P.B. RATNAYAKE
v.
M.S.B.J. BANDARA

SUPREME COURT.
RANASINGHE, C.J., TAMBIAH, J., H. A. G. de SILVA ,J., G. P. S. de SILVA, J., BANDARANAYAKE, J., MARK FERNANDO, J., AMERASINGHE, J., KULATUNGA, J., and DHEERARATNE, J.
S.C. No. 4/86- C.A. No. 579/76 (F)- D.C. MATALE No. 2059/L
MARCH 22 and 23, 1990.

Kandyan Law - Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939 ss.5(1) 34 (1) 75 (1) (d) – Kandyan Deed of Gift. Donation inter vivos - Irrevocability - Validity of revocation and gift to another – Action for declaration of title - Is Privy Council judgment binding on the Supreme Court - Fideicommissum -Does it affect revocability - Application of Roman Dutch Law.

On 11.6.1960 one Tikiri Kumarihamy Ellepola by Deed No. 8247 gifted certain land to her sister Jayalatha Kumarihamy as a donation *inter vivos* absolute and irrevocable subject to the condition that the donee shall not mortgage or otherwise alienate the said premises but shall only possess and enjoy the fruits and produce thereof and on her death the land was to devolve on her children and in the event of her dying issue on the donor and her children. The gift was accepted by the donee. Jayalatha Kumarihamy by Deed No. 5204 of 5.10.1972 gifted the said land to her husband Ratnayake the defendant-appellant. On 31.1.1973 Tikiri Kumarihamy by Deed No. 39373 revoked the Deed of gift No. 8247 and on 17.2.1975 by Deed No. 72 gifted the said land to her son Bandara the plaintiff respondent who sued Ratnayake the defendent-appellant for declaration of title.

The majority decision of the Privy Council in *Dullewe v. Dullewe* 71 NLR 289 held that a Kandyan Deed of gift is revocable unless the right of revocation is expressly renounced in the particular manner stated in s. 5(1) (*d*) of the Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939.

Held:

1. The Privy Council judgment in *Dullewe v. Dullewe* is not binding on the Supreme Court. Though that judgement is of great value the question decided there is open to review.

HELD Further : (Ranasinghe, C.J., H.A.G. de Silva, J., G.P.S. de Silva, J., and Kulatunga J., dissenting):

(1) The Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939 is an Ordinance to declare and amend the Kandyan Law. It seeks to amend the Kandyan Law and not to make a mere restatement of the law as it was prior to 1939 when the intention to renounce the right to revoke was inferred or deduced from the particular words used. The amending Ordinance has enacted a uniform rule requiring an express and not merely inferential renunciation of the right of revocation. The words "expressly renounced" in s. 5(1) (*d*) of the Ordinance recognise a pre-existing right to revoke which every Kandyan donor had in Kandyan Law. What the Ordinance contemplates is an express and

deliberate renunciation by the donor of his right to revoke. From the words "absolute and irrevocable" it may be implied that the Donor intended to revoke but such an expression would not constitute an express renunciation of the right to revoke.

There is a further requirement that the renunciation must be effected in a particular way, viz, by a declaration containing the words " I renounce the right to revoke" or words of substantially the same meaning.

The Ordinance by s. 5(1) (*d*) has now vested in the Donor a statutory right to revoke and he is required to exercise that right in a particular way.

The words "absolute and irrevocable" are only an adjectival description of the gift but the essential requirement is a transitive verb of express renunciation. Words merely of further assurance are insufficient.

The use of the words "absolute and irrevocable" and "to hold the premisess for ever" do not satisfy the requirement of s. 5(1) (*d*) of the Ordinance. Deed No. 8247 was revocable. (2) Though a Deed of gift creating a fideicommissum is valid under the Kandyan Law and the Court will resort to Roman Dutch Law to ascertain whether the Deed creates a fideicommissum other connected matters must be determined according to Kandyan Law. A Kandyan Donor can impose burdens on the donee without giving up his right to revoke. The expected gifts are contained in s. 5(1) sub–paragraph (*a*) to (*d*). The Court cannot add to this list of irrevocable gifts a deed of gift subject to fideicommissum.

The Abolition of Fideicommissum Law, No. 20 of 1972, which came into operation on 12.05.72 did not by ss. 4 and 6 place the property in the hands of Jayalatha Kumarihamy absolutely. The right of revocation is vested in the Donor. The donee is not freed from being subject to this right by creation of a fideicommissum.

Cases referred to :

(1) *Tikiri Banda Dullewe v. Padma Rukmani Dullewe 71 NLR 289 (P.C)*
(2) *Punchi Banda v. Nagasena 64 NLR 548*
(3) *Kirihenaya v. Jotiya 24 NLR 149*
(4) *Dharmalingam v. Kumarihamy 27 NLR 8,13*
(5) *Ukku Banda v. Paulis Singho 27 NLR 449*
(6) *Bogahalanda v. Kumarihamy 8 Ceylon Law Recorder 91*
(7) *Jams Singho and Others v. Dingiri Banda 5 Times Law Reports 77*
(8) *Gunadasa v. Appuhamy et al 36 NLR 122*
(9) *Biso Menika v. Punchiamma et,al at NLR 430*
(10) *Ukku Amma v. Dingiri Menika 69 NLR 212*
(11) *Tammika v. Palipana 70 NLR 520*
(12) *Dullewe v. Dullewe 70 CLW 55(S.C.)*
(13) *Sumanasiri v. Tillekeratne Banda 74 NLR 155*
(14) *Molligoda v. Sinnetamby 7 SCC 118, 119*
(15) *Assistant Government Agent, Kandy v. Kalu Banda et al 23 NLR 26, 27*
(16) *Menike v. Banda 25 NLR 207*
(17) *Thepanisa v. Haramanisa 55 NLR 316*
(18) *Molligoda v. Keppitipola (1858) 3 Lorenz 24*
(19) *Kiri Menika v. Cau Rala & Others (1858) 3 Lorenz 76*

(20) *Bologna v. Punchi Mahathmaya (1866) Ram (1863 to 1868) 195*
(21) *Kumarasamy v. Banda 62 NLR 68*
(22) *Tikiri Bandara v. Gunawardene 70 NLR 203*
(23) *Tikiri Kumarihamy v. De Silva 12 NLR 74 (D.B)*
(24) *Salpalhamy v. Kiri Ettena (1944) Morg . Dig 373*
(25) *Tikiri Kumarihamy v. De Silva 9 NLR 202*

APPEAL from judgment of the Court of Appeal report et al 1986 1 Sri LR 245

Dr. H.W. Jayewardene, Q.C. with *L. Perera, H. Amerasekera,* and *H. Cabraal* for appellant.

H.L. de Silva, P.C. with *G. Dayasiri, S.J., V. Cossette Tambiah* and *P.M. Ratnawardene* for respondent.

Cur.adv.vult.

May 28, 1990.

RANASINGHE, C. J.,

This appeal has been directed to be heard by this Bench – comprising nine judges of this Court–in terms of the provisions of Article 232 (3) of the Constitution, in order to decide the question of law which arises in this case – whether the majority decision of this Privy Council, delivered on 4.12.1968, in the case of *Tikiri Banda Dullewe v. Padma Rukmani Dullewe,* (1) at a time when the Privy Council was the final Court of Appeal under the then legal system prevailing in this Island, in regard to the construction of the provisions of s. 5(1) (*d*) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 (Chap. 59), is the correct view of the law; or whether this Court should affirm the dissenting judgment delivered in that case by Lord Donovan, which said view of the law also finds support in the judgment of Sansoni C. J., in the case of *Punchi Banda vs. Nagasena* (2).

Appeals to the Privy Council from the Supreme Court were abolished by Act No. 44 of 1971. That this Court, as constituted under the provisions of the Constitution of 1978, is now not bound by the said judgment delivered by the Privy Council and that this Court is free to consider the correctness of the said judgment of the Privy Council, which had been delivered on an appeal from the Supreme Court, was not in dispute; and the argument before us proceeded on the basis that this Court is now free to take a different view.

