1967 *Present :* **Tambiah, J., and Alles, J.**

THE ATTORNEY-GENERAL, Appellant, *and* O. M. DE LIVERA, Respondent

S. C. 559/65—D. C. Colombo, 95/T

Estate Duty Ordinance (Cap. 241)—Proviso 3 of s. 6 (d)—"Gift made in consideration of marriage"—Requisites necessary for such gift.

A father donated to his daughter, seven years after her marriage, certain immovable property. He purported to make the gift in pursuance of an earlier oral "agreement", prior to the time of the marriage, to convey the premises to the daughter at her marriage by way of dowry.

Held, that the gift was not a "gift made in consideration of marriage" within the meaning of that expression in proviso (iii) of section 6 (*d*) of the Estate Duty Ordinance. A requisite necessary for the gift contemplated in that proviso is that it must be made on the occasion of the marriage and contingent on the marriage taking place.

APPEAL from a judgment of the District Court, Colombo.

P. Naguleswaran, Crown Counsel, for the appellant.

H. W. Jayewardene, Q.C., with *S. Ambalavanar*, *Sinha Basnayake* and *B. Eliyatamby*, for the respondent.

Cur. adv. vult.

November 27, 1967. TAMBIAH, J.—

The matter raised in this appeal is an important one and involves the construction of proviso 3 of section 6 of the Estate Duty Ordinance (Cap. 241). The short point for decision is whether the gift of property No. 7, Police Park Avenue, Colombo, described more fully in the schedule to the plaint filed in this case, which was donated on deed P1 to the respondent, is a transaction which falls under the proviso to section 6 (*d*) of the Estate Duty Ordinance (Cap. 241).

The respondent married on 23.3.1950. It appears from the evidence that it was not one of the traditional marriages arranged by parents but was a love match. Although the respondent's father Mr. Amerasekera did not consent to this union, later he gave his blessings. Before the wedding there was a conference between the respondent's parents, relatives and others at which the father consented to give this property to her. The respondent stated in the course of her evidence that her father consented to give this property saying that he was giving this in consideration of marriage. The Prevention of Frauds and Perjuries Ordinance (Cap. 70) specifically enacts that no promise or agreement

to transfer an immovable property is valid unless it is notarially executed. In view of this stringent provision of the Prevention of Frauds and Perjuries Ordinance, how far the oral evidence of the respondent is admissible has not been investigated. Be that as it may, her evidence was admitted.

The respondent stated that in pursuance of this agreement, her father executed the deed P1 of 2.8.57 in which he has stated as follows :—

"And Whereas I agreed with my daughter Evangilane Maud Olga Amerasekera to convey to her at her marriage the said premises by way of dowry."

"Now Know Ye and These Presents witness that I the said Samuel Robert Amerasekera (hereinafter referred to as the "said donor") in pursuance of the said agreement and in consideration of the love and affection which I have and bear unto my daughter the said Evangilane Maud Olga de Livera nee Amerasekera of No. 7, Police Park Avenue, Havelock Town, Bambalapitiya in Colombo (hereinafter referred to as the "said Donee") and for diverse other good causes and considerations me hereunto specially moving do hereby grant convey assign and transfer by way of dowry unto the said Donee, her heirs, executors, administrators and assigns as a gift irrevocable the said premises all that allotment of land together with the buildings thereon bearing Assessment No. 7, Police Park Avenue, Havelock Town, Colombo, and fully described in the Schedule A hereto."

The respondent also added in the course of her evidence that her father had unequivocally stated that he had given this property as dowry to her and her husband. Mr. Amerasekera had rented out this house to the Caltex Company and had written two letters P2 and P3 of 1954 requesting the company to give possession of the property for the reason that he had given this property as dowry to his daughter. In one of the letters he states that his daughter is pressing him to give her the possession of the property. Caltex Company vacated the property and in September 1954 the respondent and her husband went into occupation and have been living there ever since.

