1952 *Present :* **Gunasekara J. and Swan J.**

JAINUDEEN, Appellant, *and* MURUGIAH, Respondent

S. C. 140—D. C. Matale, 203

Collation—" Bring into hotchpot or collation "—Matrimonial Rights and Inheritance Ordinance (Cap. 47), s. 35.

When immovable property which was the subject-matter of a donation is brought into collation under section 35 of the Matrimonial Rights and Inheritance Ordinance, the legal title to it continues to remain with the donee and does not vest in the administrator of the deceased donor's estate.

APPEAL from a judgment of the District Court, Matale.

N. E. Weerasooria, Q.C., with *Ivor Misso*, for the plaintiff appellant.

E. B. Wikramanayake, Q.C., with *D. S. Jayawickreme*, for the defendant respondent.

Cur. adv. vult.

[1] *(1950) A. C. 459 at p. 480.*

September 18, 1952. GUNASEKARA J.—

This is an appeal against an order dismissing an action for declaration of title to land and ejectment of the defendant and damages. The property was gifted by one Ponniah to his son Sellasamy in 1927 and the latter mortgaged it in 1944. It was sold in 1949 in satisfaction of a decree for the enforcement of the mortgage and was purchased by the plaintiff, who obtained a fiscal's conveyance in 1950. Meanwhile, Ponniah died in 1936, and in the proceedings relating to the administration of his estate it was decided by the District Court of Kandy on the 3rd February, 1941, that this property had been gifted to Sellasamy on the occasion of his marriage " and that its value was Rs. 6,000 and that it must be brought into collation ". The decision was affirmed in appeal by this Court and by the Judicial Committee of the Privy Council. The defendant, who is the present administrator of Ponniah's estate, claims that by this order Sellasamy was divested of his title and the property became part of the estate, and that the defendant is in lawful possession of it as administrator. This view of the effect of the order was accepted by the learned District Judge and the plaintiff's action was accordingly dismissed.

Collation is explained in Steyn's Law of Wills in South Africa [1] as follows :—

> " Collation is the duty incumbent on all descendants who as heirs wish to share in the succession to an ancestor, either by will or *ab intestato*, of accounting to the estate of the ancestor for certain kinds of gifts and debts received from or owing to him by them during his lifetime.
>
> Thus, if a child, grandchild or more remote descendant wishes to inherit from a parent, grandparent or remote ascendant from whom he has during his lifetime received any property or money as his portion of his inheritance, or as a marriage gift or otherwise for his advancement in trade or business or such like, he will, before the division of the estate, have to bring into or collate with the estate of such parent, &c., either what he may have so received or enjoyed, or the true value of same at his option, so that the whole estate, thus augmented, may be divided in terms of the will of the testator or according to the law of succession *ab intestato*. "

Relying on this and other citations from text-writers, Mr. Weerasooriya contends that under the Roman-Dutch Law a child of the deceased person is not liable to collation unless he claims a share in the inheritance and that the liability may be discharged by his surrendering the property or paying its true value at his option ; and that, consequently, the effect of the order made on the 3rd February, 1941, in the testamentary case is only that Sellasamy cannot share in the inheritance unless he brings into account the gift or its value. Mr. Wikramanayake's reply is that the Roman-Dutch Law has been superseded by section 35 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47) and that the liability is not dependent upon the heir's claiming a share in the inheritance, and is moreover a liability to surrender the property itself to the executor

[1] *1935 Edn., p. 103.*

or administrator if it is within his power to do so at the time of the deceased's death, without any option merely to bring into account its value ; and that therefore the order in question was in effect a declaration of title in favour of the estate and operated as a cancellation of Ponniah's gift to Sellasamy.

The section is in these terms :

> " Children or grandchildren by representation becoming with their brothers and sisters heirs to the deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parent, either expressly or impliedly, released any property so given from collation ."

This provision no doubt altered the law as regards liability to collation, but it did not give a new meaning to the expression " bring into hotchpot or collation ", which was a term of art that was already known to the common law. Moreover, it may well happen that where some of the children are liable to collation, " all that they have received from their deceased parents above the others " is not represented by any specific parcel or parcels of land or any other specific thing, and that the excess can be brought into collation only by bringing its value into account. It seems to me that the context of the expression " bring into hotchpot or collation " in the section confirms rather than negatives the view that the legislature did not intend to take away the heir's option to discharge a liability to collation by bringing the value of the property into account.

In support of the view that the order of the 3rd February, 1941, in effect declared Ponniah's estate to be entitled to the property, Mr. Wikramanayake contended that what was in issue was whether the property was rightly included in the inventory. There was no issue, however, as to the title to the property. The issue as formulated by the District Judge in his order in that case was

> " whether the 1st respondent (Sellasamy) who was given a deed of gift No. 7881 of 1927 (1R3) by his father Ponniah should bring the property gifted into collation if he wishes to inherit as an heir. "

The decision that the property must be brought into collation did not have the effect either of declaring that Ponniah's estate was entitled to it or of divesting Sellasamy of his title under the deed of gift. The judgment that is appealed from must therefore be set aside and the plaintiff must be declared entitled to the property and to have the defendant ejected therefrom. There is no evidence in support of the plaintiff's claim for damages and he is therefore not entitled to a decree for damages The defendant must pay the plaintiff's costs in this Court and the Court below.

SWAN J.—I agree.

Appeal allowed.