1941 *Present :* **Howard C.J. and Soertsz J.**

KALLAMMA *et al. v.* SELLASAMY.

36—D. C. Kandy, 5,437.

Collation—Gift given on the occasion of marriage—Marriage does not take place —Gift liable to collation—Matrimonial Rights and Inheritance Ordinance, s. 35 (Cap. 47).

Under section 35 of the Matrimonial Rights and Inheritance Ordinance two classes of gifts are liable to collation, viz., (*a*) those given on the occasion of marriage, and (*b*) those given to advance or establish children in life, unless it appears either expressly or impliedly that it was intended that they should be released from that liability.

For a gift to fall into the former category, it must be clear that the donor by way of partial anticipation of what the donee would ultimately get from him makes him a gift because so important an event in his life as marriage is taking place or is about to take place.

The fact that the marriage did not take place does not release the gift from liability to collation.

For a gift to fall into the latter category it must be clear that when the donor made the gift he had in contemplation the fact that the donee would inherit a certain share of his estate on his death and that in anticipation of that event decided to draw on the ultimate share in order, presently, to advance or establish the child in life.

APPEAL from a judgment of the District Judge of Kandy.

The question argued in appeal was whether the deed of gift No. 7781 is liable to collation within the meaning of section 35 of the Matrimonial Rights and Inheritance Ordinance.

H. V. Perera, K.C. (with him *R. C. Fonseka*), for the first respondent, appellant.—The point for adjudication is whether the property gifted to the appellant by his father is liable to collation. The Roman-Dutch law on collation is much wider than our law. See *Maasdorp's Institutes of South African Law, vol. I., p. 172 et seq. (5th ed.)*. Our law on the subject is stated in section 35 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47). That section introduces an encroachment on the old Roman-Dutch law and restricts collation to the two kinds of gifts mentioned therein.

To understand the nature of the gift, one should not go beyond the words of the deed. The attendant circumstances should not be considered for the purpose of contradicting the declarations in the deed. It cannot be said that the gift in the present case was given to advance or establish the appellant in life. What was conveyed was merely a reversionary interest. Nor can the gift be regarded as one made on the occasion of marriage. It had only a casual or accidental connection with the marriage. On the face of it, the deed of gift was given for love and affection. The District Judge himself has found that this is a simple and ordinary gift, but has strained the facts of the case to bring it into collation. Simple donations, unless made on the occasion of marriage, cannot be subjected to collation—*Cooray v. Perera*[1]. Further, the marriage must take place before the deed can be regarded as one given on the occasion of marriage. In this case, the marriage did not take place.

[1] *(1883) 5 S. C. C. 113.*

N. Nadarajah for the second, third, and fourth respondents.—It is in evidence that the appellant gave notice of marriage. The deed of gift was clearly given on the occasion of this contemplated marriage. It was a *donatio ante nuptias* and is liable to collation—*Cooray v. Perera* [1]. The reservation of the life-interest does not detract from the character of the gift.

The gift can also be regarded as one made to advance or establish the appellant in life. A large sum given to a son in one payment might be presumed, in the absence of evidence, to be an advancement by way of portion. See *Lewin on Trusts (1927), p. 374, note (e).*

The onus is on the appellant to show that his father waived all rights to collation. Section 35 of the Matrimonial Rights and Inheritance Ordinance and *Cooray v. Perera (supra)* justify the conclusion reached by the District Judge.

H. V. Perera, K.C., in reply.—Ante-nuptial gifts are operative only when the marriage takes place. As there was no marriage it was open to the donor to have claimed a revocation, but he did not do so, thus showing that he waived his rights in favour of the appellant. The gift was a simple one.

Cur. adv. vult.

June 17, 1941. SOERTSZ J.—

The question that arises for decision on this appeal is whether the subject matter of the deed of gift No. 7781 executed on November 1, 1937, is liable to collation as a gift made by a father to a son, within the meaning of section 35 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47, Legislative Enactments).

There appears to have been much controversy among Roman-Dutch law text writers and commentators in regard to the kind of gifts that were liable to be brought into collation. There is a learned discussion on the subject in the case of *Cooray v. Perera* [2], but in view of the fact that the law governing us in regard to this matter is to be found in section 35 of the Matrimonial Rights and Inheritance Ordinance, there is really no occasion for us to examine in detail what the position was before 1876, although it will be necessary to make brief reference to the earlier law in order to elucidate the law as it stands. Section 35 enacts as follows :—

> "Children or grandchildren by representation becoming with their brothers and sisters, heirs to the deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parent, either expressly or impliedly, released any property so given from collation."

The clear implication of this provision is that two classes of gifts are now liable to collation, namely, (*a*) those given on the occasion of marriage, and (*b*) those given to advance or establish children in life, unless it appears either expressly or impliedly that it was intended that they should be released from that liability. But under the Roman law, and

[1] *Ibid at 114.*

[2] *(1883) 5 S. C. C. 113.*

in the Roman-Dutch law originally, in the absence of indication to the contrary, all gifts were liable to collation for the presumption of law was that a parent intends that there should be perfect equality among his heirs (see *Nathan Common Law S. A., vol. III., p. 1933*). But, later on, gifts made *simpliciter*, gifts of a remuneratory character, and gifts or advances made for preparing and qualifying a son for a profession or for teaching him a trade or calling were free from collation if there was nothing to show a contrary intention. (See *Ibid p. 1934*). But under the law that governs us to-day, the material consideration is whether what was given was given "on the occasion of marriage" or "to advance or establish in life". Consequently it would hardly be relevant to inquire whether a gift made on the occasion of marriage is a *donatio simplex* or a donatio remuneratoria for in either case, it would be liable to collation unless expressly or impliedly exempted from collation. Such an inquiry would, however, be relevant for the purpose of ascertaining whether there is an implied exemption to be gathered from the nature of the gift and from other circumstances.

