy land to his wife, the first plaintiff, subject to the condition that upon her death the defendant's wife was to succeed to the property. The defendant says that after this date he entered into possession of all the lands given to him and his wife including the land in claim in this action. In support of his statement he produced the two letters marked D 4 and D 5. These letters do corroborate his story

that from about January, 1922, the dowried lands were given over to him. The document D 8 shows that in October, 1921, the defendant leased one of the dowried lands for a term of one year. The dispute between the parties appears to have begun after the death of the defendant's wife. These facts were relied on by the defendant as proving that the plaintiffs waived their right to insist upon a registration of the marriage, and that they were thereby estopped from questioning the defendant's title.

On behalf of the plaintiffs it was submitted that it was a term of the contract between the parties that the marriage should be registered, and that this term could not be varied by any oral agreement or by the conduct of the parties, but that the variation must be by a notarially attested document as the contract related to an interest in land. I am not convinced that this argument is sound, but it is unnecessary to consider it as it does not arise in the view I take of the facts.

I am of opinion that the deed No. 5,111 (D 1) contains nothing detracting from the grant of an absolute title made by its operative words. In the absence of any words in the deed which without any ambiguity detract from the absolute grant in the operative part of the deed, the deed must be construed as having operated to pass title to the donees named in it. That portion of the deed which refers to the taking charge of the properties by the donees clearly does not deprive the donees of the dominion conveyed by the operative words. In my opinion the words that the donees " shall take charge " of the properties " from the day of the registration of their marriage " and that " their heirs and assigns forever shall possess as dowry property " only indicate, and were intended to indicate, the point of time at which the possession of the donees and their successors was to begin. Those words are wholly inapt to create a condition precedent before a transfer of any interest could take place under the deed. I am unable to regard them as even creating a condition precedent before the transfer of the right of possession would take place. To my mind the only effect of those words is to deprive the donees of the right which they would otherwise have had of insisting upon their right of possession being given immediately. Accordingly, I would hold that the plaintiff's main contention that the deed passed no interest whatever fails.

There is one reason why the plaintiffs could not succeed in this action in resisting the defendant's claim to the possession of the land in dispute. The provision in the deed that the donees were not to have possession until their marriage was registered implied that the donees on their part would do all that was necessary to have the marriage registered, and that the plaintiffs would, on the other hand, do on their part whatever was necessary for that purpose. The marriage of the donees could not be registered under

1925.

SCHNEIDER J.

Arumogam Valliamma v. Kanagaratnam

the Ordinance until due notice of the registration of the marriage had been given under the provisions of the Ordinance. Under the provisions of sections 23, 24, and 25 the defendant's wife being under 21 years of age, the second plaintiff, her father, should have given his written consent to the marriage. His refusal to give that consent made it impossible for the marriage to be registered. It is true that the defendant or his wife might have applied to the District Judge for obtaining consent to the marriage, but that they had that right makes no difference to the fact that the registration of the marriage was prevented by the act of the plaintiffs. The first plaintiff appears to have acquiesced in her husband's refusal to give the necessary consent to the marriage. While on this point I would say that I do not believe the second plaintiff when he says that the defendant's wife also objected to the registration of the marriage.

Mr. Hayley on behalf of the defendant-appellant cited the following passage from the Laws of England [1] :—

> " If the terms of an agreement show that the parties contemplated that a certain thing, as to which there is no express covenant, would be done before another thing, as to which there is an express covenant, is done, it is a question whether the agreement can be read as comprising a covenant to do the former. If the two things are so involved that the parties cannot be supposed to have intended to impose an obligation to do one without imposing also an obligation to do the other, then there is, by construction, a covenant to do the first thing (1). But otherwise it is not to be assumed that the parties intended to bind themselves to do the first thing because they entered into the contract in the expectation that it would be done, treating it as a thing certain to take place and providing only for the event of its taking place. In such a case there will usually be no covenant implied to do the first thing, but if it is not done, then the express covenant to do other thing does not become operative."

In the deed under consideration there was an express provision that there should be a registration of the marriage. That express provision implied that the plaintiffs, both or either of them, would do whatever was necessary to be done on their part to effect the registration of the marriage. That covenant is implied by the express covenant that the marriage should be registered, and as the implied covenant was not performed by the plaintiffs the express covenant that the marriage should be registered did not become operative. It follows, accordingly, that the provision in the deed fixing the right of possession to commence as from the day of the

[1] *10 Halsbury, Art. 832, p. 479.*

registration should be regarded as not having become operative and that, in the circumstances, the donees are to be regarded as having become entitled to the possession of the lands as from the date of the refusal of the second plaintiff to consent to the marriage of the defendant with Sellatangam.

It is not necessary to deal with all the issues specificially, but I would add in regard to issue 7 that for the reasons given in my judgment the plaintiffs are not entitled to a cancellation of the deed in question. I, therefore, set aside the decree of the District Court, and direct that judgment be entered dismissing the plaintiffs' action with costs. The defendant will have his costs of this appeal.

DALTON J.—I agree.

Appeal allowed.