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*Present* : Garvin and Lyall Grant JJ.

GUNERATHAMY *v.* MANUEL APPUHAMY.

*133—D. C. Kurunegala, 11,039.*

*Kandyan law—Deed of gift of all landed property—Disinherison of heir—Clause of disinherison—Gift absolute and irrevocable.*

A deed of gift by a Kandyan parent of all his landed property is inoperative against his heirs unless it contains a clause of disinherison.

No particular formula is necessary for disinheriting an heir so long as there appears in the deed language which discloses an intention to disinherit.

*Per* GARVIN J., *Semble.*—The requirement of a clause of disinherison must be limited to cases in which the donor has not expressly renounced his right of revocation nor manifested an intention that his grant was to have the effect of an absolute and irrevocable disposition.

APPEAL from a judgment of the District Judge of Kurunegala. Plaintiff, the minor son of one Malhamy, claimed to be declared entitled to the subject-matter of the action as the sole heir of his father. The defendant resisted the claim on a deed of

[1] *9 N. L. R. 142.*

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gift made in his favour by Malhamy. This deed was attacked on two grounds: (1) that it was not the act and deed of the donor, (2) that as the donor had by the deed parted with all his landed property his son was entitled to the premises by inheritance, in the absence of an express clause of disinherison. The learned District Judge dismissed the plaintiff's action.

*H. V. Perera*, for plaintiff, appellant.

*Drieberg K.C.* (with *Weerasooriya*), for defendant, respondent.

February 28, 1927. GARVIN J.—

This is a contest as to title. The plaintiff is the minor son of Malhamy, and is represented by his duly appointed next friend. He claims to be entitled to the subject-matter of the action as the sole heir of his father. His claim is resisted by the defendant, who bases title on a deed of gift No. 4,010 dated July 8, 1921 made in his favour by Malhamy. This deed of gift is attacked on two grounds: First, that it is not the act and deed of the donor; and second, that inasmuch as by this deed the donor has parted with all his landed property, it is in the absence of an express clause of disinherison of no avail against the claim of his only surviving legitimate son to take the premises by right of inheritance.

The evidence shows that for some time before his death, which took place on July 9, 1921, the donor had been estranged from his wife and had been living apart from her and his son and with strangers. Towards the end of his life he had been staying with the defendant, and during that period developed the illness which proved to be his last. He was brought to Colombo to Dr. Rutnam's hospital, where he died. The deed of gift was executed the day before he died. The evidence of the notary and the other witnesses if believed establishes that he was in full possession of his senses, and that his mental faculties were unimpared when he executed the deed of gift. There is the further circumstance that about three months previously he had executed a deed of giift of these lands in favour of some other persons, who also were strangers. That gift he revoked before he executed the deed under consideration.

The District Judge has accepted this evidence, and has found that the plaintiff has failed to establish circumstances which would in law avoid the gift. The transaction labours under the suspicion which attaches to deeds executed shortly before the donor's death, but upon a consideration of all the evidence I am unable to say that the District Judge was wrong.

The principal ground on which the appeal was pressed was that the deed was bad for the reason that it contained no words which could fairly be held to disclose a clear intention on the part of the donor to disinherit his son.

The general effect of the evidence on this point is that by this deed the donor divested himself of all his landed property, and there is nothing to show that at his death he left any estate.

All the parties concerned are Kandyans.

The question for consideration is whether under the Kandyan law such a deed is invalid in the absence of words disclosing a clear intention on the part of the donor to disinherit his legal heir. The deed is in form, at least, an irrevocable deed of gift.

The Kandyan law gave to a proprietor full power to dispose of his property, even to strangers, to the exclusion of his children or other heirs. There also existed certain customary forms and ceremonies by which a person may disinherit an heir.[1]

Whether the Kandyan law ever insisted as an essential requirement of a disposition by gift in other respects clearly and unambiguously established that it should contain a clause disinheriting the donor's legal heir may be open to doubt, but I think there can be no question that the decisions of this Court have established that such a clause is necessary, at least where such a gift is revocable.

As early as the year 1842 this Court took the view that an only son could not be disinherited by a deed of gift "unless the cause of disinherison be expressly mentioned in it." (See *Siriwardene v. Ranghamy.*[2]) There followed in 1856 the case of *Indejoti Unnanse v. Keerala,*[3] which is an authority for the proposition that a revocable deed of gift must contain a clause of disinherison before it can defeat the right of the heirs of the donor to take the property by right of inheritance. Two years later another decision of the Collective Court is reported in *Austin* at page 203, which followed the case of *Indejoti Unnanse v. Keerala* (*supra*), the Judges observing:—

> "It has not, in the Court's opinion, been shown that at the time of his death the admitted proprietor possessed any other lands in dispute. Such being the case, and plaintiff being admitted to be his heir at law, it would become necessary, according to Kandyan law, that in deeds such as the one now in question the usual clause of disinherison should be inserted."

