TILLEKERATNE *v.* SAMSEDEEN *et al.*

D. C., Colombo, 11,779.

1900.
June 29 and July 3.

Presumption as to formalities in execution of deeds—Civil Procedure Code, s. 160—Facts to be proved, before a deed executed by an illiterate person is admitted in evidence—Code of Mohammedan Laws—How far Mohammedans are governed by the Roman-Dutch Law—Right of Mohammedan wife to alienate her immovable property.

Where a deed is on the face of it regular, it will be presumed that all the formalities required by law were complied with in its execution.

The requirement of section 160 of the Civil Procedure Code that, before a document purporting to be executed by an illiterate person who cannot read is put in evidence, it must be proved that at the time his name was written on or his mark put to it he understood its contents, is merely directory, and may be waived by the parties to an action; and where a person denies the fact that he put his mark to a document, and that fact is proved by the opposite party, it is not necessary to prove further that he understood the contents of the document as required by this section.

Section 10 of Ordinance No. 5 of 1852 extends the Code of Mohammedan Laws drawn up in 1806 for the use of the Moors in the Western Province to all Mohammedans in the Island; and where, in matters relating to Mohammedans, this Code is silent the Roman-Dutch Law applies.

But inasmuch as a marriage contracted by Mohammedans is not in substance the same as a monogamous marriage contemplated by the Roman-Dutch Law, the limitation of the powers of married women under that law do not apply to the case of married women among Mohammedans, and the latter may therefore alienate their immovable property without the intervention of their husbands.

THIS was an action to vindicate a parcel of land which the plaintiff alleged was in the unlawful possession of the defendants. The land at one time admittedly belonged to the second defendant (a Malay woman) and her brothers and sisters. The plaintiff pleaded a conveyance by them by deed No. 574, dated the 6th January, 1882, to Jamel Hassen, from whom the plaintiff through certain mesne conveyances claimed title. The second defendant denied the execution by her of deed No. 574, and contended further that at its date she was a married woman, and not capable, on that account, of alienating her immovable property. Judgment was entered for plaintiff, and the second defendant appealed.

Walter Pereira, for second defendant, appellant.—The second defendant was a Malay woman, and was not subject to the Code of Mohammedan Laws introduced in 1806. That Code, as appears

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from the Minutes of the Council that adopted it, was a Code of "special laws concerning Maurs or Mohammedans" to be observed by the "*Moors in the Province of Colombo.*" A strict reading of section 10 of Ordinance No. 5 of 1852 would appear to show that the words "other parts of this Colony" therein used refer to parts other than the "Province of Colombo" and the "Kandyan Provinces" mentioned earlier in the same section. So that, as regards what used to be called the "Province of Colombo," the law remained the same as before, namely, that the Code applied only to Moors. Any way, even if the Code applied to the second defendant as a Malay woman, the law applicable to her as to matters not provided for by the Code is the Roman-Dutch. No doubt the Charter of 1801 conserved to all Mussalman natives of this Island the laws and usages by which they had theretofore been governed, but, although it was held in 59,578, D. C., Colombo (*Grenier 1873-74, p. 28*), that that provision of the Charter was still in force, the Privy Council, in the recent case of *Le Mesurier v. Le Mesurier* (*1 N. L. R. 160*) decided that the Charter of 1801 must be taken to have been wholly repealed by the Charter of 1833. So that, for laws peculiar to the Mohammedans of Ceylon we have to look to the Code of 1806 and that alone. Where the Code is silent, the common law of the land—the Roman-Dutch—applies. Now, the subject of the rights and disabilities of married women is not dealt with in the Mohammedan Code of 1806, and therefore a question such as that involved in the present case must be taken to be governed by the Roman-Dutch Law, and under that law a married woman had no right to alienate immovable property.

Then, deed No. 574 has been irregularly received in evidence. The second defendant was an illiterate person, and under section 160 of the Civil Procedure Code it was necessary not only to show that she put her mark to the deed, but that she understood its contents; but there is no evidence in the case that the contents of this deed were explained to her. [BONSER, C.J.—Was not that to be presumed when the plaintiff proved that the deed was duly executed by the second defendant?] Yes, but, in spite of that presumption, section 160 directs, as a matter of procedure, that a document purporting to have been executed by an illiterate person is not to be admitted in evidence unless it is affirmatively shown that the person understood its contents.

Sampayo, for plaintiff, respondent.—In *Meera Cando v. Sarocwa Umma* (*2 Lorenz's Rep., p. 108*), it was held after full discussion that a Moorish woman might dispose of her own property without the intervention of her husband. [BONSER, C.J.—In that case the Court has given no reasons for its judgment.] No,

but the report shows that the point involved was exhaustively argued by counsel. The judgment has been acted upon hitherto, and it is now too late to depart from it. [BONSER, C.J.—But, what do you say to the contention as to the applicability of the Roman-Dutch Law?] The Mohammedan Law applies, meaning thereby not only the Code of 1806, but the customs and usages of the Mohammedans of the Island. [BONSER, C.J.—The reply to the contention appears to me to be that a Mohammedan marriage is not the same as a marriage under the Roman-Dutch Law.] No, it is not. The same consequences do not flow from the two. Marriage, as understood by the Roman-Dutch Law, is the union of one man and one woman for their joint lives. That cannot be said of a Mohammedan marriage, and in the eye of the Roman-Dutch Law it is no marriage, and a Mohammedan wife is in the same position as a *femme sole*.

