1941 *Present :* **Howard C.J. and Keuneman J.**

WANIGARATNE *et al.* *v.* SELOHAMY *et al.*

21—D. C. Kurunegala, 19,222.

Donation—Gift to concubine—Validity—Roman-Dutch law.

A gift to a concubine is not prohibited by the Roman-Dutch law. Such a gift cannot be revoked by the donor.

***Parasatty Ammah et al. v. Setupulle* (3 N. L. R. 271) followed.**

[1] *13 Ch. Div. 774.*

THE plaintiffs as heirs of one Mango Nona claimed title to the land in suit by virtue of a deed of gift made in favour of the said Mango Nona by Podisingho Appuhamy.

The defendants maintained that the said Podisingho had revoked the said deed of gift and transferred the land to the 1st and 2nd defendants.

The learned District Judge dismissed the plaintiffs' action on the ground that the deed of gift in favour of Mango Nona was executed by Podisingho to induce her to live in concubinage with him and that Podisingho was entitled to revoke the deed of gift.

N. E. Weerasooria, K.C. (with him *E. B. Wikremanayake* and *Stanley de Zoysa*), for plaintiffs, appellants.—The parties are Low-country Sinhalese. Roman-Dutch law applies. Roman-Dutch law did not prohibit gifts to concubines. (*Parasatty Ammah v. Setupulle* [1].) There is no evidence that the gift was given to induce the woman to live in illicit intercourse or to continue to live in such intercourse, she being otherwise desirous to break it off. (*Sendris Appu v. Santakahamy* [2].)

L. A. Rajapakse (with him *D. Abeywickreme*), for defendants, respondents.—Even if the gift was not "ipso jure" void the deed conveyed at the most a defeasible title. The donor could revoke the gift. (*Walter Pereira*) *Laws of Ceylon, p. 604; Van Leeuwen, Censura Forensis bk. I., chap. 4, s. 12, p. 11.* Defendants are in possession. Plaintiffs cannot recover possession by suing on a deed of gift which has been given for immoral consideration. (*Silva v. Ratnayake* [3].) The Court will not lend its power to the enforcement of contracts made for immoral consideration (2 *Nathan 552; 3 Maasdorp 26*). "In pari delicto potior est conditio defendantis." Counsel cited *Brandt v. Bergstedt* [4]; *United Provident Assurance Assoc. of S. A., Ltd. v. Vivian* [5].

E. B. Wikremanayake, in reply.—By the Roman-Dutch law a deed of gift is irrevocable except in certain circumstances (*2 Nathan 1028*). Even gifts to prostitutes were not prohibited. (*Van Leeuwen, Censura Forensis bk. I., chap. 4, s. 12, p. 9.*)

Cur. adv. vult.

February 14, 1941. HOWARD C.J.—

This is an appeal by the plaintiffs from a judgment of the District Court of Kurunegala dismissing their claim for a declaration of title to certain land, for possession of the same and for damages with costs. The plaintiffs as heirs of one Mango Nona claimed by virtue of a deed of gift of June 18, 1915, made by a certain Podisingho Appuhamy in favour of the said Mango Nona. The defendants claimed that the said Podisingho Appuhamy revoked the said deed of gift and transferred the said land to the first and second defendants by deed of May 15, 1935. In dismissing the plaintiffs' action the learned Judge found that the deed of gift in favour of Mango Nona was executed by Podisingho Appuhamy in order to induce Mango Nona to live in concubinage with him. In these circumstances the learned District Judge held that Podisingho

[1] *3 N. L. R. 271.* [2] *13 N. L. R. 237.* [3] *37 N. L. R. 245.*
[4] *(1917) C. P. D. 344.* [5] *(1930) (S.A.) L. R. C. P. D. 364.*

Appuhamy was entitled to revoke such deed of gift. Counsel for the appellants has maintained that there was no evidence to justify the conclusion that the deed of gift was executed by Podisingho in order to induce Mango Nona to live in concubinage with him. Counsel for the respondents has not in this Court sought to uphold this finding. I am of opinion that this contention is right and there was no evidence on which the District Judge could arrive at such a conclusion.

It is, however, maintained by Counsel for respondents that, even if Mango Nona was not induced to live in concubinage by reason of the deed of gift, Podisingho was entitled by Roman-Dutch law to revoke the deed of gift inasmuch as Mango Nona was his concubine. It is not denied by the appellants that Mango Nona was the mistress of Podisingho. This relationship does not in itself render the deed of gift invalid. Nowhere, in any of the authorities on Roman-Dutch law, is it laid down that a gift to a concubine is null and void in the sense that it is prohibited by law. Thus in Van Leeuwen's *Censura Forensis* translated by Barber and Macfadyen, pt. 1, bk. IV, chap. 12, para. 9, it is stated as follows :—

> "But on the ground of affection, neither honourable gifts to well-deserving friends, nor dishonourable gifts to prostitutes and concubines, were by law prohibited."

