[FULL BENCH.] *June 30, 1910*

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

PONNAMMAL *v.* PATTAYE *et al.*

D. C., Kandy, 18,162.

Sale of immovable property by wife—Deed signed by husband—No express words signifying husband's consent—Ordinance No. 15 of 1876, s. 9.

A deed of conveyance of immovable property executed by a married woman was also signed by the husband (with a mark) under the signature of the two witnesses. The Supreme Court (Hutchinson C.J. and Middleton J., Wood Renton J. *dissentiente*) considered that the husband had signified his consent in writing to the transfer within the meaning of section 9 of Ordinance No. 15 of 1876.

HUTCHINSON C.J.—It is not absolutely necessary to add the words "I consent," or any other words to that effect.

WOOD RENTON J.—Section 9 is satisfied by consent in writing. It should be such a consent as will leave no need or room for oral evidence, or conflicting inferences, as to its meaning when once the signature or mark of the husband has been duly proved.

THE facts of this case are fully set out in the judgment of Hutchinson C.J.

Van Langenberg, Acting Solicitor-General, for the added defendant, appellant.—The husband has merely attested the deed as a witness. The fact that the husband signed the deed as a witness is not sufficient to satisfy the requirements of section 9 of Ordinance No. 15 of 1876 (see D. C., Kandy, 7,977 [1]. Section 9 would not be satisfied even if the husband had signed below the name of the wife. There ought to be written evidence of consent; oral evidence cannot be admitted to prove that the husband intended to give his consent by signing the deed. The fact that a person signed as a witness does not necessarily show that he knew the contents of the deed. The provisions of section 12 indicate that the consent must be of a formal character. Counsel also referred to *Marie Kangany v. Karuppasamy Kangany*,[2] *Jayesinghe v. Perera*,[3] *Beling v. Vethecan*.[4]

Bawa, for the plaintiff, respondent.—The husband must have known the contents of the deed, as, under the Notaries Ordinance, the deed had to be read and explained to the wife—who was an illiterate person—in the presence of the witnesses. The unreported Kandy case may be distinguished from the present. There the husband was one of the two witnesses, and his signature was therefore necessary for the validity of the deed. Here the husband signs his

[1] *S. C. Min., Oct. 24, 1895.*
[2] *(1908) 10 N. L. R. 79.*
[3] *(1903) 9 N. L. R. 62.*
[4] *(1903) 1 A. C. R. 1.*

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name after the two witnesses; his signature was not necessary for the validity of the deed; the reasonable inference is that the husband intended by his act to signify his consent as required by section 9 of Ordinance No. 15 of 1876.

Cur. adv. vult.

June 30, 1910. HUTCHINSON C.J.—

The plaintiff sued in this action the first defendant and her husband, the second defendant, for declaration of her title to three pieces of land and to eject the defendants therefrom. She alleged that the first defendant, being the owner of the lands, by three deeds, two of them dated May 19, 1900, and the third May 28, 1900, sold and transferred the lands to her, but is in wrongful and forcible possession of them. They said in their answer that the deeds were executed by the first defendant without the written consent of her husband, the second defendant, and are therefore invalid in law; that the first defendant only received Rs. 250 as consideration for the transfers, which sum they offered to repay, and that the deeds were only executed as security for that sum; and that the first defendant, with the written consent of the second defendant, by deed dated October 5, 1900, sold and transferred the lands to Kana Rama Arunasalem Chetty, who is now in possession. Thereupon, on the plaintiff's application, Arunasalem Chetty was added as a defendant; and afterwards the plaint was amended by adding a claim that, if the Court should hold that the deeds were invalid, the defendants should be ordered to refund Rs. 1,100, the consideration for the transfers, with interest, and that the lands may be declared bound for the said payment; and the original plaintiff's husband was also added as co-plaintiff. The added defendant filed his answer, alleging that the plaintiff's deeds were invalid because executed by the first defendant without her husband's written consent, and that the first defendant, with her husband's written consent, had sold and transferred the lands to him by the deed of October 5, 1900.

Issues were framed, of which the following are now material:—

(1) Was the first defendant the wife of the second defendant at the date of the first defendant's transfers to the plaintiff ?

(2) If so, are the transfers of no effect by reason of the husband's written consent thereto not having been granted ?

The District Judge found on the first and second issues that there was no proof that the first defendant was the wife of the second defendant at the date of her transfers to the plaintiff, and that, if she was, the transfers were not invalid, as the husband's written consent was obtained thereto. On those findings he gave judgment for the first plaintiff for the land and damages.

At the first hearing of the appeal before Middleton J. and myself we thought that the evidence proved that the first defendant was

the wife of the second defendant, but we referred the appeal for argument before three Judges on the second issue.