Mr. Amerasekera also left a last will dated 13.4.55, marked R1, in which he has devised the same property to the respondent and in paragraph 10 of R1 he has specifically stated that the estate duty payable on this property should be paid by the respondent. The respondent admitted having seen and read R1. R1 should have been properly proved by the production of the probate but of consent it was admitted.

The learned Crown Counsel who appeared for the appellant urged that the deed P1 was not given in consideration of marriage since on the date it was given it was not given either to promote the marriage or to induce it.

It must be noted that whatever intention Mr. Amerasekera might have had before the marriage of the respondent, he waited for nearly seven years, during the course of which he changed his mind by the execution of the will R1, and bequeathed the property by way of testamentary disposition. Even in the deed of transfer P1 he has stated that it was transferred not only in consideration of marriage but for the love and affection he had towards his daughter. The learned Crown Counsel submitted that exactly similar words are found in the English Finance (1909–10) Act [10 Edwards 7, chapter 8, section 59 (2)] as in the proviso to Section 69 of the Estate Duty Ordinance and wherever the words of our statutes are similar to the statutes in England, our Courts should be guided by the decisions of some of the highest tribunals of the United Kingdom. He contended that the corresponding section of the English statute is identical with proviso 3 to section 6 of the Estate Duty Ordinance and has exactly the same words, namely—" Nothing herein contained shall apply to gifts made in consideration of marriage ".

It has been held by the highest authority that where words in our statutes are identical with English statutes, the construction placed by the English courts should be adopted by us (vide *Meideen v. Banda* [1], following *Trimble v. Hill* [2]). Although this rule was laid down during the colonial regime, yet there is no reason for us to depart from this rule (vide *Meideen v. Banda* (supra) ; *Nadarajan Chettiar v. Tennekoon* [3]).

In *Inland Revenue Commissioners v. Lord Rennell et al.* [4], the learned Law Lords who decided it adopted the three tests which were suggested by Counsel in the course of the argument in order to determine whether a transfer is a gift in consideration of marriage within the meaning of the similar provision in the English Finance Act (1909–1910). The three tests suggested were : It should be made on the occasion of the marriage ; secondly, it must be conditional to take effect only if the marriage takes place ; and thirdly, it must be made by a person with the purpose of or with a view to encouraging or facilitating the marriage.

In *Inland Revenue Commissioners v. Lord Rennel et al.* (supra) the question that came up for decision was whether a gift provided by settlement made on the occasion of marriage is a gift made in consideration of marriage within section 59 (2) of the Finance Act (1909 to 1910), notwithstanding that the beneficiaries under the settlement were not confined to persons who in law were within the marriage consideration. The majority view was that despite the fact that the settlement was not confined to persons, who in law were within the marriage consideration, yet, if the gift was made in consideration of marriage to a daughter, although others might have been benefited by it, yet it came within the purview of that section.

[1] *(1895) 1 N. L. R. 51.*
[2] *5 L. R. A. C. 342.*
[3] *(1950) 51 N. L. R. 491.*
[4] *(1963) 1 A. E. R. 803 at 817.*

Although on this point there has been difference of opinion, all the judges who took part in the case have adopted the three tests suggested earlier. Viscount Radcliffe in the course of his speech said ((1963) 1 A. E. R. at p. 807) :

> "What then is the meaning of the phrase 'gift which is made in consideration of marriage' as used in the Finance (1909–10) Act, 1910? First, the word 'gift' can hardly have been used in the sense usually attributed to it in ordinary speech, for in that sense it would signify no more than a present made without return of any kind. Yet it was determined by several decisions, previous to 1910, that there could be a gift for the purposes of account or estate duty and property taxed as such, even though the transfer of it had been made on the terms of some substantial benefit, even a monetary benefit, accruing in return to the transferor."

