1943 *Present :* **de Kretser and Wijeyewardene JJ.**

APPUHAMY, *et al.*, Appellant, *and* HOLLOWAY, Respondent.

135—D. C. Kandy, 455.

Kandyan deed of gift—Revocation by donor—Subsequent gift to another—Transfer by original donee's heirs after revocation—Prior registration of transfer—Fidei commissary gift—Doctrine of si sine liberis.

Where a deed of gift contained the following clause :—And after the demise of both of us, the said P shall possess the aforesaid lands and premises as long as possible ; and in the event of his having legitimate children, born of a wedded wife of his, that he may convey the premises unto them ; but in the event of his having no legitimate children, then and in such case, he shall possess the said premises during his lifetime and thereafter the said lands and premises shall devolve on the daughters of K., deceased, and their respective descendants, and the said premises shall not devolve on any other persons,—

***Held*, that the deed did not create a valid *fidei commissum* in favour of the children of P.**

A Kandyan deed of gift was revoked by the donor on the ground that the donee had failed to give him necessary assistance. Thereupon the donor gifted the property to A.

Subsequent to the deed of revocation the property was transferred to B by the heirs of the original donee and B registered his transfer prior to the deed of gift to A.

***Held*, that B's transfer did not prevail over the gift to A by reason of prior registration.**

APPEAL from a judgment of the District Judge of Kandy.

The facts appear from the headnote and the argument.

N. E. Weerasooria, K.C. (with him *C. E. S. Pereira* and *S. R. Wijayatilake*), for defendants, appellants.—The deed of gift P 2 was executed by the donor with the object of securing succour and assistance from the donee. However, as the latter predeceased him, he by 2 D 2 of 1904 revoked the gift referred to, the object of the gift being defeated by the donee's demise.

[DE KRETSER J.—Could the donor have revoked P 2 in view of the express renunciation that the donors "their heirs, executors, administrators shall not at any time dispute or contest the donation ?]

That clause could not make the deed irrevocable so long as the conditions of the grant had not been fulfilled. See *Hayley on Sinhalese Laws and Customs p. 307 and p. 312* and *Dharmalingam v. Kumarihamy*[1].

After the revocation of P 2 by 2 D 2 the donor executed a gift to Punchirala subject to a *fidei commissum* in favour of the second to fifth defendants—his legitimate children. P 4 could not have conveyed any interest in the share which Mudalihamy gifted to Kirihamy as in 1916 when P 4 was executed, the deed of gift P 2 had already been revoked.

The fact that P 4 is registered and the revocation 2 D 2 is not is immaterial. Prior to the Kandyan Law Declaration and Amending Ordinance of 1938 it was not necessary even to execute a deed of revocation and therefore no question of registration can arise. The effect of Ordinance No. 7 of 1840 in this respect was considered in *D. C., Kandy, 23,886*[2] in which case Carr J. held that a notarially executed instrument was necessary but this decision was not followed in *D. C., Kandy, 23,043*[3] and dissented from in *D. C., Badulla, 19,360*[4] where it was held that resumption of the land by the donor was sufficient to annul a deed of gift. The only requisite for a valid revocation is *intention* and some evidence that the intention has been carried out. See *Hayley p. 313*. So that under the Kandyan Law if a formal revocation was not required the fact that the deed of revocation was not registered is irrelevant. Therefore the plaintiff cannot under P 4 claim Mudalihamy's rights.

L. A. Rajapakse for plaintiff, respondent.—The competing deeds are plaintiff's deed P 4 and defendant's deeds 2 D 2 and 2 D 1. P 4 gets priority by registration, and 2 D 2 and 2 D 1 are void. In other words if 2 D 2 and 2 D 1 were never executed plaintiff would get a declaration of title on his deeds. As soon as the defendants produce 2 D 2 and 2 D 1 with a view to