The facts and circumstances relevant to this appeal are set out in the judgment of (G.P.S.) de Silva, J., which I have had the advantage of perusing in draft. The state of the law on this particular question, as laid down by the decisions of the Supreme Court prior to the enactment of the Kandyan Law Amendment and Declaration Ordinance, No. 39 of 1938, have also been fully set out in the said judgment. So too the decisions pronounced by the Supreme Court after the said Ordinance was enacted and upto the time of the decision in the *Dullewe case* (supra). In the circumstances I do not propose to set down the facts and circumstances and the relevant judicial decisions prior to the decision in the *Dullewe case* (supra).

The provisions of s 5(1) (*d*) of the said Ordinance No. 39 of 1938 require a donor, who wishes to renounce the right he has, under the Kandyan Law, to revoke a gift made by him, to make "a declaration containing the words 'I renounce the right to revoke', or words which are of substantially the same meaning." If, however, the language of such deed of gift is not English the donor is then required to use "the equivalent of those words in the language of the instrument....."

According to the provisions of this paragraph, therefore, when the deed of gift is executed in the English language, what is required to constitute an express renunciation is a declaration which contains either the words "I renounce the right to revoke," or else other words which have "substantially the same meaning" as those which have been so expressly enacted. The relevant deed of gift in this case is the document P1; and P1 is in the English Language.

The operative words embodied in P1 are:

"For and in consideration of the natural love and affection which I have and bear unto ..... and for diverse other good causes and considerations we hereunto specially moving do hereby give, grant, convey, assure and make over as a donation inter vivos absolute and irrevocable unto the said donee ....."

A consideration of the majority judgment of the Privy Council makes it clear that the majority has taken the view that, where a donor exercises the option and uses other words which have "substantially the same meaning", such group of words too must contain the same features, viz

a transitive verb and an object of such verb, as exist in the group of words within the inverted commas in the aforesaid paragraph (*d*).

What is required by section 5(1) (*d*) of the said Ordinance to constitute an express renunciation is a declaration as set out in the said paragraph (*d*). The declaration so required could be made by using either the specific words set out therein within the inverted commas, or other words, which convey "substantially the same meaning." The emphasis, to my mind is on the meaning of the words, which constitute the declaration, rather than on any particular form or structure the declaration constituted by such words should take or be expressed in. The stress so laid is upon the substance of the declaration rather than on the form it should take.

If the emphasis was to be not only upon the substance of the words, but also upon the form in which the alternative declaration should also be made, then the Legislature could well and easily have stopped with the express words set out in para (d) of the said section 5(1), and need not have proceeded to spell out any options. In this connection it has to be noted that, even though the Privy Council had considered it necessary to observe that the Report of the Commissioners was being looked into in order only to obtain accurate information as to the evil or defect which was intended to be remedied, yet, Sansoni, C. J., has in *Punchi Banda's case* (supra), observed that the Legislature had not accepted the recommendation of the Kandyan Law Commission "so far as it relates to a clause or to a prescribed form." The majority judgment does not go to the extent of expressing the view that a meaning, which is substantially the same, cannot be obtained unless the other group of words is also structured or formulated in the same manner, and contain the same features as the words set out in the said paragraph (*d*) within inverted commas.

The distinction sought to be drawn between a declaration expressed through a transitive verb and one through an adjectival description, has, with respect, been effectively dealt with by Lord Donovan in the dissenting judgment. Where a person states: "This is my decision (or act). It is absolute. It is irrevocable, "is there any doubt but that he is expressly making it known that his decision (or act) is a definite one, that it is unconditional and that it is irreversible and that he, has the right to cancel, vary, modify, withdraw it, will not do so, that he, who will not exercise his right to do so? There has been no instance, before the Ordinance No. 39 of 1938 (supra), where the Supreme Court had held that the words

"absolute and irrevocable" were not sufficient to constitute a renunciation of a donor's right, under the Kandyan law, to revoke his gift.

The relevant words in P1, which are relied on, are, in my opinion, words which taken together convey quite expressly, if not the same, at least a meaning, which, in substance, is equivalent to that which is being sought to be expressed and conveyed by the use of the express declaration set out within inverted commas in para (*d*) of the said s. 5(1).

In this view of the matter, I am of opinion that the judgment of Lord Hodson, who spoke for the majority in *Dullewa's case* (supra), should no longer be accepted as setting out the correct interpretation of the law, embodied in s. 5(1) (*d*) of Ordinance No. 39 of 1938 (supra) on this question: that the dissenting judgment of Lord Donovan in the said case, and the judgment of Sansoni, C.J., in *Punchi Banda's case* (supra), set out the correct view of the law which should now be followed.

In the view I take upon this question of law, it is not necessary to consider the other question of law argued – based upon the principles of the law of fideicommissum – by learned Queen's Counsel for the defendant–Appellant.

For these reasons, I make order allowing the appeal of the defendant–Appellant. The judgment of the learned District Judge is set aside; and the plaintiff- respondent's action is dismissed. Parties to bear their own costs.

TAMBIAH, J.

This appeal raises once again the question of the irrevocability of a Kandyan Deed of Gift.

The facts are as follows :-

On June 11, 1960, one Tikiri Kumarihamy Ellepola by Deed No. 8247 iin consideration of the natural love and affection and diverse other causes and consideration conveyed to her sister Jayalatha Kumarihamy, her heirs, executors, et al " as a donation inter vivos absolute and irrevocable the land and premises called Walawwewatta *Alias* Atapattu Walawwa. She further declared that the donee and her heirs, executors

et. al. were to " have and hold the said premises ..... for ever" and that the " donee shall not mortgage or otherwise alienate the said premises but shall only possess and enjoy the fruits and produce thereof and on her death the same shall devolve on her children and in the event of her dying issueless on me the said donor and my children". The gift was accepted by the donee. Jayalatha Kumarihamy on 5th October, 1972 by Deed No. 5204 gifted the said land to her husband, the defendant - appellant. On 31st January, 1973, Tikiri Kumarihamy by deed No. 39373 revoked the Deed No. 8247 and on 17th February, 1975, by Deed No. 72 gifted the land to her son, the plaintiff - respondent. The plaintiff - respondent sued the defendant - appellant for a declaration of title to the land. The learned District Judge held that Tikiri Kumarihamy had validly revoked the Deed of Gift No. 8247 and that the plaintiff - respondent got title to the land on the Deed of Gift No. 72.

On appeal, the Court of Appeal dismissed the appeal holding, inter *alia*, that it was bound by the majority decision of the Privy Council in *Dullewe v. Dullewe* (1) and that Deed No. 8247 was revocable by the donor Tikiri Kumarihamy Ellepola. Seneviratne J., however, expressed the view that the dissenting judgment of Lord Donovan in *Dullewe*'s case was correct. Both learned Judges of the Court of Appeal agreed that leave should be granted to the defendant - appellant to appeal to the Supreme Court on the substantial point of law as to whether Deed No. 8247 of 11.6.60 was revocable.

The majority judgment of the Privy Council, though of great persuasive value, is not binding on the Supreme Court which is now the highest and final superior Court of Record in the Republic. We are, therefore, free to review the decision of the Privy Council and decide whether the majority decision delivered by Lord Hodson, or the dissenting judgment by Lord Donovan, is correct. While learned Queen's Counsel for the appellant contended that the majority decision delivered by Lord Hodson is wrong in law and that the dissenting judgement of Lord Donovan is the correct one, learned President's Counsel for the plaintiff - respondent, however, maintained the contrary.

It was the contention of learned Queen's Counsel that the words in the Deed of Gift "as a donation inter vivos, absolute and irrevocable ..... and to hold the said premises ..... for ever," are sufficient to conform to the requirements of the Ordinance.

The Deed of Gift No. 8247 was executed on 11th June, 1960. The parties to the case are subject to the Kandyan Law. The Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939, therefore, applies to this case. The question whether Deed No. 8247 is revocable or not depends on whether the words of Deed of Gift No. 8247, reproduced above, satisfy the requirements of 5 (1) (*d*) of the Ordinance. The preamble to the Ordinance states that it is "an Ordinance to declare and amend the Kandyan Law in certain respects". The relevant provisions of the Ordinance are as follows :-

S. 4 (1) : Subject to the provisions and exceptions hereinafter contained, a donor may, during his lifetime and without the consent of the donee or of any other person, cancel or revoke in whole or in part any gift, whether made before or after the commencement of this Ordinance, and such gift and any instrument effecting the same shall thereupon become void and of no effect to the extent set forth in the instrument of cancellation or revocation :

Provided that the right, title, or interest of any person in any immovable property shall not, if such right, title or interest has accrued before the commencement of this Ordinance, be affected or prejudiced by reason of the cancellation or revocation of the gift to any greater extent than it might have been if this Ordinance had not been enacted.