He continued (at page 808) :

> "First then, there is 'Consideration' as a necessary element of the English contract, consideration as the thing done or foreborne or promise given by the promisee in return for the undertaking of the promisor. Consideration in this sense belongs to the law of contract : a gift, which is a transfer, belongs to the law of property, and the contract sense of consideration is inappropriate to the context in which the word here appears. Of course, marriage, the act of marrying, of entering into the married state, can be consideration for an enforceable promise."

He added (at page 809) :

> "In my opinion, one must turn from consideration in relation to promises to consideration as that word has been understood by equity lawyers and conveyancers in relation to transfers or proposed transfers of property. It was they who analysed and developed the ideas of "valuable", "good" and "meritorious" consideration ; and at any rate by the sixteenth century it had become a matter of the first importance to equity to determine what consideration was to be sufficient to raise a use or, to put it in another way, what circumstances were to be regarded as sufficient to prevent a transferee of property, ostensibly unfettered, from holding it free from obligation to the transferor or third parties. Consideration in this sense is said by Sir William Holdsworth (see his History of English Law, Vol. 8, pp. 42 *et seq.*) to have been a *causa* recognised by civil lawyers. I should hesitate to try to offer any definition of what is meant by "causa" but it was certainly not the *quid pro quo* idea that was developed into our conception of contractual consideration. It was rather a set of circumstances, sometimes the essential nature of the transaction, which was categorised by the equity law as justifying its intention and the employment of its procedures of enforcement."

"My understanding of the matter is, therefore, that a *gift made in consideration of marriage is a transfer made on the occasion of marriage*, contingently on the marriage taking place, and containing such limitations, if made by way of settlement, as amount to the customary provision for the spouses and the issues of the marriage."

Lord Cohen said (at page 813) :

"In the result I am content to accept counsel for the respondents' three requisites for a gift to be made in consideration of marriage within the meaning of the subsection, (1) it must be made on the occasion of the marriage ; (2) it must be conditioned only to take effect on the marriage taking place ; (3) it must be made by a person for the purpose of or with a view to encouraging or facilitating the marriage."

Lord Guest was of the same view (vide 1963 1 A.E.R. at 817).

Applying any of these tests, the gift which is evidenced by P1 is not a gift in consideration of marriage. In the first place it was not made on the occasion of the marriage since the marriage took place seven years earlier. Secondly, it was not conditioned only to take effect on marriage because, as stated earlier, the evidence disclosed that it was a love match and this property was not given as a condition for the marriage to take place. Thirdly, the evidence shows that it was not made for the purpose of or with a view to encouraging or facilitating the marriage. Indeed it was made many years later. Even if there was an earlier promise, it is unenforceable since it was not a notarially executed document. The evidence shows that Mr. Amerasekera had changed his mind as would be found from the contents of the will R1, and his intention in executing P1 was to give it as a gift.

Mr. Jayewardene who appeared for the respondent relied on the case of *Kandappa v. Charles Appu* [1] and also the case of *Murugesu v. Subramaniam* [2]. Dealing with the different species of property known to Kandyan law and Thesawalamai, different considerations arise. The case of *Kandappa v. Charles Appu* (supra) merely decided that under the Kandyan law a dowry could be given before or at the time of marriage or even after marriage, if it was in pursuance of a promise made before marriage.

In the case of *Murugesu v. Subramaniam* (supra) I have held that a dowry could be given before marriage. But these considerations have no application in construing the relevant provisions of the Estate Duty Ordinance. It may well be that a deed may be executed as a dowry both under the Kandyan Law and the Thesawalamai, but yet it may not come under section 6 of the Estate Duty Ordinance to escape the payment of the Estate Duty. Further the parties to this action are not governed by the Kandyan Law.

[1] *(1926) 27 N. L. R. 433.*

[2] *(1967) 69 N. L. R. 532.*

Mr. Jayewardene ventured to submit that a deed of gift executed even many years after marriage comes within the ambit of the proviso to section 6 of the Estate Duty Ordinance, if it was the intention of the donor to implement a promise to give a dowry before marriage. If his contention is accepted it will open the door to the perpetration of colossal frauds against the Crown. Every parent can escape the payment of estate duty by disguising a simple gift by stating in the deed that it was given in consideration of marriage. This was not the intention of the Legislature in enacting the proviso to section 6 of the Estate Duty Ordinance.