This judgment indicates that the view held was that a clause of disinherison was necessary only where the proprietor by the disposition under consideration parted with all the property to which he was entitled.

[1] *Pereira's Armour 98 and Niti Nigandawa 54.*

[2] *(1842) Morgan's Digest 345.*

[3] *Austin 192.*

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The law as laid down in *Indejoti Unnanse v. Keerala* (*supra*) was affirmed and approved in 1861 in the case of *Bandara Menika v. Palingo Menika.*[1]

It was reaffirmed in *D. C. Kandy 51,683* [2] in a judgment where the position of the law on the subject is set out thus:—

> "The law in respect of deeds of gift made by persons in the Kandyan Provinces appears now to stand thus. Deeds of gift made by a parent affecting his whole property and entirely disinheriting one or more of his children are not valid unless they contain a clause of disinherison stating sufficient ground for the act. But deeds of gift which do not include the whole of the donor's property need not contain such clause of disinherison. And all bequests are good, even though they in fact disinherit the children of the testator and deal with his whole property without containing any express clause of disinherison. The law was formerly the same with regard to deeds and wills; but the Ordinance No. 21 of 1844 introduced the difference just adverted to. The law as it now stands is in a somewhat anomalous state, permitting an owner of property to deal with it after his death as he pleases, but introducing certain restrictions which prevent him from disposing of his own life interest with equal facility. It is now too late to consider whether the law which removes all restrictions in dealing with property by will might not have been considered by the Courts as removing the restrictions in cases of deeds of gift also; because by allowing heirs to be deprived of all share in their ancestor's property by one form of assurance the law in effect repudiated the principle of interference, and this did away with the reason on which such restrictions were founded. But we are certainly not inclined to extend the law which avoids a deed for want of a clause of disinherison beyond the point to which previous decisions oblige us to go."

This reluctance to go beyond the point at which the law was left by the current of judicial decision was again manifested in the case of *Pattiya Arawagedera v. Pattiya Arawagedera,*[3] and the judgments in *Sundara v. Peris* [4] *and Appu Hamy v. Kiri Menika* [5] show that it was the settled policy of the Courts not to extent the rule as laid down in the earlier cases and to restrict its application to cases in which it had been applied.

[1] . . (*1860-1862*) *108.*
[2] . . *derstraaten* (*1871*) *165.*
[3] *Beven & Siebel* (*1875*) *46.*
[4] *3 Cey. L. Rec. 80* (*note*).
[5] *3 C. L. R. 81.*

Despite this consciousness of the anomalous state in which the law was left, the Courts felt themselves bound to admit that a deed of gift by a parent of all his landed property was inoperative against his heirs unless it contained a clause of disinherison.

It is, however, important to note that no particular formula was required or insisted upon so long as there appeared in the deed language which disclosed an intention to disinherit the heir. A statement of the cause of disinherison had long ceased to be regarded as essential to the validity of such deeds.

In *D. C. Ratnapura 10,690* [1] the deed under consideration contained no express clause of disinherison, but it did contain the following words: " neither I nor any heirs, executors, &c., or any other person whomsoever shall in future dispute the validity of this gift." The judgment of the Court on the point was as follows:

> " From the clause (quoted above) in the deed in question it is evident that the deed was intended to disinherit the heirs of the donor. "

Similarly, in the case of *Komalie v. Kiri* [2] Middleton J. held that a clause in a deed of gift which said that none of the donor's heirs, executors, administrators, or assigns should make any dispute with regard to the gift had the effect of a special clause of disinherison.

It is evident that the reason underlying this requirement of a clause of disinherison in the case of a gift of all his property by a parent is that the law refused to give such a disposition the effect of a final and absolute conveyance by the donor unless such an intention was clearly manifested. Gifts under the Kandyan law being revocable and in practice freely made and freely revoked, it was apparently thought to be necessary that a Court should be satisfied in the case of a deed of gift by a parent of all his property that it was the donor's intention that the grant should operate as a final deposition of his property, and not merely as a gift revocable at will before such a deed was given the full effect of an absolute and irrevocable conveyance.

Such an intention had to be manifested by the presence in the deed of a clause of disinherison, and this requirement as a result of the gradual development of the law is now satisfied if the deed contains language which sufficiently manifests an intention to disinherit the heir.

It is necessary, however, to take note of the progressive development of the law on a kindred point. From time to time the contention has been advanced that it was competent for a donor under the Kandyan law to renounce the right to revoke a gift

[1] *Ram. (1877) 195.*

[2] *(1911) 15 N. L. R. 371*

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made by him, and in the case of *Ukku Banda v. Paulis Singho* [1] Dalton and Jayewardene JJ. admitted the contention, and held that where a donor has renounced the right to revoke a deed of gift it becomes irrevocable. The earlier cases on the point will be found reviewed in their judgments.