[1] *(1925) 27 N. L. R. 8.*
[2] *(1851) Austin 159.*
[3] *(1852) Austin 145.*
[4] *(1874) 3 Grenier 24.*

destroying or taking away Kirihamy's title on P 2, the doctrine of registration steps in and destroys or declares void or gets out of the way the attempted destroyers, viz., 2 D 2 and 2 D 1. *Vide de Silva v. Wagapadigedera*[1]; *James v. Carolis*[2] and *Kobbekaduwa v. General Rubber Co.*[3]

[WIJEYEWARDENE J.—If the revocation was subsequent to P 4 will the plaintiff succeed as against the defendants?]—No in that case the defendants will succeed as no question of priority will arise then. The result may be anomalous but such anomalies arise as a result of the doctrine of registration, *e.g.*, the case of a subsequent transferee from an intestate who may claim priority by registration as against an earlier transferee from an executor or administrator where the probate or letters were earlier and had not been registered. See per Sampayo J. in *James v. Carolis*[4]; [also *Fonseka v. Fernando*[5]].

The fact that P 2 was a Kandyan deed of gift which was revocable and that Kirihamy's title was defeasible does not make any difference.

The instrument that is declared void need not be a deed conveying title: it may be a deed of release, surrender, annulment or a grant of administration or a judgment of a Court. See sections 8 and 6 of Cap. 101.

The idea underlying registration is the protection of the innocent purchaser for value. *James v. Carolis* (*supra*). It does not re-vest title or establish rights to land: it merely declares the earlier unregistered deed void and in that way affects the devolution of rights. *Mohamed Ali v. Weerasooriya*[6].

That a gift of immovable property by a deed can be revoked without another deed is a startling proposition.

Quite apart from registration, the defendant's case must fail because the deed 2 D 1 does not create a valid *fidei commissum* in their favour. 2 D 1 is subject to two conditions:—(1) if Punchirala has legitimate children, he *may* convey the lands to them; that is, he has a discretion to convey or not, (2) if he has no legitimate children, upon his death the lands shall devolve on third parties. There is a valid *fidei commissum* in condition No. (2) only; but that is a *conditional fidei commissum*. In this case Punchirala *had* legitimate children, and persumably using his discretion he did not convey to his children, but instead conveyed to the plaintiff.

N. E. Weerasooria, K.C. (in reply).—The principle enunciated in the decisions cited by my learned friend does not apply to the facts of this case. The effect of the revocation was to completely destroy the deed of gift P 2. Here, there is no question of competing deeds as the deed of gift has been effectively annulled and nothing could have passed. The grantor at the time of the execution of P 4 had no title whatsoever to Mudalihamy's rights.

2 D 1 creates a *fidei commissum* in favour of the legitimate children of the donee. It sets out on whom the property would devolve if the donee died without issue and in the circumstances of this case as the donee left children the doctrine of *si sine liberis* would apply and the property would devolve on the legitimate children.

[1] *30 N. L. R. 317.*
[2] *17 N. L. R. 76.*
[3] *32 N. L. R. 353.*
[4] *17 N. L. R. 76.*
[5] *15 N. L. R. 491.*
[6] *4 C. A. C. 30.*

March 8, 1943. WIJEYEWARDENE J.—

This is an action for partition. A dispute has arisen between the plaintiff and the second to fourth defendants regarding the half share claimed by the plaintiff.

It is admitted by both the parties that Malhamy Vedarala, the original owner of the property, gifted it by P 1 of 1867 to his two children, Mudalihamy and Kaluhamy. Mudalihamy and Kaluhamy gifted the property to Kirihamy, the son of Kaluhamy, by P 2 of 1897. On the death of Kirihamy the administratrix of his intestate estate executed a conveyance P 3 of 1903 in favour of Punchirala and Dingiri Amma, the two children of Kirihamy. The plaintiff claims Punchirala's half share by right of purchase under deed P 4 of 1916 executed by Punchirala and registered on October 31, 1916. The contesting defendants have proved that Mudalihamy revoked the deed of gift P 2 by 2 D 2 of September 7, 1904, after the death of Kirihamy so far as his own share of the land was concerned and that Mudalihamy gifted that share by 2 D 1 of September 7, 1904, to Punchirala subject to certain conditions. Punchirala died about 1939 leaving as his legitimate children the 2nd, 3rd, and 4th defendants.

