PARASATTY AMMAH *et al.* *v.* SETUPULLE.

1872.
November 19.

D. C., Jaffna, 20,463.

Donation inter vivos—*How far a "contract"—When is it complete?—Whether tradition is essential—Consideration—Donation to a concubine*—Inhonesta affectio—*Evidence of concubinage*—Tesavalamai *of Tamils—Donation by husband of lands acquired during marriage.*

It is only in a very lax sense of the word "contract" that a donation can be called a contract at all.

Donations *inter vivos* are completed by tradition, or even without tradition, when the donor's intention to give and the donee's intention to receive have been clearly expressed, in which case the donee can compel tradition.

In donation there is no consideration in the legal sense of the word. A man makes a donation when he gives solely out of liberality or munificence. A donation is not void because the liberality or munificence is exercised under the influence of "discreditable affection," *e.g.*, a donation made out of affection for a whore.

The Roman Law prohibition against donations to wives did not extend to donations to concubines. However, a gift by a man to a woman to induce her to live in illicit intercourse with him or to continue to live in such intercourse, she being otherwise desirous to break it off, would be a contract *ex turpi causa*, and a judge would refuse the support of the law to it.

1872.
November 19.

Where the donor had said in the deed of gift that she (the donee) "is now my concubine," and the woman stated, "He gave it to me because I was living with him in concubinage,"—

Held, that this was no proof other than that of a donation made to a *meretrix* under the influence of an *inhonesta affectio*, which is not prohibited by law.

By the Tamil customary law, a married man could under no circumstances give away more than half the lands acquired by him during the marriage.

IN this case the plaintiff alleged that the defendant had fabricated a donation deed in her favour, whereby the late husband of the plaintiff purported to grant to the defendant certain lands to which she and her minor children were lawfully entitled under the Tesavalamai of Jaffna. She prayed that the deed be cancelled, and that she for herself and her minor children be declared as the lawful owners of the said lands.

The defendant pleaded that the deed of gift was a genuine one; that plaintiff's late husband being the lawful owner of the lands by right of purchase in his own favour had the right to gift it to the defendant; and that she was duly put in possession, but was wrongly ousted by the plaintiff.

In her replication the plaintiff averred that, even if her husband had bought the land in his own name, he could not donate the whole of it according to the Tesavalamai, and that therefore defendant's claim to the whole land was bad in law; and that defendant never possessed the land.

On the trial day a new issue was raised by plaintiff's counsel that as on the very face of the deed the consideration for it appeared to be concubinage between defendant and the plaintiff's late husband, it was invalid.

The District Judge held the donation to be legal, and entered judgment for plaintiff.

Defendant appealed.

Dias, for appellant.

Cur. adv. vult.

19th November, 1872. The judgment of the Supreme Court was delivered as follows by CREASY, C.J. :—

The decree of the Court below should be set aside and judgment entered for the plaintiff for half the lands in question, inasmuch as by the Tamil customary law the donor could only dispose of half this property; but judgment is to be entered for the defendant for the other half of the lands, and the deed is declared valid so far as regards half the lands.

1872.
November 19.
CREASY, C.J.

This case has been erroneously treated in the Court below as a case of contract on account of concubinage, and the peculiar principles of Roman Law as to donations have been lost sight of. It is only in a very lax sense of the word "contract" that a donation can be called a contract at all (see *Voet ad Pandectas, XXXIX., section 2*). Donations *inter vivos* are complete when there has been tradition to a willing transferree made with the design of passing the property, or when even without tradition the donor's intention to give and the donee's intention to receive have been clearly expressed. In the last-mentioned case, the donee can compel tradition. See *Poste's Gaius, p. 168*, and the passage from *Gaius* cited in the *Digest, XLI., 1, 3*, and see *Poste's Gaius, p. 335*, and the passage in the *Institutes, II., 7, 2*, commented on by Mr. Poste. In a true case of donation, there is no consideration in the legal sense of the word. A man makes a donation when he gives solely out of liberality or munificence when "*propter nullam aliam causam facit quam ut liberalitatem et munificentiam exerceat; haec proprie donatio appellatur*" (*Digest, lib. XXXIX., tit. 5, section 1*). There is the same conclusive authority to show that a donation is not void because the donor exercised his liberality and munificence under the influence of affection, whether of creditable affection or of discreditable affection. Indeed, the Roman jurist specifies this very case of a donation made out of affection for a whore, and declares that such donations are not illegal: "*Affectionis gratia neque honestæ, neque inhonestæ donationes sunt. prohibitæ; honestæ erga bene merentes amicos vel necessarios inhonestæ circa meretrices*" (*Digest, XXXIX., tit. 5, section 5*). There are also numerous authorities to be found in the Digest and its Commentators that the Roman Law prohibition against donations to wives did not extend to donations to concubines (see *Digest, VIII., tit. 5, section 31; Voet ad Digest, XXIV., tit. 1, section 15*).

Unquestionably it is 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 the support of the law to it. But no such proof is given here. All that appears on the face of the deed is that the donor says that she is "now my concubine," which is mere matter of description. The parol evidence does not go further than the woman's statement: "He gave it me because I was living with

1872. *November 19.* CREASY, C.J.

" him in concubinage." A clear case of a donation made to a meretrix under the influence of an *inhonesta affectio*, which is certainly a kind of donation which the Roman Code declares not to be prohibited by law.

As the defendant claimed to retain twice as much as she was entitled to, each side is to pay their own costs.