S. 5 (1) : Notwithstanding the provisions of section 4 (1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance :-

(*a*) any gift by virtue of which the property which is the subject of that gift shall vest in the trustee or the controlling viharadhipati for the time being of a temple under the provisions of section 20 of the Buddhist Temporalities Ordinance or in any bhikkhu with succession to his sacerdotal pupil or pupils or otherwise than as pudgalika for the benefit of himself and his heirs, executors, administrators or assigns ;

(*b*) any gift in consideration of and expressed to be in consideration of a future marriage, which marriage has subsequently taken place ;

(*c*) any gift creating or effecting a charitable trust as defined by section 99 of the Trusts Ordinance ;

(*d*) any gift, the right to cancel or revoke which shall have been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words " I renounce the right to revoke" or words of substantially the same meaning or, if the language of the instrument be not English, the equivalent of those words in the language of the instrument :

Provided that a declaration so made in any such subsequent instrument shall be of no force or effect unless such instrument bears stamps to the value of five rupees and is executed in accordance with the provisions of the Prevention of Frauds Ordinance or of the Deeds and Documents (Execution before Public Officers) Ordinance.

(2) : Nothing in this section shall affect or be deemed to affect the revocability of any gift made before the commencement of this Ordinance.

It is necessary to ascertain why the Legislature enacted Ordinance No. 59 of 1939. What was the evil or defect which the Ordinance was intended to remedy ?

The general rule under the Kandyan Law was that all Deeds of Gift, even transfers by sale, were revocable by the grantor in his life time, subject to the right of the grantee to be compensated by the grantor for improvements.

Armour ("*Grammar of Kandyan Law*", *p.91*) says -

" all Deeds of Gift excepting gifts made to priests and temples, whether conditional or unconditional, are revocable by the donor in his life. "

Armour adds (ibid pp. 92,93) that certain other Deeds of Gift also came within the exception, viz, grants made in consideration of payment of debts and future assistance and support, and containing a clause renouncing the right to revoke, grants in consideration of past assistance

with a renouncing clause, grants to a public official in lieu of a fee with a renouncing clause, and settlements on the first wife and children before contracting a second marriage. It was in dealing with the exception that uncertainty and confusion were created by the various decisions of the Courts. One such exception which has led to difference of opinion in our Courts was whether a Deed became irrevocable by the donor renouncing his right to revoke it. In *Kirihenaya v. Jotiya* (3) the Deed of Gift contained the words " I shall not revoke this Deed of Gift at any time in any manner, or change it in any way after date thereof". The Court held that a Kandyan Deed of Gift, which expressly renounced the right of revocation and which is not dependant on any contingency, was irrevocable.

Subsequent to the decision in *Kirihenaya v. Jotiya* (supra), it would appear that our Courts have been concerned with deciding whether or not the particular words by which a donor purported to renounce his right sufficiently indicated his intention to renounce it. In *Dharmalingam v. Kumarihamy* (4) the words " not to raise or utter any dispute whatsoever against this gift and donation" were construed as being insufficient to exhibit an intention to renounce the right of revocation. In *Ukku Banda v. Paulis Singho* (5) the Deed stated that the gift should be " absolute and irrevocable" and that the donee should have the property " absolutely for ever." The Court held that the donor had clearly and expressly renounced his right of revocation. In *Bogahalanda v. Kumarihamy* (6) the Court held that the donor by the use of words " I hereby renunce the right to revoke or cancel these premises ..... do hereby grant unto him" had dabarred himself from revoking the Deed. In *James Singho and Others v. Dingiri Banda* (7), the Deed described the grant "as a gift irrevocable" and stated that the grantees should "own from this day and possess for ever". The Court following the decision in *Ukku Banda* v. *Paulis Singho* held that the Deed was irrevocable. In *Gunadasa v. Appuhamy* et. al.(8) (*36 NLR 122*) the Deed stated that the donees shall "possess the said properties hereby donated ..... for ever without any interruption whatsoever or deal with the same in whatsoever manner they may desire". The Court held that the donor did not renounce his right of revocation by the use of words "for ever " and that the clause could not be construed as containing a renunciation of the ordinary right of the donor to revoke such a Deed.

As doubts had arisen on account of various decisions of our Courts when dealing with exceptions to the general rule that a Kandyan Deed of

Gift is revocable, in 1927 the Kandyan Law Commission was appointed to deal with the matter. In September, 1935, the Commission issued its Report. This Report may be looked at "not to ascertain the intention of the words used in the subsequent Act ..... but because ..... no more accurate source of information as to what was the evil or defect which the Act of Parliament now under consideration was intended to remedy can be imagined than the Report of that Commission" (per Lord Hodson in the *Dullewe* case, p. 293). In paragraphs 44 and 58 the Commission stated :

44. "Revocability of Deeds of Gift .- Although the General rule was that all deeds of Gift were revocable by the grantor in his lifetime, this rule seems to have had certain exceptions and it is in laying down what the exceptions were that great difficulty, not to say some confusion, has arisen owing to the very indefinite state into which the law drifted as a result of the construction of Deeds of Gift, the language of which lent itself to different interpretations.

58. On a consideration of all the authorities bearing on the point we have come to the conclusion that to minimize the evils of litigation and to give a certain amount of security and stability to titles derived by deeds of gift, a clause renouncing the right to revoke made in explicit terms and according to a form prescribed should in itself be sufficient to render a deed, otherwise revocable, absolute and irrevocable, and we accordingly make this recommendation. As regards the actual working of the form of renunciation, we do not think it necessary to make any suggestion, as this is a matter which may be left to the Legal Draftsman if and when an Ordinance is drafted to give effect to the recommendations we have made in this report."

and in paragraph 332 of its Report, the Commission recommended as follows : -

" (1) The revocability of Kandyan Deeds of Gift to be retained subject to the following exceptions, deeds of gift falling within these exceptions being declared irrevocable : -

(*c*) A gift where the right to revoke is expressly renounced in writing according to a prescribed form. "

It is this Report which led to the passing of Ordinance No. 59 of 1939.

We shall now consider the cases where the Deeds of Gift, executed after the commencement of the Ordinance came up for construction and interpretation by the Supreme Court.

In *Biso Menika v. Punchiamma et. al.* (9), the proper interpretation to be placed on para (*b*) of s. 5 (1) of the Ordinance No. 39 of 1938 came up for consideration. The Kandyan Deed of Gift contained the words "we do hereby gift unto a beloved daughter of ours, Purijjala Biso Menika and a beloved son-in-law, Muthu Banda Ekanayake ..... for the love and affection we bear towards them." It was contended that by reason of the words " our beloved son-in-law", the Deed was expressed to be in consideration of marriage, Windham , J. said (p. 432) :

> " But this contention cannot succeed. No doubt that reference is evidence of the fact (of which there was abundant other evidence outside the deed) that the gift was in consideration of a future marriage. But s. 5 (1) (*d*) in addition to proof of this fact, requires that the gift shall be expressed to be in consideration of future marriage ; and this in my view means that the deed shall state expressly, and not merely use words from which the inference might or even must be drawn that the gift is in consideration of future marriage."

The Deed of Gift was held to be revocable.

In *Punchi Banda v. Nagasena* (2) the Deed of Gift stated : " I, Manapaya Kulatunga Mudiyanselage Kiri Banda ..... do hereby give, grant, convey, make over and confirm unto ..... as a gift or donation inter vivos absolute and irrevocable the premises in the Schedule hereto ..... subject however to my life interest ..... To have and to hold the said premises hereby donated unto ..... and his heirs, executors, administrators and assigns absolutely for ever." The Court held that by the use of a single word "irrevocable " in Kandyan Deed of Gift the donor may under s." 5 (1) (*d*) of the Kandyan Law Declaration and Amendment Ordinance, expressly renounce his right to revoke the gift. Sansoni, J. said (p. 550) :

> " The question of the revocability of the deeds depends solely on whether the first clause of the deeds, already reproduced, satisfies the

an unrestricted right of revocation of any gift, except those referred to in Section 5. The excepted gifts are-

(*a*) any gift of a specified description made to a temple ;
(*b*) any gift expressed to be in consideration of a future marriage, which subsequently takes place ;
(*c*) any gift creating a charitable trust ;
(*d*) any gift in which the right of revocation has been expressly renounced in a declaration of renunciation.

