1955 *Present :* de Silva, J., and Fernando, J.

HEEN BANDA, Appellant, *and* SINNIAH *et al.*, Respondents

S. C. 419—D. C. Kandy, 2,827L

Donation—Gift made by way of dowry—Right of donor to recover it if marriage does not take place.

Where a man makes a gift of land to his prospective bride in contemplation of marriage, the gift must be returned if the marriage does not take place even through the fault of the donor.

APPEAL from a judgment of the District Court, Kandy.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the 2nd defendant appellant.

Cyril E. S. Perera, Q.C., with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

September 26, 1955. FERNANDO, J.—

The plaintiff in this action seeks a reconveyance of certain land which he conveyed to the 1st defendant by a deed No. 1371 executed in April, 1947. The deed clearly recites that the plaintiff had arranged to marry the 1st defendant and that the land was being donated to her in consideration of the marriage. The operative clause of the deed purports to make a gift absolute and irrevocable.

The contemplated marriage did not take place and each of the parties places on the other the blame for the failure to carry out the undertaking to marry. The responsibility for the failure was not however placed in issue at the trial, the plaintiff only raising the issue "Was there a failure of the consideration in that there was no such marriage?" and the defendant the issue whether "such marriage did in fact take place".

The 1st defendant attempted to show that the parties had lived together as husband and wife for a few days, but the learned Judge was properly unable to hold on that evidence that the contemplated marriage had in fact taken place. The point which Mr. Weerasooria has argued in appeal is that since the donation was made in contemplation of marriage, the plaintiff cannot claim a reconveyance without proving that the 1st defendant refused to carry out her agreement to marry the plaintiff, or in other words, that a gift made in contemplation of marriage does not become inoperative merely because the marriage does not take place but only becomes so if the donee refuses to contract the marriage.

De Sampayo J. in *John Singho v. Weerawardene* [1] appears to express a contrary view, relying on a passage in Grotius (3, 2, 20) :— "A donation made in contemplation of marriage *must be returned in case the marriage does not take place*". In that case it was clear that the plaintiff who sought to recover the gift had been deceived by a representation of the defendant into giving his consent to his daughter's marriage and making the gift in question. He subsequently withheld his consent upon discovering that he had been so deceived and it could therefore have been said that, constructively at least, the contemplated marriage did fail owing to the fault of the defendant. In those circumstances it would have been quite sufficient for de Sampayo J. to have laid down the principle that the gift could only be recalled when the donee was at fault. But he chose to state the principle in much wider terms.

There are many passages in the judgment of Macardie J. in the case of *Cohen v. Sellar* [2] which imply that in English Law a gift made in contemplation of marriage need only be returned if the donee refuses to carry out the promise of marriage. But Macardie J. was there dealing with the case of an engagement ring and referring to earlier cases affecting gifts of similar articles such as jewellery &c., and not with a gift made by way of dowry which was the subject of the dispute in *John Singho v. Weerawardene* (supra). In so far as gifts of the former description are concerned, it might well be the case that they are returnable only if the donee refuses to fulfil the promise to marry, or even that (as in the case of a gift of perfume, flowers or other consumable articles) some donations to a prospective bride or bridegroom can be held to be absolute. But it would seem clear that where a man makes a gift of land to his prospective bride in contemplation of marriage, the intention of the parties would be that the gift shall be returned if the marriage fails to take place even through the fault of the donor. Nathan (The Common Law of South Africa, Vol. 2, p. 1155) distinguishes between *donatio propria* which in no case reverts to the donor, the motive for it being pure beneficence, and *donatio impropria* which is only to become the receiver's property

[1] *(1922) 24 N. L. R. 277.* [2] *135 L. T. 21.*

if some certain event takes place; and he places the *donatio propter nuptias* in the category of *donatio impropria*. I would therefore hold that the principle as laid down by Grotius (3, 2, 20) is applicable without qualification in the present case.

The 2nd defendant obtained a conveyance of the land in question from the 1st defendant and the learned Judge has quite rightly held that he had notice of the defeasible nature of the title.

For these reasons the decree in favour of the plaintiff is affirmed and the appeal is dismissed with costs.

DE SILVA, J.—I agree.

Appeal dismissed.