Present: De Sampayo A.C.J. and Garvin J. 1923.

VALLIAMMA *v.* LOWE *et al.*

439—D. C. Chilaw, 6,511.

Husband and wife—Mortgage of immovable property by wife without the written consent of husband—Subsequent ratification by deed—Does ratification render mortgage valid?—Money bond.

A mortgage of immovable property by a wife without the written consent of her husband cannot be regularized by subsequent ratification by the husband. But the ratification renders the bond valid and effectual as an ordinary money bond.

THE facts appear from the judgment.

Samarawickreme (with him *Arulanandan*), for plaintiff, appellant—Section 9 of Ordinance No. 15 of 1876 has not done away with the Roman-Dutch law relating to the marital rights of the husband. A married woman could not enter into any contracts without the assistance of the husband, but the subsequent ratification by him rendered the contract valid. Although the section says that the consent in writing is necessary, there is nothing to prevent the husband from giving it afterwards. Even if the hypothecation of the property is bad, the bond is good as an ordinary money bond, in view of the husband's ratification in writing given subsequently. Counsel cited *Voet 23, 2, 42; I. Maasdorp, pp. 43-45; Grotius 1, 5, 23;* and *Marie Cangany v. Karuppasamy Cangany.*[1]

Croos-Da Brera, for defendants, respondents.—Sections 9 and 12 make it clear that the husband's consent should be given prior to or at the time of execution of the deed. The intention of the Legislature was to protect the wife and prevent her being inveigled into some foolish disposition. The consent comes too late when given after the transaction. The plaintiff cannot recover as on a money bond. The husband's ratification does not validate a contract of this nature. There should be proof that the wife benefited by the transaction. Counsel cited *Silva v. Egonis*,[2] *Ponnamal v. Pattaye*,[3] *Wickremaratne v. Dingiri Banda.*[4]

July 2, 1923. GARVIN J.—

This was an action by a mortgagee against the mortgagor, her husband, the second defendant, and a surety, the third defendant. The second defendant filed no answer. The mortgagee's claim

[1] *(1906) 10 N. L. R. 79.*
[2] *(1901) 2 Br. 362.*
[3] *(1910) 13 N. L. R. 201.*
[4] *(1913) 2 C. A. C. 132.*

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was, however, resisted by the first defendant, on the ground that inasmuch as the mortgage bond was executed by her without the written consent of her husband, it was bad in law for non-compliance with the requirements of section 9 of Ordinance No. 15 of 1876. Judgment was entered for the plaintiff against the third defendant, but the plea of the first defendant was upheld, and so far as she was concerned the action was dismissed with costs. From this judgment the plaintiff appeals.

The learned counsel for the appellant rested his case upon a deed bearing No. 1,853 of July 15, 1916, which purports to be a ratification by the husband of the mortgage bond upon which this claim is based and of the debt of Rs. 750 incurred by his wife and secured by the said bond. He contended, in the first place, that any defect which may have existed in the mortgage bond by reason of the absence at the time of the execution of the writtten consent has been cured by subsequent ratification. In the next place, he contended that, even if it had been held that subsequent ratification will not cure the defect in the bond so far as it purports to deal with immovable property, still it is nevertheless sufficient to support the claim for money lent on the bond.

The first of these points depends upon the correct interpretation of section 9 of Ordinance No. 15 of 1876. That section after giving a wife a separate estate in her immovable property proceeds as follows:—

> "Such woman shall . . . . have as full power of disposing of and dealing with such property by any lawful act *inter vivos* with the written consent of her husband, but not otherwise, or by last will without such consent as if she were unmarried."