Although the first three classes of excepted gifts need not be considered on this appeal, I mention them in order to emphasise the intention of the Legislature that the question whether a particular deed of Gift is capable of revocation should be determinable with reasonable certainty upon an examination of the deed. It should not ordinarily be difficult to decide whether a particular gift is of any of the first three classes specified in Section 5. Equally, in my opinion, it should not be difficult to decide whether a deed contains an effective clause of renunciation of the right of revocation. The ordinary meaning of the words " expressly renounced " is exactly or definitely renounced as opposed to impliedly renounced, and I am satisfied that those words have that meaning in Section 5 (3). There can be no question that in the deed I have now under construction the right of revocation has been expressly renounced " in the manner intended by the statute, namely by a definite declaration in appropriate language. Having regard to the Legislature's intention that the right of revocation will be exercisable unless that right is renounced with reasonable certainty, I am unable to accept counsel's argument that in Section 5 (3) " expressly renounced " bears the meaning " unconditionally renounced".

It was argued that the recital of the donor's expectation of receiving "succour and assistance " is equivalent to the words " I renounce the right of revocation subject to the condition that the donee must render me support and assistance", and therefore constituted an express but conditional renunciation and that such a clause will permit revocation, if support and assistance is not rendered. Rejecting this argument, H.N.G. Fernando, SPJ., said (p.214) :

" Even if the parties did have such a condition in mind, the condition is not expressly, i. e. , clearly or definitely, stated in the deed ..... Although I have assumed that the Legislature did not

intend to render ineffective an express reservation of the right of revocation framed in language such as that I have employed above, that assumption should not be extended to cover what can at best be termed the implied reservation contended for in this case. Since the Legislature did intend that renunciation will be effective only if expressed in the document, then a condition qualifying the renunciation can only be effective if it is also " expressed."

In *Tammitta v. Palipana* (11), the donor by Deed of Gift gifted the properties " absolutely" to his nephew. The habendum clause stated : " To have and hold the said lands and premises hereby gifted unto the said donee and his heirs and executors, administrators and assigns absolutely for ever". The Deed after stating that the donor "expressly renounces his right to revoke" contained a clause whereby the donee thankfully accepts the said gift and " undertakes to render all succour and assistance to the donee during his life time." The Court held that the donor had expressly renounced his right to revoke and, although an undertaking was given by the donee to give succour and assistance to the donor during the donor's life time, the undertaking was not one of the conditions on which the grant was made to the donor by the donee.

In *Dullewe v. Dullewe* (12), the donor by Deed of Gift dated 26.5.1941 granted, conveyed etc. " unto the donee as a gift irrevocable but subject to the condition hereinafter contained all those premises ..... To have and to hold the said lands and premises hereby conveyed unto the said donee subject to the condition that the said donee shall not sell, gift, mortgage or otherwise alienate or encumber the said premises (but may lease the said premises for a period not over five years) and after his death the same shall devolve absolutely on his legal issue and in the event of his dying without legal issue the property shall devolve absolutely on ..... Tikiri Banda Dullewe. " (This Deed is almost identical with the Deed in the present case). Later, on 26.10. 1943, the donor revoked the Deed of Gift. The question arose whether the words " as a gift irrevocable " satisfy the condition for irrevocability prescribed by s. 5 (1) (*d*) of the Ordinance. The Supreme Court, following the decision in *Punchi Banda v. Nagasena* (supra) held that the use of the words " as a gift irrevocable was sufficient to indicate the gift was meant to be irrevocable and to bring it within s. 5 (1) (*d*) of the Ordinance. The case went up in appeal to the Privy Council. The majority judgment delivered by Lord Hodson, overruled the decision of *Punchi Banda v. Nagasena*

(supra) and held that where the right to revoke a Kandyan Deed of Gift executed after the commencement of the Ordinance of 1939 is renounced by the donor, the renunciation is not valid unless the Deed expressly contains a special clause of renunciation expressed in the particular manner stated in s. 5 (1) (*d*) of the Ordinance. There should be a declaration containing a transitive verb as opposed to an adjectival description of the gift as irrevocable. Accordingly, the words " as a gift irrevocable " in a Deed of Gift do not satisfy the condition for irrevocability prescribed by the section ; such a gift is subsequently revocable by the donor. Lord Hodson said (p. 295, 296) :

> " The Ordinance permits revocation of any gift when the right to cancel or revoke shall have been expressly renounced by the Donor. These words recognise a pre-existing right to revoke and require an express renunciation either in the instrument effecting the gift or in any subsequent instrument. There is a further requirement that the renunciation must be effected in a particular way videlicet by a declaration containing the words " I renounce the right to revoke " or words of substantially the same meaning. The inverted commas draw attention to the words to be used. The exact words need not be used but if they are not used, words of substantially the same meaning are required. This alternative leaves no room for departure from the essential requirement of a declaration containing a transitive verb as opposed to an adjectival description of the gift as irrevocable which is apt to describe what has been done.

Now, however, the words of the Ordinance do require that which may fairly be described as a special clause of renunciation. The renunciation is to be expressed and not to be implied The renunciation of a gift as irrevocable does no more than imply the renouncing of an existing right to renounce. The requirement of an express renunciation stands in the way of the acceptance of an interpretation of the words used in this case, to all intents and purposes the same words as those used in the *Ukku Banda* case (supra), so as to produce the result that the Donor has already effectively renounced his right to revoke."

Lord Donovan in his dissenting judgment said (p. 298) :

> The Donor here has expressly indicated that the lands were to be"a gift irrevocable". The word "irrevocable" means "not capable of

revocation", and the capacity to revoke obviously depends upon the existence of a right to do so. One may therefore ask, "Who could revoke the gift in the ordinary way " or "In whom would such right ordinarily exist!" The answer of course is the Donor himself. When therefore he uses a word which indicates that the gift is not to be capable of revocation, he is saying that he shall not enjoy the right to revoke which he would otherwise possess. In other words he is renouncing that right. He is not using words which "substantially" mean the same thing as the prescribed formula, but exactly the same thing. True, the Ordinance requires that whatever words are used the right shall be "expressly" renounced. The words "as a gift irrevocable" are express."

In *Sumanasiri V. Tillekeratne Banda* (13) the deed of gift contained the words "I Rankiri give, grant etc. unto the said donee his heirs etc. by way of gift absolute and irrevocable all those lands and premises.....". G. P. A. Silva, J. with Samerawickrame J. agreeing, held, following the Privy Council decision, that the Deed did not contain a special clause of renunciation expressed in the manner stated in S. 5 (1) (*d*).

We are in agreement with the majority judgment of the Privy Council delivered by Lord Hodson. The Kandyan Law Declaration and Amendment Ordinance is an Ordinance to "declare and amend the Kandyan Law". On the question of revocation of gifts, it seeks to amend the Kandyan Law and not to make a mere restatement of the Law.

In the cases decided prior to 1939, the Courts construed the particular words used by the Donor in the Deed of Gift and came to the conclusion whether or not the language sufficiently exhibited an intention to renounce the right of revocation. The intention to renounce was inferred or deduced from the particular words used by the Donor in the Deed of Gift. In the result Courts came to conflicting decisions. The Legislature wanted to put an end to the controversy and enacted the Amending Ordinance wherein it set out a uniform rule requiring an express and not merely inferential renunciation of the right of revocation.

S. 4 of the Ordinance confers on any Donor an unrestricted right of revocation of any gift, except those referred to in S. 5. The excepted gifts are set out in sub-paragraphs[(*a*) to (*d*). The excepted gift in sub-paragraph (*d*) is any gift in which the right of revocation has been

expressly renounced in a declaration of renunciation containing the words "I renounce the right to revoke" or words of substantially the same meaning. The Court in *Punchi Banda V. Nagasena* (supra) analysed s. 5 (1) (*d*) of the Ordinance and enumerated the requirements as follows :-

(1) A renunciation of the right to revoke;
(2) Which is express;
(3) made by the Donor in a declaration;
(4) containing the words "I renounce the right to revoke" or words of substantially the same meaning.

The Court added that"the fourth requirement seems to be merely illustrative of the other three". With due respect to the learned Judges who decided that case we cannot agree with this statement.

