

W. M. RAMMENIKA v. R. M. KIRI BANDA.

C. R., Kurunegala, 7,814.

1903.

February 27
& March 10.

Civil Procedure—Framing of issues—Deed of Conveyance—Consideration other than that recited—Evidence Ordinance, s. 92.

Even where both parties to a deed of transfer of land agree that the consideration was other than that recited, but are at issue as to what it really was, it is not open to the Court to frame an issue on the latter point unless both parties consent.

THE plaintiff, a Kandyan woman, had executed a transfer in favour of her daughter and one Dingirihami, which on its face purported to be a sale of three lands to them in consideration of the sum of Rs. 300 paid to her by them.

She brought the present action for the purpose of having the said transfer cancelled and declared null and void, not on the simple ground that there was a failure of the recited consideration, but that there was no money consideration, and that the real consideration was an undertaking on the part of Dingirihami to register his marriage with the plaintiff's daughter, with whom he had been living, and that he had failed to register the marriage, and had deserted her daughter, whereby the consideration for the transfer had wholly failed.

Dingirihami answered admitting that there was no money consideration, but not agreeing that the consideration was his promise

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to register the marriage. He asserted that the consideration was his love and affection for the plaintiff's daughter, which he had fulfilled by living with her until she drove him away and took another husband, with the connivance of the plaintiff.

The case underwent two trials in the Court below. At the first trial one of the issues agreed to by the proctors for the parties was, " Was the transfer executed in order to induce the first defendant to register his marriage with the second defendant and to continue to live with her as her husband, or was it executed for the latter purpose only? "

At the first trial, on 29th November, 1900, the Commissioner dismissed the plaintiff's claim on an issue framed by himself, viz., " Has the Court jurisdiction, the action being for breach of promise of marriage? " which he decided adversely to the plaintiff.

On an appeal by the plaintiff the case was sent back for the trial to be proceeded with.

At the second trial, on 7th November, 1902, fresh issues were not framed by the proctors, but the Court framed the issue, " What was the consideration for the transfer? Was it the undertaking of the first defendant to register his marriage? Or was it his agreement to live with the second defendant as husband and wife? "

The first defendant's proctor objected that it was not open to the plaintiff to set up a consideration different from that recited. The Commissioner held that the first defendant might, under section 92 of the Evidence Ordinance, have resisted the attempt to set up a different consideration, but had not done so, and had consented to an inquiry as to what really formed the consideration. He held that the consideration was the registration of the marriage, and that the first defendant had no excuse, but was solely to blame for not registering it, and he gave judgment for the plaintiff.

The first defendant appealed.

F. J. de Saram, for apellant.

Cur. adv. vult.

10th March, 1903. PEREIRA, A.J.—

This is an action by the plaintiff to have what is called a " transfer deed," executed by her in favour of the two defendants, cancelled. The deed, on the face of it, is a conveyance of certain lands by the plaintiff in favour of the defendants " in consideration of Rs. 300, lawful currency of Ceylon," paid by the defendants to the plaintiff. The plaintiff says that the true consideration of the deed was the first defendant's promise to " register his marriage with the second defendant and to continue to

live with the second defendant as her husband," that the first defendant committed breach of this promise, and hence the consideration for the deed failed.

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A.J.

The main, if not the only question in appeal is whether it was competent to the Commissioner to frame an issue on these allegations of the plaintiff. The contention of the first defendant's proctor in the Court below appears to me to be sound. While by our law, both before and after the Evidence Ordinance of 1895, a party to a deed may be allowed merely to negative the statement therein as to what I may call the transit of consideration, or to show that the particular consideration mentioned therein has failed, it is not open to him to show that the consideration was other than that stated in the deed, and that there was a failure of that other consideration. The Commissioner, however, framed the issue because the plaintiff, as he says, "consented to inquiring as to what really formed the consideration." The consent he refers to is apparently in the memorandum of issues appearing at page 28 of the record dated the 15th October, 1900; but that memorandum was filed at a stage of a case which had become matter of history past and dead when necessity to frame fresh issues arose on the 7th November, 1902. The parties had long since ceased to be bound by that memorandum. The first defendant's objection to the issue must prevail.

I do not fail to notice that the first defendant in his answer makes an admission to the effect that no money consideration passed on the transfer, but that the true consideration was love and affection. Inasmuch as a Kandyan deed of gift is ordinarily revocable at the will and pleasure of the donor, it may possibly be, as the learned Commissioner observes, that it is still open to the plaintiff to revoke this deed, but that, if it can be done, must be done in the usual way. Her present action fails. The judgment is set aside, and the plaintiff's claim is dismissed.