The submission is that these words should be construed to mean that the written consent required by section 9 may be given at any time, and not necessarily at the time at which the act by which the property is disposed of or dealt with is done. It is suggested by counsel that the language of the passage does not definitely fix the moment at which the act is done as the point of time at or before which the written consent should be obtained, and that in these circumstances it is justificable in construing the section to have regard to the law, as it stood before Ordinance No. 15 of 1876 was passed. It is contended further that prior to the time when this Ordinance became law, the husband's consent to a contract by the wife may be given before or at the time of the formation of the contract or at any time subsequent thereto. The only authority that learned counsel was able to cite in support of his contention that the disposition of her immovable property, subject to the Roman-Dutch law, could be regularized by the subsequent ratification of the

husband is a passage in *Voet 23, 22, 42.* which is rendered by Stoney in his translation as follows:—

> "Nowadays the ratification of the husband is equivalent to his authority . . . . for as the consent of the husband is particularly required to prevent him suffering a loss, a contract founded on the consent of the husband cannot seem to lack confirmation though entered into by the wife."

This passage appears in an article in which Voet is dealing generally with the position of a husband and wife relating to contracts made by the wife. The general tenor of the article would seem to indicate that the contracts which Voet is here considering are contracts of a different kind. Voet says nothing in this article with specific reference to the disposition or dealing with her immovable property by a wife, nor has counsel been able to cite anything more specific than the passage I have just referred to in support of his proposition; nor is this altogether suprising when it is remembered that in the state of community of property which came into existence upon a marriage of persons subject to the Roman-Dutch law, it is the husband alone who has the power of disposition over the property of the community. The only case in which any similarity is possible between the condition of a wife under the Roman-Dutch law and one who is entitled to claim the privileges created by Ordinance No. 15 of 1876 is that of a woman who by ante-nuptial contract has reserved to herself a separate estate in her immovable property, leaving the management and control of it to her husband. Counsel was unable to refer us to any clear authority for the proposition that in such a case a disposition of her immovable property by the wife without the consent of her husband might be regularized by subsequent ratification by her husband. Whatever the Roman-Dutch law may be, I think that the language of section 9 is clear, and only admits of the interpretation which has already been placed upon it by Wood-Renton C.J. In the case of *Ponnamal v. Pattaye* (*supra*), he said:

> "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 very instrument."

This is the interpretation I should myself place upon the words of the section by which a valid disposition or dealing with immovable property is only permitted when the act of disposition or dealing with the property is done with the written consent of the husband

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When such consent has not been given at or before the act, it is a dealing with immovable property otherwise than in accordance with the provisions of section 9. No dealing otherwise than in accordance with the provisions of that section is permitted.

In the case of *Wickramaratne v. Dingiri Banda* (*supra*) this interpretation was re-affirmed by Wood Renton C.J. and Pereira J., the other member of the Court expressed his own view as follows:—

> " I have no hesitation in saying that this provision implies that a disposition of immovable property by a maried woman is ineffectual unless the consent of her husband is given to the disposition of the particular property dealt with *at or before such disposition.*"

Where the words of an enactment are as clear as the one now under consideration, there is no room for speculation as to the intention of the Legislature. But even if this were a case in which it is necessary to look beyond the words of the enactment to gather its true meaning, I should like to point out that the Ordinance No. 15 of 1876 in so far as it gives a married woman a separate estate is not a development of the Roman-Dutch law, but was designed to introduce the principles of the English law; for it is common knowledge that this part of the Ordinance is founded on the Married Women's Separate Property Act.

The second of the two contentions upon which this appeal is founded remains to be considered. Granting that the bond is ineffectual as a mortgage of immovable property, is not the plaintiff entitled to judgment for the amount of the debt thereby created? Counsel contends that the bond is valid and effectual as an ordinary money bond. Such a bond does not fall within the class of documents affected by section 9.

Counsel contends that inasmuch as the husband has ratified the contract, the plaintiff is entitled to recover on the bond. This contention is entitled to succeed. The Roman-Dutch law broadly stated is that the contract of a married woman made with the consent of or which has been ratified by her husband is good in law. In this case both the debt and the mortgage have been so ratified. For reasons I have stated at some length the ratification of the mortgage of immovable property is ineffectual. There remains the obligation to repay money borrowed and received by the wife. The whole transaction having been ratified by the husband, in my opinion the plaintiff is entitled to judgment for his money claim. He is not entitled to a hypothecary decree.

I would accordingly allow the appeal, with costs.

DE SAMPAYO A.C.J.—I agree.

Appeal allowed.