Sept. 14, 1910

Present : Hutchinson C.J. and Middleton J.

UMAITAI *v.* THAMOTHARAMPILLAI.

98, *D. C., Trincomalee*, 217.

Marriage in community of property—Donation between husband and wife after Ordinance No. 15 of 1876—Donation by husband of all his undivided half share to his wife—Wife takes all husband's interest.

Where a husband married in community of property donated to his wife, after the Matrimonial Rights Ordinance came into operation, " ' the exact half ' of all the specified community properties belonging to him (me), exclusive of the other half belonging to (my) his wife by law," it was—

Held, that the husband had conveyed to his wife all his interest in the community property, although his interest was inaccurately described as an undivided half.

" Where community of goods exists all property is joint property between husband and wife. As a partner can give all his interest in any of the partnership property to his co-partner, so a husband can, since the Ordinance of 1876, give to his wife married in community of property all his interest in any of the common property. The deed should be construed, if its language will allow of it, so as to have some effect ; no effect can be given to it except by construing it as a gift of all the husband's interest ; that was its obvious intention.

APPEAL from a judgment of the District Judge of Trincomalee.

The appellant is a nephew and one of the heirs of one Velauther Supper, who died intestate and without issue on December 29, 1904. The respondent, who is the widow of the intestate, obtained letters of administration to the estate of the deceased ; she filed final account on August 19, 1909. The appellant filed objections to the accounts and prayed for a judicial settlement. The learned District Judge allowed some objections and disallowed others. This is an appeal against the disallowance of certain objections.

Sampayo, K.C., for appellant.—The husband had the right to make a gift under section 13 of Ordinance No. 15 of 1876. He had only made a gift of one-half the property of the community. The other half, therefore, remains in the community. The husband had, after the donation, still power to deal with the other half ; a creditor could have seized a half against the husband even after the donation.

[Chief Justice.—Could not the husband have given all his interests to his wife?] He did not give all his interests to his wife ; he may have had the intention, but he did not do so. He expressly says in the deed that he is not dealing with one half share of the properties. [Middleton J.—By the terms of his deed the husband seems to have repudiated his right in favour of his wife. By a mere declaration of a mistaken view of the law in a deed a man does not cease to be the owner.

Van Langenberg (with him *Tambyah*), for the respondents.—The deed would operate as an estoppel as against the husband's heir, the appellant. Where parties are married in community half the property vests in the husband and half in the wife ; the husband has, all the same, a right of disposal over the whole. The husband, after the gift, may have had only a right to dispose of the other half ; but he did not exercise the right. The intention of the husband is quite apparent from the terms of the deed. Counsel cited 1 *Nathan* 394, 397, 404.

Sampayo, K.C., in reply.—There is no estoppel here ; the deed could not be pleaded as an estoppel under section 115 of the Evidence Ordinance or under any other law. The community property is common property of both spouses; only on the dissolution of marriage would half the property vest in the surviving spouse. Even if the other half belongs to the wife, it is still in the community ; it is as if she had purchased it subsequent to the gift. Counsel cited 2 *Walter Pereira's Laws of Ceylon*, 174.

Cur. adv. vult.

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His Lordship, after discussing other points raised by appellant's counsel, continued :—

The last and most important matter relates to some lands which the appellant alleges to belong to the intestate's estate. It was admitted that the administratrix was married to the intestate in 1863 in community of property. By deed 3,699, dated September 28, 1895, written in Tamil, the intestate conveyed to his wife (subject to the conditions thereinafter set forth) " the exact half " of all the properties therein described " belonging to me, the said V. Suppar Udaiyar exclusive of the other half belonging to her by law, she being my lawful wife, and the properties having been acquired by her and myself by our joint labour." Then, after describing the properties, the deed goes on : " my wife (subject to the conditions hereinbelow written) shall take over charge after my life of the hereinbefore mentioned undivided right (or exact, or full) half share of the properties to the value of Rs. 6,030 ; and

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she, her heirs, executors, and administrators, shall enjoy the same for ever as their own." Then come the conditions :—

"(1) Although it is my intention and the true intent and purpose of this instrument are to hereby give to my wife the undivided half share of the properties belonging to me, so that they may become her property after my death, I reserve to myself the independent right and power of selling or mortgaging all or any of the properties at my will, with the consent and signature of my wife, should there occur until my death from this date any want, pressure, or difficulty.