The words "expressly renounced", as was pointed out by the Privy Council in its majority judgment, recognise a pre-existing right to revoke which every Kandyan Donor had in Kandyan Law. What the Ordinance contemplates is that the Donor, with full knowledge of his right to revoke makes an express and deliberate renunciation of this right to revoke either in the Deed of Gift or in any subsequent document. The ordinary meaning of the words "expressly renounced" is exactly or definitely renounced as opposed to impliedly renounced (per H. N. G. Fernando, SPJ., in *Ukku Amma*'s case, supra, p.213), Prior to 1939 the Courts examined the language in the Deeds in order to ascertain whether the Donor intended to revoke the Deed of Gift or not; it was implied or inferred from the particular words used by the Donor. Now, the Ordinance requires that the intention to revoke must be clearly and definitely stated in the Deed. From the words "absolute and irrevocable" it may be implied that the Donor intended to revoke, but such an expression would not constitute an express renunciation of his right to revoke.

There is a further requirement that the renunciation must be effected in a particular way, viz, by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning. The Ordinance by s.5 (1) (*d*) has now vested in the Donor a statutory right to revoke and he is required to exercise that right in a particular way, viz, by using a special clause of renunciation containing either the prescribed words or equivalent words. In either case, there must be act of renunciation on the part of the Donor indicating that he has given up his right of revocation. The words "absolute and irrevocable" are only an adjectival

description. of the gift and describes the kind of gift that the Donor was making and do not have substantially the same meaning as "I renounce the right to revoke". As was rightly pointed out by learned Presidents' Counsel, by the use of words "absolute and irrevocable" the Donor is only describing the consequence of his renunciation. These words are merely descriptive of the effect of a proper renunciation.

The observations of Clarence, J., in *Molligoda* v.*Sinnetamby* (14) as to the manner in which a Kandyan donor should exercise his option of renunciation of his right to revoke, are of great relevance.

> "If it be possible for a Kandyan donor to renounce the power of revocation, we should require the party setting up a title based on such renunciation, to satisfy us that the donor understood what he or she was doing when a voluntary deed containing so exceptionally stringent a provision was executed. In the case before us the grantor was a woman, the mother of the donee; the words relied on as amounting to a renunciation of the power of revocation appear to be such words of further assurance as might reasonably be expected to occur in an ordinary conveyance, and we are certainly far from satisfied that the Donor, when she executed the deed containing them, intended thereby to renounce her Kandyan power of revocation. Such a renunciation, if it be possible, must certainly be express and unmistakable, and we are not disposed to infer it from what we view as ordinary words of further assurance."

We are of the view that the words in the Deed of Gift "absolute and irrevocable" and "to hold the said premises for ever" do not satisfy the requirements of S. 5(1) (*d*) of the Ordinance. We hold that the Deed of Gift, No.8247, dated 11th June, 1960, was revocable.

The second contention of learned Queen's Counsel was that the Deed of Gift, No. 8247, created a fidei commissum, and that the Deed has been accepted by the donee; that while the concept of fidei commissum is unknown to the Kandyan Law, yet it is open to a Kandyan to utilise the mechanism of the Roman Dutch Law principles of fidei commissum to entail his property for the benefit of his more distant descendants; and that should a Kandyan opt to do so, the rule of Roman Dutch Law that a Deed containing a fidei commisum, when duly accepted by the donee, renders the Deed of Gift irrevocable, is applicable to the case.

Undoubtedly, the Deed of Gift created a fidei commissum. Though the device known to the Roman-Dutch Law as fidei commissum is entirely foreign to the Kandyan Law, there is nothing in the Kandyan Law which prevents a Kandyan person from giving a limited interest in property to one person, and providing that at the termination of that interest the property should vest in another person. The Court will give effect to it. (per De Sampayo, J., in *Assistant Government Agent, Kandy V. Kalu Banda et.al* (15). Though a Deed of gift creating a fidei commissum is valid under the Kandyan Law and one may resort to the Roman Dutch Law to ascertain whether the Deed creates valid fidei commissum or not, yet to ascertain who the lawful heirs are, one has to resort to the Kandyan Law (vide *Menike v. Banda* (16)).

In *P. Thepanisa v. P. Haramanisa* (17) it was argued that the Kandyan Deed of Gift created a fidei commissum and that the donor's right to revoke the gift must be ascertained solely within the framework of the Roman Dutch Law. Rejecting this argument, Pulle, J. (at p. 318) said :

> "The creation of a fidei commissum by a Kandyan deed of gift does not by itself affect its revocability. In my view no valid reason can be formulated for holding that while a gift simpliciter can be revoked one which is subject to restrictions becomes irrevocable."

The cases show that a Kandyan donor can insert a provision creating a fidei commissum, and the Court will resort to Roman Dutch Law to ascertain whether the Deed created a valid fidei commissum or not, but, to determine other connected matters, it is the Kandyan Law that applies. By executing a Deed of Gift creating a fidei commissum, a Kandyan subject to Kandyan Law is not transformed into a person governed by the Roman Dutch Law. A Kandyan Donor can impose burdens on the donee without giving up his right to revoke. He or she can combine both.

The answer to this submission of learned Queen's Counsel is to be found in the very Sections 4 and 5. S. 4 (1) of the Ordinance states that subject to the exceptions hereinafter contained, a donor has the right of revocation of any gift. The excepted gifts are contained, in s. 5 (1), sub paragraphs (*a*) to (*d*). The Ordinance, therefore, indicates the excepted gifts. To accept the learned Queen's Counsel's submission would be to add to the list of irrevocable gifts a further exception, viz., a Deed of Gift subject to a fidei commissum. We are not entitled to do so.

The learned Queen's Counsel finally submitted that fidei commissum had been abolished by the Abolition of Fidei Commissum Law No. 20 of 1972 which came into operation on 12.5.1972 ; that sections 4 and 6 of this Law placed the property in the hands of Jayalatha Kumarihamy absolutely, and that she had an absolute and unfettered right to transfer the property as a gift to the defendant-appellant. We are unable to accept this submission either.

As we see it, S. 4 enumerates the restrictions and constraints placed on the Fiduciary or Donee and frees the Donee from these restrictions and constraints. It extinguishes the burdens imposed on the Donee and the contingent rights of potential successors. On the other hand, the right of revocation is a right that is vested in the Donor, and the Sections make no mention of the grantor or donor. We cannot read into those sections words to the effect that the Donee is also freed from the right of revocation which is a right vested in the donor.

We dismiss the appeal with costs.

G. R. T. D. BANDARANAYAKE, J.—I agree

MARK FERNANDO, J.—I agree

A. R. B. AMERASINGHE, J.— I agree

R. N. M. DHEERARATNE, J.— I agree

H. A. G. DE SILVA, J.

I have had the benefit of reading the judgments prepared by My Lord the Chief Justice and my brother, G. P. S. DE SILVA, J. and I wish to state that I am in complete agreement with the views they have expressed therein and the orders they propose to make. As to costs I direct that the parties should bear their own costs in the District Court, Court of Appeal and this Court.

G. P. S. DE SILVA, J.

The plaintiff instituted this action on 26th July, 1974, in the District Court of Matale for a declaration of title to the land called Walauwewatte *alias*

Ayapattu Walauwewatte and for the ejectment of the defendant. It was not in dispute that Tikiri Kumarihamy Ellepola was the former owner of this land and that she had on deed No. 8247 of 11.6.60 (P-1) gifted it to her sister Jayalatha Kumarihamy Ratnayake. On 05.10.72 by deed No. 5204 (V-3) Jayalatha Kumarihamy Ratnayake transferred the land to her husband, the defendant. Thereafter by deed No. 39373 of 31.1.73 (P-2) Tikiri Kumarihamy Ellepola revoked the deed of gift, (P-1) and on 17.2.73 by deed No. 72 (P-3) she gifted the land to her son, the plaintiff. The main issue at the trial was whether the deed of gift P-1 was revocable. The District Judge held that P-1 was revocable, that it was validly revoked by P-2, and that title passed to the plaintiff on P-3. The defendant preferred an appeal to the Court of Appeal against the judgment of the District Court.