This ruling was approved and followed by Schneider A.C.J. and Maartensz A.J. in the case of *Bogahalande v. Tikiri Hamy et al.*[2]

If it is settled law—and I think it is—that where a donor makes a deed of gift and by that very deed renounces his right of revocation the gift becomes absolute and irrevocable, is there any need for a clause of disinherison where such a deed embraces all the landed property of the donor?

The grant under consideration is expressed to be made "by way of gift absolute and irrevocable." If the grant related to a part only of the landed property of the donor, it must be taken to have the effect of an absolute and irrevocable grant. Is the law different where the grant extends to all the donor's landed property? The principles upon which the judgments referred to proceed apply generally, and are in no way affected by such considerations. As I understand these principles, they are, that the right to revoke may be renounced and that the paramount consideration is the intention of the parties. If a clear intention that the grant is to operate as an absolute and irrevocable gift is manifested, that intention must be given effect to.

The identical words appear in the deed under consideration. They indicate that the donor has renounced his right of revocation, and disclose a clear intention that that gift is to be absolute and irrevocable. On the authority of the cases referred to, it is the law that such a deed operates as a final, absolute, and irrevocable disposition.

It is a logical and necessary consequence of the law as settled by these cases that the requirement of a clause of disinherison must be limited to cases in which the door has not expressly renounced his right of revocation nor manifested an intention that his grant was to have the effect of an absolute and irrevocable disposition.

Indeed, upon what principle can an heir be admitted to impeach a grant which is final, absolute, and irrevocable, and is given that effect because it was manifestly the intention of the donor that it should have that effect?

In addition to the words which are a renunciation by the donor of his right to revoke the gift, the habendum clause repeats that the donee is to hold the premises "absolutely *and for ever*" subject to the reservation of a life interest in the donor; and finally, the

[1] *27 N. L. R. 449.* [2] *S. C. Mins. of November 30, 1926.*

donor " for himself and his heirs, executors, and administrators covenants " that the premises are free from encumbrance and that he will warrant and defend the title thereto.

If the question were to be decided apart from the effect of the recent decision to which reference has been made, the deed, in my opinion, contains language which sufficiently manifests the intention of the donor that it was to operate as a final and absolute disposition to the exclusion of his heirs.

For these reasons I would affirm the judgment under appeal.

The respondent is entitled to the costs of this appeal.

LYALL GRANT J.—

I have had the advantage of reading the judgment of my brother Garvin, and I have examined the cases quoted in that judgment. It seems to me that the line of authority in regard to clauses of disinherison and declaration of irrevocability in Kandyan deeds of gift establishes the following propositions:—

(1) It is open to a Kandyan parent to make a deed of gift affecting his whole property and entirely disinheriting one or more of his children.

(2) Before the Court will give effect to such a deed, it must be satisfied that the existence of the child or children was in the contemplation of the donor at the time when he made the gift, and that when he made it he had the express intention to disinherit either all his natural heirs or a particular one, as the case might be.

(3) That where a donor has disposed of part of his property by a deed which purports to be irrevocable, such a deed operates as against the heirs, although there may be no express clause of disinherison.

I do not think it has ever been held that a deed of gift of the whole of the donor's property is good as against his children merely because the deed purports to be irrevocable.

(4) That a testamentary document disposing of the whole of the testator's property may be good although it does not contain an express clause of disinherison.

There can be no doubt that the tendency of the Courts has been to require less and less formality in the words which have to be used in deeds of gift to disinherit children. The sole requirement that remains is that the Court should be satisfied that this intention was present to the mind of the donor when he made the deed.

If I might suggest a reason for the distinction made between deeds of gift and testamentary dispositions, it would be that when a person makes a testamentary disposition he is presumed to have his mind specially directed to his children, who are his natural

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heirs, whereas it is not presumed that when he makes a gift *inter vivos* the effect of the gift upon his natural heirs is present to his mind.

The fact that express mention of heirs was required in a deed relating to the whole property while it was not required in a deed which dealt with part of the property is explicable on the theory that the law only interferes to preserve the rights of children when those rights are in danger of extinction and does not interfere to preserve them in their entirety.

It is admitted that in the present case the deed of gift deals with the donor's whole property and that it has the effect of disinheriting his infant son.

I do not think the authorities go so far as to say that such a deed cannot be disputed by the heir merely because it is expressed to be irrevocable, nor do I think that the clause in the deed binding the donor, his heirs, executors, administrators, &c., to warrant and defend the premises must necessarily operate as a clause of disinherison. That is a formal clause inserted by the notary who drew up the deed, and it is possible that its full effect might not have been apparent to a donor to whom the deed was merely read over while he was lying ill in bed. The fact, however, that about three months previously the donor had executed a deed of gift of the same land to other persons, who are also strangers, satisfies me that the donor by the second deed did intend to disinherit his wife and child. In these circumstances, I have come to the conclusion that the appeal should be dismissed, with costs.

*Appeal dismissed.*