"(2) I shall enjoy the whole rents and profits of these properties till my death, and after my death my wife and her heirs shall take over and enjoy the profits thereof for ever as their own."

The first condition has no effect, so far as I can see ; the effect of the deed would be just the same without it. And the whole deed is an immediate gift to the wife, with a reservation to the husband of the right to take all the rents and profits during his life.

By another deed, No. 3,000 of December 17, 1891, the husband conveyed to his wife, by way of gift, certain other lands to be taken and enjoyed by her after his death. And by another deed, 372 of October 20, 1888, he conveyed to her by way of gift a half share of some other land (that half being apparently all the interest in that land to which he was, or he and his wife together were, entitled), reserving to himself the income and profits during his life.

Section 13 of Ordinance No. 15 of 1876 enacts that a husband or wife, whether married before or after the commencement of the Ordinance, and notwithstanding the existence of any community of goods between them, may make any gift of any property to the other. The gifts made by the two last-mentioned deeds were therefore valid. But the appellant contends that deed 3,699 only disposed of one-half of the lands mentioned in it, and that the othe half remained in the community ; that the husband expressly says in the deed that he does not deal with the other half, because it already belonged to his wife ; that it is not the law that a husband and wife married in community of property are each entitled to an undivided half of the common property ; that although the husband may have intended to make his wife the sole owner, he or the draughtsman of the deed made a mistake, and that he did in fact only make her at most the owner of an undivided half of the lands.

The husband made a mistake in supposing that he was entitled to an undivided half and his wife to the other half. And as he was not entitled to an undivided half, either the deed conveyed nothing and had no effect at all, or else it conveyed all the husband's interest ; and the Ordinance empowered him to convey all his interest to his wife. I cannot read the Ordinance as only authorizing a gift of property which is not part of the joint property of the husband and wife ; for where the community of goods exists all

their property is joint property. And as a partner can give all his interest in any of the partnership property to his co-partner, so a husband can, since the Ordinance, give to his wife married in community all his interest in any of the common property. The deed should be construed, if its language will allow of it, so as to have some effect ; no effect can be given to it except by construing it as a gift of all the husband's interest ; that was its obvious intention ; it says that after the husband's death the wife is to have these properties and the whole of the profits as her own (see condition 2) ; and when in the earlier part of the deed he says that he conveys to her his half, that must be taken to mean his interest, although his interest was not accurately described as an undivided half.

In my opinion, therefore, this appeal should be dismissed with costs.

MIDDLETON J.—

I have had the advantage of reading my Lord's judgment, and do not propose to go into the facts.

On the question of the amount incurred for funeral expenses, and the disallowance of the claim that certain paddy and jewellery should be included in the inventory of the deceased, I agree there is no reason to interfere with the Judge's decision.

On the third and most important question of the construction of the deed No. 3,699 dated September 28, 1895, I am inclined to think the argument for the appellant is underlaid by the fallacy in the deed that, when property goes into community, each spouse is entitled to an undivided half during the existence of the marriage. As I understand the Roman-Dutch Law, *communio bonorum* meant a sort of partnership in common, which arose *ipso jure* on the marriage or its consummation.

It is only on the dissolution of a marriage that a division must take place (*Voet, book* 23, *tit.* 11, *section* 68 ; *Grotius, book* 2, *chapter XI., section* 13 ; *Sande, CCXXII.*, 77). During the partnership of marriage the property was held in common, indivisibly subject to the husband's paramount rights as guardian of his wife and power of alienation and its liability for the debts of the community. If this is so, I see no reason why an apparent attempt by a husband to deal with his whole interest in the commixtion should not be given effect to if the law now allows it in his lifetime.

I agree, therefore, that the deed must be taken to mean that the deceased conveyed his entire interest in the property dealt with to his wife. This he was entitled to convey under section 13 of Ordinance No. 15 of 1876, while the deed, I think, assuredly shows his intention to convey it. I agree, therefore, to dismiss the appeal with costs.

Appeal dismissed.