At the hearing before the Court of Appeal, Dr. Jayewardene for the defendant-appellant "conceded that if deed P-1 is in fact revocable, then deed P-2 would be an effective act of revocation and that title would then have passed on to the plaintiff.....". On the basis of the majority judgment of the Privy Council in *Dullewe vs. Dullewe* (1) the Court of Appeal held that P-1 was revocable. It is right to add that Dr. Jayewardene, while conceding that the Court of Appeal was bound by the majority judgment of the Privy Council in *Dullewa's* case (supra) "wished it to be noted that he reserves his right to challenge the correctness of this majority decision of the Privy Council in the appropriate forum" – [1986] 1 SLR 245 at 253. The Court of Appeal dismissed the appeal but granted leave to the defendant-appellant to appeal to this court "on the substantial point of law, namely as to whether the deed No. 8247 of 11.6.60 (P-1) is revocable" (1986) 1 SLR 245 at 257. Since this question of law involved a consideration of the correctness of the majority judgment of the Privy Council in *Dullewe's* case (supra), My Lord, the Chief Justice, constituted a Bench of nine Judges to hear this appeal.

At the hearing before us it was not disputed (i) that this Court was not bound by the majority judgment of the Privy Council in *Dullewe's* case (supra), (ii) that if the interpretation placed on section 5(1)(*d*) of the Kandyan Law Declaration and Amendment Ordinance (hereinafter referred to as the Ordinance) by the majority judgment of the Privy Council in *Dullewe's* case (supra) is correct, then P-1 is revocable.

The first submission of Dr. Jayewardene for the defendant-appellant, however, was that the majority judgment of the Privy Council in *Dullewe's* case was wrong, and that the interpretation of section 5(1)(*d*) of the Ordinance by Lord Donovan in his dissenting judgment is correct. Thus two matters arise for consideration, namely the terms of the deed of gift P-1 and the relevant provisions of the Ordinance namely section 5(1)(*d*).

The material words of P-1 strongly relied on by Dr. Jayewardena in support of his submission that the gift is irrevocable are as follows :- ".....I ..... Tikiri Kumarihamy Ellepola for and in consideration of the natural love and affection which I have and bear unto my beloved sister ..... Jayalatha Kumarihamy Ratnayake ..... do hereby give, grant, convey, assure and make over as a donation inter vivos *absolute and irrevocable* unto the said donee ....." (The emphasis is mine).

It is common ground that P-1 is a Kandyan deed of gift and since it was executed in 1960, it is governed by the provisions of the Ordinance. Section 4 of the Ordinance permits, subject to certain provisions and exceptions, a donor to revoke in whole or in part any gift whether made before or after the commencement of the Ordinance. Section 5 sets out the categories of gifts which cannot be revoked if made after the commencement of the Ordinance.

> " *Section 4(1)* : Subject to the provisions and exceptions hereinafter contained, a donor may, during his life-time and without the consent of the donee or of any other person, cancel or revoke in whole or in part any gift, whether made before or after the commencement of this Ordinance, and such gift and any instrument effecting the same shall thereupon become void and of no effect to the extent set forth in the instrument of cancellation or revocation :
>
> *Section 5(1)* : Notwithstanding the provisions of section 4(1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance :-
>
> (*a*)
>
> (*b*)
>
> (*c*)

(*d*) any gift, the right to cancel or revoke which shall have been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning or, if the language of the instrument be not English, the equivalent of those words in the language of the instrument .....".

In construing section 5(1)(*d*) of the Ordinance, the legal position of gifts under the Kandyan Law and the decisions of our courts dealing with deeds of gift executed prior to the enactment of the Ordinance in 1939 are not without relevance. Hayley in his treatise on the Laws and Customs of the Sinhalese, referring to the case of a "simple gift" states that "the authorities are consistent that they can be revoked, and that, whether there is a clause purporting to renounce revocability or not....." (pages 306 and 307). In *Molligoda v. Keppitipola* (18), the Supreme Court affirming the judgment of the District Judge held that a deed of gift, though it contained a clause - "I shall not alter, cancel or break" - renouncing the right of revocation, was revocable. However, in *Kiri Menika vs. Cau Rala & Others* (19) the Full Court held that a deed of gift in consideration of past and future services with a renunciation of the right of revocation expressed on the face of the deed was irrevocable. The words in the deed, "to be possessed finally as paraveni property" and provided "that if the donor should happen to leave him, not being satisfied, he should for the above-named consideration (i.e. assistance for 3 years and payment of a debt) finally hold the land" were construed as a renunciation of the right of revocation. The full Bench in *Bologna v. Punchi Mahatmeya*, (20), stated the principle in the following terms: "It is impossible to reconcile all the decisions as to revocability or non-revocability of Kandyan deeds; but the Supreme Court thinks it clear, that the general rule is that such deeds are revocable, and also that before a particular deed is held to be exceptional to this rule, it should be shown that the circumstances which constitute non-revocability appear most clearly on the face of the deed itself". A promise "not to raise or utter any dispute whatsoever against this gift and donation" was held to be insufficient "to exhibit an intention to renounce the right of revocation". (*Dharmalingam v. Kumarihamy*, (4)).

On the question as to whether a Kandyan deed of gift is rendered irrevocable by the donor renouncing the right of revocation, there was a further development through judicial decisions as is seen from *Kirihenaya*

vs. Jotiya (3) and *Ukku Banda vs. Paulis Singho* (14). In *Kirihenaya v. Jotiya* (supra) Ennis, J. laid down the principle in the following terms:- "The deed itself must be examined in order to ascertain the true position of the parties, and where the deed of gift expressly renounces the right of revocation, and the gift is not dependant on any contingency, the gift is irrevocable, The reason would seem to be that a deed of gift is a contract, and there is no rule of law which makes it illegal for one of the parties to the contract to expressly renounce a right which the law would otherwise give him or he ". This case was decided in 1922.

Four years later in 1926, Dalton, J. and Jayewardene, A.J., delivered the judgment in *Ukku Banda v. Paulis Singho*,(5). This case has an important bearing on the question that arises for determination in the appeal before us. The Court was there concerned with a deed of 1905 where the donor gave the property to the donee "as a gift absolute and irrevocable". These are the very words which have to be considered in the appeal before us. Dalton, J. having considered the earlier decisions and the terms of the deed of 1905 stated:- "I am unable to agree with the learned trial Judge that the words in the deed renouncing the right of revocation are not an express and unmistakable renunciation of the power; I must admit I am not able to appreciate what he wishes to convey in his conclusion that the words 'absolute and irrevocable' in the deed are 'nothing more than words as are really found in deeds of gift' ..... Applying the law set out in the authorities to which I have referred to the facts of this case I find the donor clearly and expressly renounced the right of revocation and hence his subsequent revocation was invalid".

Jayewardene, A.J. in a separate judgment, while agreeing with Dalton, J. expressed himself thus:- "The terms of the deed of gift in this case are unambiguous and there is nothing in the document to show that when the donor said he gave the property as a gift 'absolute and irrevocable' he did not mean what he said, or said what he did not mean ..... Although under our common law - The Roman Dutch Law - deeds of gift are irrevocable, yet it has been held that it is lawful for a donor to reserve to himself the right of revocation ..... So, in the same way under the Kandyan Law according to which deeds of gift are as a rule, revocable, it should be lawful for the donor to agree that his gift should be irrevocable. I would therefore accept the law as laid down in *Kirihenaya v. Jotiya* (supra), which upholds this principle and say that in the deed of gift in question in this case the donor has renounced the right to revoke

it, and that the renunciation is effective". There is a further noteworthy point in the judgment of Jayewardene, A.J. The learned Judge makes reference to the clause renouncing the right to revoke in the deed of gift that was under consideration in *Kirihenaya v. Jotiya* (supra). That clause reads as follows:- "And I hereby declare that I shall not revoke the deed of gift at any time in any manner or change it in any way after date hereof". Said the learned Judge:- "It is practically on all fours with the present case, the only difference being that *the donor here has stated in one or two words, 'absolute and irrevocable' what the donor there took a whole clause to express*". (The emphasis is mine) I may add that a similar view was expressed very many years later by Sansoni, J. in *Punchi Banda v. Nagasena*, (2) referred to later in this judgment.

The next case in which the use of the expression 'absolute and irrevocable' in the operative part of the deed of gift was considered is *Kumarasamy v. W.T.R. Banda*, (21). Having set out the terms of the Deed of Gift, and having referred to the case of *Bologna v. Punchi Mahatmeya* (supra) Basnayake, C. J. concluded his judgment by stating:- "In this deed the donor having declared that the deed is irrevocable, in most clear language, he is not entitled to go back on it".