The principle adopted by the Cape Supreme Court is that it will not lend its power and authority to the enforcement of contracts made for illegal or immoral consideration. Hence a concubine or prostitute would not be able to sue for anything promised her in consideration of illicit intercourse. But if the thing promised had been transferred, it could not be taken from the concubine or prostitute following the maxim of the civil law : *quum par delictum est duorum semper oneratur petitor et melior habetur possessoris causa* (when both persons are in the wrong the burden always lies on the claimant, and the possessor is in the better legal position, *2 Nathan 613*). The principle to which I have referred was applied in the case of the *United Provident Assurance Assoc. of S. A., Ltd. v. Vivian* [1]. The principle has also been recognized in various Ceylon cases. Thus in *Parasatty Ammah et al. v. Setupulle* [2] it was held by Creasy C.J. that the Roman law prohibition against donations to wives did not extend to donations to concubines. He further held that it was unquestionably within the province of a Judge in cases of this kind to inquire into the true nature of the transaction. And if it is clearly proved that the nominal gift was really made by the man in order to induce the woman to come and live in illicit intercourse with him, or to continue to live in such intercourse, she being otherwise desirous to break it off, it would be the duty of the Judge to pronounce it to be a contract *ex turpi causa* and to refuse support of the law to it. The learned Chief Justice proceeded to hold that there was no such proof and all that appeared on the face of the deed was that the donor said the donee was now his concubine which was mere matter of description. The donee stated that the donor gave it to her because she was living

[1] *(1930) (S.A.) L. R. C. P. D. 364.*

[2] *3 N. L. R. 271.*

with him in concubinage. It was a clear case of a donation made to a meretrix under the influence of an *inhonesta affectio*, which was certainly a kind of donation which the Roman-Dutch law declares not to be prohibited by law. It is to be observed that in the case of *Parasatty Ammah et al. v. Setupulle* (*supra*) the defendant's claim was upheld although the plaintiff was in possession. The same principle was formulated in *Sendris Appu v. Santakahamy* [1] where it was held that a deed of gift made in consideration of past cohabitation is not invalid for that reason. A concubine would not be able to sue for anything promised her in consideration of illicit intercourse; but if the thing promised had been transferred, it could not be taken from the concubine. Nothing contrary to this principle can be deduced from the case of *Silva v. Ratnayake* [2] where it was held that under Roman-Dutch law a woman cannot recover property gifted by her to her paramour. By Roman-Dutch law a deed of gift, save in certain circumstances, is irrevocable. If made for immoral consideration it is revocable, but the Courts will not assist a party to take advantage of her moral turpitude in order to recover the property gifted.

In so far as the facts of this case are concerned the gift as in *Parasatty Ammah et al. v. Setupulle* (*supra*) was one which was not prohibited by Roman-Dutch law. It has been urged that the gift having been made to a concubine could by Roman-Dutch law be revoked. In this connection we have been referred to paragraph 11 in Chapter 12 of Part I., Book IV. of *Censura Forensis*, where it is stated as follows :—

> " . . . . and whatever is given to concubines, as such, '*inter vivos*' or is left by last will, can be revoked and taken from them as being dishonourable and unworthy."

To this statement there is appended a footnote by the translators as follows :—

> "But see Lib. 3, cap. 4, num. 41, where our author rightly tells us the contrary."

This statement of the law is not confirmed either in de Sampayo's treatise on Voet, bk. 39, tit. 5, para 22, or in the 4th Edition of Maasdorp, Vol. III., 115, where the revocation of gifts is considered.

It is obvious that this statement in Van Leeuwen so challenged and unsupported by case law or any other authority cannot be regarded as an accurate statement of the law. Even if it was, I am of opinion that in the present case it has not been established that the gift to Mango Nona was to a concubine "as such". The terms of the deed of gift referring as they do to the love and affection borne by the donor towards Mango Nona, who is described as his beloved wife, rebut any such presumption or inference.

In view of the decision at which I have arrived, that the deed of revocation was not valid, I find it unnecessary to consider whether such a deed could be obtained without a decree of Court.— The judgment of the

[1] *13 N. L. R. 237.* [2] *37 N. L. R. 245.*

learned Judge must be set aside and judgment entered for the appellants, with the exception of the claim for damages which has not been proved, together with costs in this Court and the District Court.

KEUNEMAN J.—I agree.

Appeal allowed.