For these reasons we set aside the order of the learned District Judge and hold that the gift which is the subject matter of the deed P1 does not fall under proviso 3 of section 6 of the Estate Duty Ordinance and is therefore liable to payment of death duty.

The appellant is entitled to costs in both courts.

ALLES, J.—

I agree that this appeal should be allowed. On the facts disclosed at the trial, it was not possible for the trial Judge to have held that a disposition of property made seven years after the marriage was a gift made in consideration of marriage. The trial Judge appears to have been influenced by some oral statements made by the deceased at the time of the marriage in 1950—statements which are clearly inadmissible in law—which he has utilised as evidence of the donor's intention to devise the property to his daughter as dowry, and which intention according to him, was implemented at the time of the execution of the deed P1 in 1957.

According to Lord Cohen and Lord Guest in *Rennell v. Inland Revenue Commissioners* [1], the three requisites necessary for a gift to be made in consideration of marriage are :

(1) It must be made on the occasion of the marriage ;

(2) It must be conditioned to take effect only on the marriage taking place ; and

(3) It must be made by a person for the purpose of or with a view to encouraging or facilitating the marriage.

The third requisite suggests that the settlor's intention at the time of the devise is a matter that is relevant in deciding whether the gift was made in consideration of marriage or not. Viscount Radcliffe however seemed to take the view that the settlor's intention was not material to this issue. Said Viscount Radcliffe at p. 752 :

"I do not myself think that the question whether this divesting of assets was a gift made in consideration of marriage depends upon *what was contemplated or intended by the settlor at the time of the divesting*

[1] *(1967) 2 W. L. R. 745 at 761 and 767.*

> ..... To try each case by a post-obit inquiry into the supposed contemplations or intentions of the deceased is to apply a criterion that is at once improbable and unsatisfactory."

Again in the concluding portion of his judgment, he says :

> " There is no more reason why the description (gifts made in consideration of marriage) should be said to include the idea that the gift must be made ' for the purpose of or with a view to encouraging or facilitating the marriage '.....than that it should include the idea that the gift should unequivocally secure provision for the spouses and their issue."

The difference of opinion between Viscount Radcliffe and the majority of the Law Lords was on the issue whether the particular marriage settlement in *Rennell's case* was a gift made in consideration of marriage. Viscount Radcliffe was of the view that it was not, because it purported to benefit not only the spouses and their issue but also to secure provision for an unascertained class of beneficiaries. He however made it clear that " a gift made in consideration of marriage is a transfer made *on the occasion of marriage, contingently on the marriage taking place,* and containing such limitations, if made by way of settlement, as amount to the customary provision of the spouses and the issue of the marriage." According to Viscount Radcliffe, the declared intentions of the settlor made at the time of the divesting had no relevance to the construction of the words " gifts made in consideration of marriage ".

It would appear that in his view the conditions that must be satisfied to maintain that the gift was made in consideration of marriage are as follows :—

(*a*) There must be a " gift " to which he gave the unusual meaning " abstraction of assets " from the estate ;

(*b*) The gift must be made on the occasion of the marriage and contingent on the marriage taking place ; and

(*c*) The gift must be limited to the spouses and their issue only and not to include unascertained beneficiaries within the marriage settlement.

I would, with respect, prefer to adopt the tests laid down by Viscount Radcliffe to that which found favour with Lord Cohen and Lord Guest who were two of the members of the Court who were in the majority in *Rennell's case.* Applying these tests to the facts of the instant case, the transfer of property made in 1957 was not made on the occasion of the marriage or contingent on the marriage that had already taken place in 1950. I agree with the order proposed by my brother Tambiah, J.

Appeal allowed.