As to the other point, the Supreme Court has held in case No. 1,360, D. C., Jaffna, that where a deed appears on the face of it to have been regularly executed, it is to be presumed that the formalities required by law have been complied with.

BONSER, C.J.—

This appeal depends on the question whether a deed which was executed nearly nineteen years ago was executed by the second defendant. She has denied her signature; and that question was the issue between the parties. The notary was called who attested the deed; the notary's clerk was called who wrote out the body of the deed; and one of the attesting witnesses was called to prove the execution of the deed by the second defendant by her affixing her mark to it. The deed is on the face of it regular; and my remarks in D. C., Jaffna, 1,360, which were assented to by my brother WITHERS, will apply to this case. Where a deed is, on the face of it, regular, it will be presumed that all the formalities required by law were complied with. At the trial an objection was taken to the admission of this deed on the ground that section 159 of the Civil Procedure Code had not been complied with. That objection was overruled by the District Judge, who held that that section had no application where the mark was made on the deed by the party himself. This objection is again pressed on us in the petition of appeal, but Mr. Walter Pereira candidly admitted that he could not support it. With his usual ingenuity, however, he sought to shew that there was another objection to this deed, which would be fatal; and that was that the provisions of section 160 of the

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Code had not been satisfied. That section directs the District Judge what he is to require by way of proof in a case where a deed is executed by a marksman. It provides that in such a case it must be proved that the person at the time when he put his mark to the document understood the contents of it. That is merely directory, and it would be quite competent for the parties to waive that objection. In this case the party said I never put my mark to the deed at all. What sense would there be in proving that she understood what she was doing when she put her mark; but, apart from that, the observations I made in the Jaffna case apply to this case.

Then, a further objection was raised as to the legal effect of the execution of this deed by the second defendant. It appears that at the time the deed was executed she was a married woman, and her husband did not concur in the deed. It was argued in the Court below and here, that the non-concurrence of the husband rendered the deed invalid to pass the property in this land. But we called Mr. Pereira's attention, when he opened that argument, to the fact that that was not one of the issues stated between the parties. The only issue that was stated and tried was whether this woman executed this deed or not. No question was raised as to the legal effect of the execution. It was apparently assumed that, being a Mohammedan woman, her husband's consent was not necessary. At the conclusion of the case counsel raised this point, and the District Judge had dealt with it in his judgment. It seems to me that it was not competent for parties to raise that question. At the same time, as the District Judge dealt with the matter in his judgment, I wish to say a few words on it. Section 10 of Ordinance No. 5 of 1852 extends the Code of the Mohammedan Laws, drawn up in August, 1806, for the use of the Moors in the Western Province to all Mohammedans in the Island. That Code apparently does not deal with the powers of Mohammedan married women over their own property. It was urged that where the Code was silent the law of the Island must prevail. I quite agree with that; but I am not satisfied that the Roman-Dutch Law does limit the powers of Mohammedan married women to deal with their property. The Roman-Dutch Law says that certain consequences follow from marriage; amongst other things, the property of the wife is during the coverture to be under the sole control of the husband.

Now, it seems to me that the principle laid down by President Hannan in *Brinkley v. Attorney-General* (*15 P. D. 79*) applies.

He says: " The principle which has been laid down by those " cases is that a marriage which is not that of one man and one

" woman, to the exclusion of all others, though it may pass by the " name of a marriage, is not the status which the English Law " contemplates when dealing with the subject of marriage." Substitute for the word " English " the words " Roman-Dutch," and that principle applies to this case. It is sought to impose on a Mohammedan woman a disability as regards dealing with her own property, because she is a married woman; but the marriage she has contracted is not such a marriage as was contemplated by the persons who laid down the rule that a married woman cannot dispose of her own property. No doubt the connection is called in both cases a marriage, but the things are not the same. As Lord Penzance said, in the case of *Hyde v. Hyde* (*L. R., 1 P. & M. 130*),—" I conceive that marriage, as understood in Christendom, " may be defined as the voluntary union for life of one man and " one woman, to the exclusion of all others." Although a marriage contracted by Mohammedans is called by the same name as a monogamous marriage, yet it is in substance quite a different thing.

It seems to me that, applying that principle, we should be wrong if we held that all the incidents of monogamous marriages necessarily attended polygamous marriages.

In my opinion the appeal should be dismissed.

I should like to add, with regard to the question of requiring the concurrence of a Mohammedan husband to his wife's conveyances, that the uniform practice appears to have been not to require it. We should need very strong proof that that practice was wrong before we made any order disturbing that practice and thus shaking numerous titles.

MONCREIFF, J.—

I agree with the conclusion to which the CHIEF JUSTICE has come with regard to section 160 of the Civil Procedure Code.

I think that, where the execution of the deed is recent, it may not be unreasonable to expect that some person would testify to the fact that the illiterate person, whose mark is in question, understood what he was doing; but where the length of time which had elapsed is such that it would be not reasonable to expect that the memory of the persons present would be sufficient to supply the proof in question, I think proof should be presumed from the circumstances of the case, viz., the fact that the party signed in the presence of other persons; that she was a person of intelligence; and that it was probable from the nature of the transaction and many other such circumstances that she knew what she was doing.