The three deeds are similar in form and in mode of execution and attestation. In each of them the first defendant, the vendor, is described as " Pattaye, wife of Arasen." She signed with a mark, and after her mark are the words, in Tamil,

" Witnesses:

" (1) Shayema Shaina Abbubaker.

" (2) Kawane Marudamuttu.

" This is the mark × of Shaina Arasen.

" Awana M. Cassem (in Tamil).

" A. M. Cassem (in English).

" N. P."

Awana M. Cassem was the notary who attested the deed.

Did Arasen sign merely as a witness, or for the purpose of signifying his consent to the transfer thereby made by his wife? It is to be noted that the first two signatories after the woman sign in letters, and their names are numbered (1) and (2); that the law requires that there must be two witnesses, who must sign in letters, and that, where the person executing the deed is or professes to be unable to read it, the notary must read it over and explain it in the presence and hearing of that person and of the attesting witnesses; that in the absence of evidence to the contrary, the execution of the deeds having been admitted, we should presume that this requirement of the law was fulfilled, and that there seems no reason why the husband should have signed the deeds except for the purpose of signifying his consent to them. The execution of the deeds was admitted at the trial, so that no evidence was called to prove it, or as to the circumstances attending the execution; and none of the defendants gave evidence. In my opinion the only possible inference as to the husband's signature which can be drawn from the inspection of these deeds is that he signed to show his consent, and it was not absolutely necessary to add the words " I consent," or any other words to that effect.

I ought to add that on further consideration of the first issue, I think that we ought to accept the District Judge's finding on that issue also.

I would therefore dismiss the appeal with costs.

MIDDLETON J.—

There are two questions in this case: (1) Whether a husband by simply signing a conveyance given by his wife to a purchaser thereby gave his written consent to the transfer under section 9 of Ordinance No. 15 of 1876; (2) if the District Judge was right in holding that there was no proof that the first defendant was the wife of the second defendant, Arasen, at the date of the first defendant's transfer to the plaintiff.

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The point has been referred to the Full Court for consideration owing to the unreported decision of this Court in D. C., Kandy, No. 7,977,[1] where it was apparently assumed, without any reason being given, that such signature was not a written consent within the meaning of the Ordinance. If a man signs a promissory note or a bill of exchange, the presumption is that he consents to and deems himself liable to the obligations contained in the instrument.

In the present case the signatory has made his mark under the signatures in writing of the witnesses. By "The Notaries Ordinance, 1877," section 26, which was in force when this document was executed, and the provisions of which have been re-enacted by section 29 (8) of Ordinance No. 1 of 1907, the notary cannot authenticate or attest any deed or instrument whatever to which two witnesses at least have not subscribed their signatures in letters. He is not debarred from having more than two witnesses, but it is not unreasonable to assume that the two persons who signed in letters were the necessary two who signed in letters.

In the attestation clause the notary alludes to Arasen as one of the attesting witnesses, in whose presence the deed was read over and signed. It was quite clear that section 9 of the Ordinance of 1876 did not intend to prevent illiterate persons from consenting to their wives' transfers of immovable property, and therefore the mark of the cross, admitted to be the mark of Arasen, as the alleged husband of the first defendant, must be taken to be in law his signature in writing.

In my opinion, apart from the attestation clause subscribed by the notary, there is an unrebutted presumption amounting to proof that Arasen, by signing the deed in question, consented to its contents. I think, therefore, the question submitted to the Full Court must be answered in the affirmative.

As regards question (2), if question (1) is decided in the affirmative, there is no necessity for the Court to consider it further. If Arasen was not the first defendant's husband, his written consent is not required. If he was, I think it has been given. It is not necessary, therefore, for us to consider whether the finding of the learned District Judge on this question is correct or not.

I would therefore dismiss the appeal with costs.

WOOD RENTON J.—

In this case the plaintiff-respondent and the added party appellant both derive title from the first defendant, Pattaye, who is the wife of the second, the plaintiff-respondent, under three deeds executed in May, 1900, by the first defendant herself, the added party, under a deed from both defendants in the following October. Although the second defendant did not execute the deeds in favour of the