On the material before us in this case, I do not think it can be said that the gift in question was given to advance or establish the first respondent-appellant in life. The phrase "advance or establish in life" must be given a special meaning or the result would be that every gift from parent to child would be liable to collation inasmuch as a gift by conferring a benefit, indirectly advances or establishes one in life. For a gift to fall into the class of gifts intended to advance a child in life it must be reasonably clear from all the circumstances that when the parent made the gift he had in contemplation the fact that the child would inherit a certain share of his estate on his death, and that in anticipation of that event decided to draw on the ultimate share in order, presently, to advance or establish the child in life. In this case, there are no circumstances from which such an inference can be drawn. At the date of the gift the donee was already established in life in a manner suitable to his social status, and he continued in the same way after the gift.

The only question, then, is whether this was a gift "on the occasion of marriage", and the answer to that, of course, depends on the true meaning of the phrase *on the occasion of the marriage.* I do not think it can be maintained that it means on the occasion on which the marriage takes place. It must, I think, be given a wider meaning and made co-extensive with the connotation of the Latin phrase employed by the Roman-Dutch text writers—*propter nuptias*—which would include a gift "in contemplation of marriage". Given that meaning, I find it difficult to accede to Mr. Perera's contention that the liability to collation of a gift "propter nuptias" depends on whether or not the contemplated marriage takes place, and that if it does not, the donor is entitled to get back the gift on the ground of a failure of consideration, and that if he omits to do that and dies intestate, there can be no question of collation. In the South African case of *Jooste v. Jooste's Executor* [1] referred to in *Vol. III., Nathan p. 1933*, it was stated that "advancements made by parents and debts owing to them but not satisfied during their life-time must, in the absence

[1] *8 S. C. 288.*

of any indication of a wish to the contrary, be collated . . . . The fact that the parent did not sue the child . . . . is not, taken by itself, a sufficient indication of a wish to the contrary".

The real question seems to be whether the donor by way of partial anticipation of what the donee would ultimately get from him, makes him a gift because so important an event in his life as marriage is taking place, or is about to take place. If that is what appears from all the circumstances, the gift must be regarded as one made "on the occasion of marriage" and is liable to collation unless it can be proved that the deceased parent, expressly or impliedly, released the property from collation.

In this case, the evidence is very strong, almost overwhelming, that a marriage between the donee and a bride whom the donor greatly desired for the donee was imminent at the time of the gift, and although there is nothing in the deed itself by way of reference or allusion to this marriage, —an omission probably due to the Notary keeping to the beaten track of the phraseology of the ordinary deed of gift,—the conclusion seems irresistible, in view of the other documentary evidence, that the impending marriage was the occasion for the gift. Once that position is reached, it is for the donee to show that the donor expressly or impliedly released the gift from collation. It is impossible to hold that the donee has shown this. All he can point to is that although the marriage did not take place, the gift was not recalled. But that is explainable on the hypothesis that the donor was satisfied that the gift having been made "on the occasion of marriage" would be liable to collation. Besides as I have already pointed out by reference to the South African case the failure to sue is not a sufficient indication of a wish to exempt. Moreover, the document RD 4 negatives the view that there was a release from collation.

Mr. Perera submitted that, in the circumstances of this case, the most that can be said on behalf of those claiming collation is that the gift was made in order to induce the donee who does not appear to have been very enthusiastic about the proposed marriage, to surrender his reluctance and marry the bride his father had chosen, and he argued that a gift so given is not liable to collation because, he submitted, it could not be said that such a gift is made "on the occasion of marriage" or in the Latin phrase "propter nuptias". The authority of *Voet* appears to me to be against this contention. He says (*bk. 37.7.3*) :—

"Quod vero interpretes nonnuli voluerunt, conferendas non esse res illas, quas praeter donationem propter nuptias pater filio dedit, ut potiretur nuptiis puellae nobilis, a qua alioquin tulisset repulsam, admittendum nonest : eo quod id quod amplius datum, re ipsa par censeri debet ipsius ante nuptias donationis, nec aliud videri potest pater egisse, quam quod amplioris propter nuptias donations ostentatione nurum pellexerit ad nuptias sui filli quemadmodum et generos dotis majoris specie pellici solitos fuisse colligi potest ex l. pen. ff de jure dot. Tuldenus ad tit C. de collation num. Peregrinus de fidei commissis art. 36. Num. 134 Ant. Matthaeus de succession : disput : 17.n.10. Vinnius de collationib. Cap. 13.n.13.

Freely rendered, the passage just quoted says :—

"Indeed, the opinion of some commentators that those things need not be collated, which, a father has given to his son over and above the gift in view of his marriage, so that he might be able to secure an alliance with a young lady of good social standing who might otherwise have rejected him, cannot be accepted, for the reason that, what has been given over and above, must needs be reckoned a part of the pre-nuptial gift ; nor would it appear that in such a case, the father had any other object than by means of a display of a larger pre-nuptial gift to entice a daughter-in-law to a marriage with his son, just as sons-in law used to be attracted by the appearance of a larger dowry, as can be gathered form "—and *Voet* goes on to cite considerable authority for this proposition.

If something given to a son to attract a reluctant bride to marriage is subject to collation, it necessarily follows that a gift to induce a recalcitrant bridegroom to the same end is likewise subject to collation.

For these reasons I reach the conclusion that the property in question is liable to collation. The appeal must therefore be dismissed with costs.

HOWARD C.J.—I agree.

Appeal dismissed.