Present: Mr. Justice Middleton and Mr. Justice Wood Renton. *July 22, 1910*

SENDRIS APPU *v.* SANTAKAHAMY.

D. C., Tangalla, 992.

Deed of gift to concubine in consideration of past cohabitation and in contemplation of future cohabitation—Valid—Completed gift.

A deed of gift made in consideration of past cohabitation and in contemplation of future cohabitation is not invalid for that reason.

A concubine would not be able to sue for anything promised her in consideration of illicit intercourse; but if the thing promised had been transferred, it could not be taken from the concubine.

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

Bawa, for the appellant.—The deed of gift in favour of respondent is void, as the consideration for the gift is illicit intercourse. A concubine cannot sue for anything promised her in consideration of illicit intercourse. (See *2 Nathan 552, section 767.*) Although the law will not disturb possession based on such deeds, it will not

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enforce a deed of this character. (Counsel also referred to *Voet, 24, 1, 15.*) *Karonchchihamy v. Angohamy* [1] is on all fours with the present case, and is a binding authority. The judgment reported in *(1904) 8 N. L. R. 1* does not touch the point now under discussion. Although *Rabot v. Silva*[2] gives a testator unlimited powers of devise, it does so on the ground that the Statute Law has modified the Roman-Dutch Law. *Rabot v. Silva* does not touch the question of donation.

Van Langenberg, for the respondent.—The gift was accepted, and it is therefore a completed gift; it is not an executory contract. Such a gift as the present one is valid; it could not be taken away from the concubine on the ground that the consideration was illicit intercourse. *Parasatty Ammah et al. v. Settupulle* [3] is a binding authority. *Rabot v. Silva* is also an authority in favour of the respondent. The Statute merely permitted parties who lived in adultery to marry one another; the Privy Council said that the right to devise was a necessary corollary to the right to marry. Counsel also cited *3 Maasdorp 21.*

Bawa, in reply.

Cur. adv. vult.

July 22, 1910. MIDDLETON J.—

This was a partition action begun by the plaintiff's father, Don Davit, who having died pending the action, his mistress, the intervenient respondent, claimed on a deed of gift of the land to her. The District Judge dismissed the partition action, upholding the deed of gift, and the plaintiff appealed on the ground that the deed must be held to be an invalid and void deed for immorality.

Don Davit was a married man, and apparently kept the respondent with the consent of his wife, who was a invalid woman. The deed is expressed as follows: " For and in consideration of the affection I have for my mistress Santakahamy, who is now of help to me, and of receiving help from her hereafter, I do hereby grant, assign, set over, and assure by way of gift, to vest after my demise, retaining the possession for myself during my lifetime, unto K. K. Santakahamy the following property . . . " In a letter clause the deed stated: " Therefore I do hereby declare that my heirs, executors, administrators, and assigns have no right or title, save and except my life interest, henceforth over the premises gifted above, and in succession to me Kodituwakku Kankanage Santakahamy aforesaid, her heirs, executors, administrators, and assigns, may possess the same, or do anything therewith according to wish." The gift was duly accepted in the deed of gift by the donee.

[1] *(1896-1897) 2 N. L. R. 276.*
[2] *(1909) 12 N. L. R. 81.*
[3] *(1872) 3 N. L. R. 271.*

The appellant relied on *2 Nathan 552* and *Karonchchihamy v. Angohamy* [1] as being a case on all fours with that under consideration. On the other hand, for the respondent it was contended that this Court was bound by the decision in *Parasatty Ammah et al. v. Settupulle,*[2] and *Maasdorp 21* was relied on.

At the date of intervention by the respondent, it is perfectly clear to my mind that the property granted by the deed had fully vested in law in the grantee, and that no express or implied revocation of it had occurred.

It seems to me that the principle adopted by the Cape Supreme Court that it will not lend its power and authority to the enforcement of contracts made for illegal or immoral consideration is the correct view of the law. That Court, while admitting that there was a conflict of opinion arising from the Roman-Dutch Law authorities, inclined to the view that a concubine or prostitute would not be able to sue for anything promised her in consideration of illicit intercourse; but that if the thing promised had been transferred, it could not be taken from the concubine or prostitute, following the maxim of the civil law: *quum par delictum est duorum semper oneratur petitor et malior habetur possessoris causa* (when both persons are in the wrong the burden always lies on the claimant, and the possessor is in the better legal position) (*2 Nathan 552*). Applying that principle here, the intervenient is, in the eye of the law in possession of the property granted by the deed of gift, and her possession must prevail as against the plaintiff's claim for partition of the land. The only ground on which the plaintiff could succeed would be on the ground of immoral consideration, which it would not lie in the mouth of Don Davit to aver, on the principle that he ought not to succeed in a court of law on the basis of his own turpitude. The plaintiff, I think, could only base his claim to an avoidance of the deed on the grounds upon which the grantor would be able to reply, and as the grantor would be debarred from averring his own turpitude in support of such a claim, it seems to me his heirs would be equally prevented. This principle, I think, is manifestly supported in the judgment of Creasy C.J. in the case of *Parasatty Ammah et al. v. Settupulle, ubi supra.*

In the case of *Sanders v. Smiles* [3] Kekewich J., a deed made in consideration of past cohabitation and in contemplation of future cohabitation was held not to be invalid for that reason.

In my opinion this appeal should be dismissed with costs.

WOOD RENTON J.—

The only point that has given me any real difficulty in this case is as to whether or not a gift by Don Davit in favour of his concubine Santakahamy could be impliedly revoked by him, and if so, should

[1] *(1896–1897) 2 N. L. R. 276.* [2] *(1872) 3 N. L. R. 271.*
[3] *(1905) 21 Times Law Reports 89.*

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be held to have been so revoked when he instituted the present partition action, claiming the subject-matter of that gift as his own, and declaring no interest in it in favour of Santakahamy. After careful consideration, however, I do not think we are bound, or indeed entitled, to decide that issue in the present case. The point was not taken at the trial, and the only use that was made by the appellant in the District Court of the circumstances to which I have just referred, was as a foundation for an argument to the effect that Don Davit's proceedings in the partition case showed that he had never had any intention of parting with the property in question to Santakahamy. Moreover, the reservation by Don Davit of an interest, which I am not prepared to say was merely a usufruct, in the property during his lifetime may well be regarded as supplying a reason for his having brought his partition action in the form which it has assumed.

On the other point argued in the case, I am clearly of opinion that the gift to Santakahamy was not *ipso jure void* under Roman-Dutch Law. The deed of gift was duly executed, it was accepted by Santakahamy at the time, and it was produced by her in support of her intervention in the action. It does not result from any Roman-Dutch authorities cited to us that a gift to a concubine is null and void in the sense that it is prohibited by law. The decision of the Supreme Court in *Parasatty Ammah et al. v. Setupulle*[1] is a direct authority to the contrary. There is nothing in *Karonchchihamy v. Angohamy*,[2] even if the whole authority of that case must not be regarded as having been undermined by the decision of the Privy Council in *Rabot v. Silva*[3], that runs counter to it in regard to the point that I am now considering, and the passages cited by Mr. Bawa from *2 Nathan 552* are not applicable to a case like the present, where the contract of donation has been completed by acceptance. On the contrary, as my brother Middleton has shown, the authority of Nathan is really against the appellant.

On these grounds I would dismiss this appeal with costs.

Appeal dismissed.

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[1] *(1872) 3 N. L. R. 271.*

[2] *(1896–1897) 2 N. L. R. 276.*

[3] *(1909) 12 N. L. R. 81.*