Finally there is the decision in *Tikiri Bandara v. Gunawardene*, (22), which was described as "an authoritative review" of many of the early cases by the Privy Council in the majority judgment in *Dullewe's* case (supra). In the course of his judgment Tambiah, J. stated:- "There has been considerable difference of opinion as to whether a deed becomes irrevocable by the donor renouncing his right to revoke. Hayley is of the view that the effect of a clause renouncing the right to revoke a simple deed of gift is of no avail in law. (vide Hayley page 311) In expressing his view, Hayley was influenced by the Kandyan customary law ..... The customary laws of the Kandyans on which Hayley was relying, have been developed and modified by case law which adapted the archaic system to suit modern conditions ..... As stated earlier, the case law on this matter is of a conflicting nature, but from the medley of conflicting decisions a clear principle has emerged which has been enunciated by the Full Bench of this Court. This principle may be formulated as follows: If in a Kandyan deed of gift, it is stated that the deed is irrevocable and the clause containing irrevocability is not dependent on any condition, then such deed cannot be revoked. This salutary principle, which has been laid down by the Full Bench, had been followed in a long line of decisions. .....".

On a consideration of the foregoing cases it would appear, firstly, there is no case in which the Supreme Court has held that a Kandyan deed of gift which conveys the property to the donee as a gift "absolute and irrevocable" to be revocable. Perhaps the only possible exception was *Molligoda v. Kepitipola* (supra) decided as far back as 1858 when the Supreme Court despite the clause "I shall not alter, cancel or break" affirmed the judgment of the District Judge that the deed was revocable. The Supreme Court, however, gave no reasons for its decision. Secondly, although the concept of renunciation of the right of revocation of a deed of gift was unknown to the customary Kandyan law, yet this concept was developed over the years through judicial decisions. There was a time when the courts were concerned with the question whether the particular words used in the deed were sufficient to indicate the donor's intention to renounce the right of revocation. (*Molligoda v. Sinnetamby*,(14); *Tikiri Kumarihamy v. de Silva*, (23). But by 1926 the Supreme Court recognised that use of the words "as a gift absolute and irrevocable" was a clear and definite expression of the intention of the donor to renounce his right of revocation of the gift (*Ukku Banda v. Paulis Singho* (supra)). As observed by Lord Donovan in *Dullewe's* case" ..... there were decisions prior to the Ordinance in which a simple declaration of irrevocability was held by the Supreme Court to be sufficient ....." 71 NLR at 298. See also *James Singho and Others v. Dingiri Banda* (7) and *Bogahalande v. Kumarihamy*, (6) which followed *Ukku Banda v. Paulis Singho* (supra). It is against this background that we have to consider the question which arises for determination on this appeal, namely, whether the words "as a donation inter vivos absolute and irrevocable" in P1 satisfy the condition for irrevocability postulated in section 5(1)(*d*) of the Ordinance.

Relying very strongly on the majority judgment of the Privy Council in *Dullewe's case* (supra) Mr. H.L. de Silva for the plaintiff-respondent submitted (i) that the Ordinance clearly contemplates an express renunciation of the right of revocation, a right which was integral to the exercise of proprietory rights under the Kandyan Law; (ii) that in P1 there is nothing more than a tacit or implied renunciation; (iii) that the Ordinance envisages a personal and formal declaration by the owner of the right and not a neutral statement or a conclusion of law; that the expression "as a donation inter vivos absolute and irrevocable" is a conclusion of law; an adjectival phrase descriptive of the gift and no more.

Lord Hodson in the majority judgment in Dullewe's case emphasised the words "expressly renounced" in section 5(1)(*d*) of the Ordinance and stated: "These words recognise a pre-existing right to revoke and require

an express renunciation ..... There is the further requirement that the renunciation must be effected in a particular way videlicet by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning. The inverted commas draw attention to the words to be used. The exact words need not be used if they are not used, words of substantially the same meaning are required. *This alternative leaves no room for departure from the essential requirement of a declaration containing a transitive verb as opposed to an adjectival description of the gift as irrevocable which is apt to describe what has been done already*". (The emphasis is mine) This approach to the construction of section 5(1)(*d*) of the Ordinance does not commend itself to me. In my opinion, a very narrow and unduly restrictive interpretation has been placed on the plain and natural meaning of the words used. The strict grammatical approach, the insistence on a "transitive verb" is unwarranted, having regard to the ordinary meaning of the phrase "or words of substantially the same meaning". It seems to me that the approach of the majority judgment places too little significance on the crucial words "or words of substantially the same meaning". If the Ordinance now requires "a special clause of renunciation" as stated in the majority judgment (71 NLR 289 at 295) then these words lose much of their significance. The point is the Ordinance itself permits the use of other words provided their meaning is substantially the same. Having regard to the phrase "or the words of substantially the same meaning" it was submitted that the Notary could substitute for the word "revoke" the word "cancel" in the special clause. But this would be to use a word which has the same meaning as "revoke" and not to use a word which has substantially the same meaning. As rightly stated by Lord Donovan in his dissenting judgment, "The alternative thus indicated clearly connotes some words which are not a repetition of the formula but the meaning of which is in no material sense different. Nor need they begin with words "I declare" in order to be a "Declaration" - a term which includes a statement or an assertion" (71 NLR at 297).

The burden of Mr. de Silva's submissions was that the Ordinance now requires an *express* renunciation of the right to revoke and the mere use of the words "as a donation inter vivos absolute and irrevocable" is at most a tacit or an implied renunciation of the right. It was urged that this does not and cannot satisfy the requirements of the Ordinance. The answer to this submission has been cogently and succinctly put by Lord Donovan in his dissenting judgment:- "The donor here has expressly

indicated that the lands were to be 'a gift irrevocable'. The word 'irrevocable' means 'not capable of revocation'; and the capacity to revoke obviously depends upon the existence of a right to do so. One may therefore ask, 'who could revoke the gift in the ordinary way' or 'In whom would such a right ordinarily exist?' The answer of course is the donor himself. When therefore he uses a word which indicates that the gift is not to be capable of revocation, he is saying that he shall not enjoy the right to revoke which he would otherwise possess. In other words he is renouncing that right. He is not using words which 'substantially' mean the same thing as the prescribed formula, but exactly the same thing. True, the Ordinance requires that whatever words are used the right shall be 'expressly' renounced. The words 'as a gift irrevocable' are express. (71 NLR at 298)

Furthermore, Sansoni, J. (as he then was) in *Punchi Banda v. Nagasena*,(9) dealing with the requirement of the Ordinance that there must be an express renunciation of the right to revoke, expressed himself lucidly and pithily in the following terms:- "He describes the gift as 'irrevocable' and the question that remains for consideration is whether, by the use of that single word, he has expressly renounced the right to revoke. I can see no need for a separate clause containing such a renunciation. The Notary could have drafted the deed in that way, but he has chosen a more abbreviated form which is just as effective. The donor has, by describing the gift as 'irrevocable', declared that he has renounced the right to revoke, for it is only a donor who has the right to revoke. When he declares that the gift is irrevocable, he is expressly renouncing that right".

It is my view that the reasoning of Lord Donovan and of Sansoni J. is well-founded and is correct. In the majority judgment of the Privy Council in Dullewe's case there has been a failure to consider the true meaning of the term 'irrevocable' in relation to the requirements of the Ordinance. I hold that the majority judgment is wrong and it should not be followed.

It follows that P1 satisfies the condition for irrevocability postulated in section 5(1)(*d*) of the Ordinance. P1 being an irrevocable Deed of Gift, no title passes to the plaintiff on P3 and his action must fail.

Having regard to the conclusion I have reached on Dr. Jayewardene's first submission, it is unnecessary to consider his further submission, viz. that P1 contains a fidei commissum and that the rule of the Roman Dutch Law that a deed containing a fidei commissum when duly accepted renders the deed irrevocable is applicable to the present case. Nor is it necessary to express an opinion on Dr. Jayewardene's submissions based on Sections 4 and 6 of the Abolition of Fidei commissum and Entails Act, No. 20 of 1972.