[1] *S. C. Min., Oct. 24, 1895.*

plaintiff along with his wife Pattaye, he affixed his mark, which is duly attested under the names of two witnesses to the execution of each of them. The actual execution of these three deeds was admitted on behalf of the appellant at the trial. The appellant contended, however, first, that Pattaye was not proved to have been married to the second defendant; and in the second place, that in any event the deeds in favour of the plaintiff-respondent were invalid, inasmuch as Pattaye had executed them without the consent of her husband, contrary to the requirement of section 9 of Ordinance No. 15 of 1876, to the provisions of which both she and her husband were subject. The learned District Judge decided against the appellant on both points. The first was not seriously pressed upon us in appeal. In regard to the second, I am of opinion that the decision of the learned District Judge is wrong. Mr. van Langenberg, the appellant's counsel, argued that we must decide the case on the basis that the first defendant's husband had signed the deeds in question solely as an attesting witness. Mr. Bawa, on behalf of the plaintiff-respondent, contended that it was apparent on the face of the record itself that he had signed as, in a sense, an assenting party. No evidence on the point was adduced at the trial, and as a matter of inference from the deeds themselves, there is something to be said in support of each of these rival contentions. On the one hand, Pattaye's husband is not made a party to the deeds, and his mark is made under the signature of the witnesses. On the other hand, Pattaye describes herself as his wife in each of the deeds, and the witnesses, whose names are signed in the ordinary way, are respectively numbered (1) and (2). Mr. Bawa strenuously argued that these circumstances, together with the fact that Pattaye's husband was an illiterate, showed conclusively that his mark had been added to the documents for the purpose of indicating his consent to their execution. For the purpose of the present case, it seems to me to be immaterial which of the two views is the correct one. If Pattaye's husband signed as an attesting witness, the decision of Sir John Bonser C.J. and of Withers J. in D. C., Kandy. No. 7,977,[1] is an express authority, which I think that we ought to follow, for holding that such a signature is insufficient for the purpose of satisfying section 9 of Ordinance No. 15 of 1876. But even if his object in affixing his mark must be taken to have been to express his assent to his wife's conveyances, I still think that the requirement of the statute has not been complied with.

Prior to Ordinance No. 15 of 1876 a married woman had no power to enter into contracts of this character during her coverture (see *Silva v. Dissanayake* [2]. That disability still exists, except in so far as it has been removed by Ordinance No. 15 of 1876. Section 9 of that Ordinance removes it where a married woman has obtained the "written consent of her husband" thereto, "but not otherwise."

[1] *S. C. Min., Oct. 24, 1895.*

[2] *(1892) 2 C. L. R. 123.*

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Both the language of section 9 and the provisions of section 12, prescribing the formalities by which the husband's consent may be dispensed with, clearly show, in my opinion, that it was the intention of the Legislature to impose the necessity of obtaining that consent as a fetter on the wife's power of alienation. I do not think that we ought to whittle away the strong language of section 9, or to accept anything as a satisfaction of its provisions, except a written expression of consent on the part of the husband. I adhere on this point to what I said in the case of *Marie Kangany v. Karuppasamy Kangany.*[1] I think that in order to satisfy the provisions of section 9 of Ordinance No. 15 of 1876 there must be an express consent in writing by the husband prior to, or at any rate, contemporaneous with, the execution of the particular instrument involved, and having relation to that instrument. I do not see that illiteracy creates any difficulty in the application of this construction of the Ordinance. The mark of the illiterate must be proved in the usual way. Even where the husband is himself a party to the deed, it would still, I think, *ex abundanti cautela*, and, as a rule, of good conveyancing, be well to see that his consent is, in terms or in effect, expressed. In my opinion the English decisions under section 4 of the Statute of Frauds do not afford us much assistance in construing section 9 of Ordinance No. 15 of 1876. As at present advised, although it is unnecessary to decide the point expressly, I should have difficulty in following the decision of Sir Charles Layard C.J. and Wendt J. in *Jayesinhe v. Perera.*[2] But in any case the language of section 9 of Ordinance No. 15 of 1876 is stronger than that of section 21 of Ordinance No. 19 of 1907 as to breach of promise of marriage. There is no Roman-Dutch text that I am aware of which throws much light on the point now under consideration. Analogous provisions are to be found in French law, and in some of our own Colonial systems of jurisprudence based on that law. The old custom of Paris required that the wife should have an express special authority from her husband for the particular act if it related to the alienation by sale or hypothecation, of movable property (*Burge 2d ed., vol. III., p. 309*). The Code Civil, Art. 217, and the Civil Code of Lower Canada, Art. 177, are not so strict; but they both require that the husband should either consent in writing or be a party to the deed. Section 9 of Ordinance No. 15 of 1876 is satisfied only by consent in writing. It should, in my opinion, be such a consent as will leave no need or room for oral evidence, or conflicting inferences, as to its meaning when once the signature or mark of the husband has been duly proved.

I would allow the appeal, with all costs here and below. The majority of the Court, however, take a different view of the law, and judgment will be entered in accordance with their decisions.

Appeal dismissed.

[1] *(1908) 10 N. L. R. 79.*

[2] *(1903) 9 N. L. R. 62.*