I accordingly allow the appeal, set aside the judgment of the District Court and Court of Appeal and direct that decree be entered dismissing the plaintiff's action. In the particular circumstances of this case, I direct that the parties do bear their own costs in the District Court, the Court of Appeal and this Court.

KULATUNGA, J.

I have had the advantage of perusing in draft the judgments of my Lord The Chief Justice and my brother G. P. S. de Silva, J. with whose judgments I entirely agree. However, I wish to add the following comments by way of emphasis and as further grounds for allowing this appeal.

This Bench has been constituted as it has become necessary in determining the appeal before us to consider whether the majority judgment of the Privy Council in *Dullewe v. Dullewe* (1) has correctly construed Section 5(1) (*d*) of the Kandyan Law Declaration Ordinance (Cap. 59) (hereinafter referred to as the Ordinance). The relevant facts and circumstances have been set out in the judgment of my brother G.P. S. de Silva ,J.. The Deed P1 gives the land described therein to the donee as a donation "inter vivos absolute and irrevocable"; under the habendum clause the donee and her heirs etc. were to"have and hold the said premises..... for ever"; the donee has thankfully accepted the gift or donation.

At the hearing of the appeal, our attention was drawn to the report of the Kandyan Law Commission Sessional Paper XXIV- 1935. On the relevance of such reports Maxwell on Interpretation of Statutes 12th Ed. p. 54 states:

"The modern attitude is best summed up in these words of Lord Denning MR in Letang v. Cooper ' it is legitimate to look at the report

of such a committee, so as to see what was the mischief at which the Act was directed..... This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief. You must interpret the words of Parliament as they stand, without too much regard to the recommendations of the committee".

The revocability of Deeds of Gift has been examined at pages 7-10 of the report in the light of opinions of text writers and some of the important judicial decisions. A more recent and exhaustive review of the authorities appears in the judgment of Tambiah ,J. in *Tikiri Bandara v. Gunawardena* (22). My brother G. P. S. de Silva, J. has also reviewed the relevant authorities in the light of the case before us. These authorities too would help us to understand the mischief against which the Ordinance is directed.

As Tambiah, J. states "the early customary law of Kandyans, unaffected by European ideas or judicial decisions, knew of no contract renouncing the right of revocations" 70 NLR 203, 205. He cites the decision in *Salpalhamy v. Kirri Ettena* (24) where it was stated as a general proposition that all Deeds of Gift except grants to priests are revocable (p. 206); see also *Molligoda v. Keppetipola* (18) . At p. 208 he cites Hayley's view that the effect of a clause renouncing the right to revoke a simple Deed of Gift is of no avail in law (Hayley p. 311) and proceeds to state thus:

"The customary laws of the Kandyans, or on which Hayley was relying have been developed and modified by case law which adapted the archaic system to suit modern conditions".

He concludes:

"As stated earlier, the case law on this matter is of a conflicting nature, but from the medley of conflicting decisions a clear principle has emerged which has been enunciated by the Full Bench of this Court. This principle may be formulated as follows: if in a Kandyan deed of gift it is stated that the deed is irrevocable and the clause containing irrevocability is not dependant on any condition, then such a deed

cannot be revoked. This salutory principle, which has been laid down by the Full Bench, had been followed in a long line of decisions and should not be departed from in the interests of ensuring the validity of title based on Kandyan deeds of gift. It is settled principle that a long established rule affecting title to property should not be interfered with by this Court. In the instant case the deed comes within this rule. The deed clearly states that it will not be revoked at any time and for any reason".

The deed considered in 70 NLR 202 had been executed in 1915 and was therefore, not governed by the Ordinance.

Some of the earlier decisions restricting the right of revocation held that a Kandyan Deed of Gift made for past services rendered by the donee to the donor and containing a clause renouncing the right of revocation is irrevocable under Kandyan Law. *Tikiri Kumarihamy v. De Silva* (25) (affirmed in review by a Divisional Bench in 12 NLR 74). In that case the donor said :

"That henceforth I or my descending or inheriting children, grand - children, heirs, administrators, or assigns whosever shall not from this day forth by act or word raise any dispute whatsoever against this donation.....".

The Court held that the deed was irrevocable. Wood Renton ,J. said (9 NLR 202, 208):

"I only desire to add that in my opinion to import into the decision of cases of this description the English doctrine of consideration or ideas borrowed from English conveyancing rules as to covenants for title, instead of looking to the real nature of the transaction and to the intention of the parties, is merely to create opportunities for the evasion of obligations, which have been seriously undertaken, on the faith of which extensive dealings with property may have ensued, and which ought in the interests of public and private honesty to be strictly enforced".

The law was further developed in *Kirihenaya v. Jotiya* (3) in which the donor declared that she should not revoke this deed of gift at any time in any manner or change it in any manner after the date of the execution. It was held that a Kandyan Deed of Gift which expressly renounces the right of revocation, and which is not dependant on any contingency, is irrevocable; a deed of gift is a contract, and there is no rule of law which makes it illegal for one of the parties to the contract to expressly renounce a right which the law would otherwise give him. This principle was followed in *Ukku Banda v. Paulis Singho* (5) in which the grant was made as "a gift absolute and irrevocable.....to have and to hold the said shares of the said premises hereby conveyed..... absolutely for ever". The deed was held irrevocable. In each of the above cases the gift was made in consideration of the love and affection the donor had towards the donee and not in view of any past or future services. According to these decisions, the paramount consideration would be the intention of the parties.

Thus, at the time of the enactment of the Ordinance the law relating to the revocation of a simple Deed of Gift in Kandyan Law was that all such gifts were revocable but the right of revocation could be renounced by an express and unmistakeble declaration appearing on the face of the deed In the light of this state of the law, it appears to me that the mischief which the legislature sought to remedy was that which arose due to the uncertainty in the phraseology appearing in some of the gifts which the Courts had construed to be sufficient to constitute a renunciation of the right to revoke. Further at p.9 of the Kandyan Law Commission Report, the Commissioners refer to the need to minimise the evils of litigation and to give a certain amount of security and stability to titles derived by Deeds of Gift; to achieve this the Commissioners recommended a clause renouncing the right to revoke made in explicit terms and according to a form prescribed. They thought that such a renunciation should itself be sufficient to render a deed, otherwise revocable, absolute and irrevocable. At p. 10 the Commissioners state ..... we believe that these recommendations if given legislative force will while preserving the sprit of the ancient law on the subject, remove certain hardships which are experienced by donees".

Viewed in this background it seems to me that Section 5(1)(*d*) of the Ordinance is merely declaratory as to the mode of renouncing the right to revoke a simple gift in Kandyan Law. It does not provide for a rigid form as recommended by the Kandyan Law Commission; hence it does not amend the existing law. It only emphasises the requirement of an express and unmistakeble renunciation of the right of revocation (for safe guarding the interests of the donee) as contemplated in the relevant decisions. It permits the use of the words "I renounce the right to revoke" or words of substantially the same meaning. As such, it is unnecessary to look for words which are substantially similar or to insist as essential the use of words containing a transitive verb as required by the majority judgment of the Privy Council. The failure to employ a transitive verb would not by itself convert a renunciation which is otherwise explicit and unmistakeble to a mere intention to renounce or to an implied renunciation. The majority judgment of the Privy Council has applied a narrow grammatical construction which would encourage the evil spoken to by Wood Renton, J. 9 NLR 202, 208 namely the creation of opportunities for evasion of obligations which have been seriously undertaken which ought in the interests of public and private honesty to be strictly enforced. It would also fail to achieve the possible intention of Section 5(1)(*d*) of the Ordinance namely, to remove certain hardships experienced by donees.

I am of the view that the majority judgment of the Privy Council in *Dullewe v. Dullewe* (supra) is wrong. I agree with the dissenting judgment of Lord Donovan and the judgment of Sansoni, J. (as he then was) in *Punchi Banda v. Nagasena* (2).

I accordingly agree that the deed P.1 is irrevocable in the light of Section 5(1) (*d*) of the Ordinance and hence no title passes to the plaintiff on P. 3 and his action must fail. In view of this finding it would be unnecessary to consider the further submissions raised by Dr. Jayewardena Q. C. in support of the appeal.

Accordingly, I allow the appeal, set aside the judgment of the District Court and of the Court of Appeal and direct that a decree be entered dismissing the plaintiff's action. I agree to the order as to costs proposed by my brother G. P. S. de Silva ,J.

Appeal dismissed.