The various questions that have to be considered in this case are—

(i.) Had Mudalihamy the right to revoke the deed P 2 ?
(ii.) What were the rights of the contesting defendants under deed 2 D 1 ?
(iii.) Are the rights of the contesting defendants under 2 D 1 avoided by the due registration of P 4 and the non-registration of 2 D 1 and 2 D 2 ?

The deed of gift P 1 was executed by Mudalihamy and Kaluhamy "with the object of securing all necessary succour and assistance" for them and Kiri Etana, the wife of Kaluhamy, during their lifetime. Mudalihamy executed deed 2 D 2 revoking his gift as he "received no assistance or succour". The deed P 1 could, therefore, have been revoked and the declaratory clause in P 1 that the donors or "their heirs, executors, administrators shall not at any time dispute or contest the donation" cannot have the effect of making the deed irrevocable so long as the conditions of the gift have not been fulfilled.

It is urged on behalf of the contesting defendants that the deed 2 D 1 created a *fidei commissum* in their favour. The relevant clause in the deed reads as follows :—

"And after the demise of both of us (namely, Mudalihamy and his sister-in-law, Kiri Etana), the said Punchirala shall possess the aforesaid lands and premises as long as possible ; and in the event of his having legitimate children, born of a wedded wife of his, that he may convey the said premises unto them ; but in the event of his having no legitimate children, then and in such case, he shall possess the said premises during his lifetime ; and thereafter the said lands and premises shall devolve on Madanwala Vidanalagegedera Ukku Menika and Punchi Menika, the daughters of Kaluhamy Arachchi, deceased, who was the brother of mine the said Mudalihamy, and their respective descendants, and the said premises shall not devolve on any other person."

That clause does not appear to me to designate with certainty the persons on whom the property should devolve on the death of Punchirala leaving legitimate children. The donor has, no doubt, stated that, if Punchirala died without legitimate children, the property should go to Ukku Menika and Punchi Menika. Does it therefore follow as a necessary consequence that, if Punchirala had legitimate children, the property should devolve on the legitimate children of Punchirala under the bond of *fidei commussum*? I do not think such an inference could be drawn in this case, as the children of Punchirala were not the descendants of Mudalihamy and no burden was imposed on them.

The whole doctrine of *si sine liberis* is discussed by Roman-Dutch Law jurists in connection with the testamentary *fidei commissa* only (*Ahamadu Lebbe v. Sularigamma.*[1] Even where there is such an express provision in a testamentary *fidei commissum*, the better opinion of the jurists appears to be that a *fidei commissum* cannot be implied in favour of the children in the absence of special circumstances (see *Lee on Roman-Dutch Law, 1915 Edition, p. 317*). In his introduction to the *Jurisprudence of Holland* (*Lee's Translation, Vol. I, page 153*) Grotius expresses his views thus—

> If any one says, "I leave my property to John, and in case John dies without children I desire that it shall go to Paul", in such case it is understood that although John dies before the testator, his children shall be preferred before Paul; but whether John succeeding as heir is understood to be burdened with the duty of letting the property go to his children is doubted. However, the generally accepted view is that this is not so unless the children were descendants of the testator or unless the children were found to be themselves charged with further gift over, or unless the last will contained some other indications from which a contrary intention might be inferred. (*Grotius 2.205*).

The same view is expressed thus by Van Leeuwen in his *Commentaries* (*Kotze's Translation, Vol. I, page 383*):—

> "If children are mentioned under a condition, as if I said . . . ." I institute John my heir and, if he happen to die without children, Peter shall be my heir in his stead; it is clearly understood that, on the predecease of John, his children are preferred to Peter. But are these children admitted to a *fidei commissary* inheritance, and is John, having enjoyed the said inheritance, bound at his death to let it devolve upon his children? A distinction must be drawn that under the testator's children, grandchildren are so held to be included, if from the circumstances it appears that such was the intention.
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> But as regards the collateral line, or other strange heirs, this does not take place, because a condition has of itself no effect, nor can it be called an actual part of the testator's intention, but is only an addition subject to the intention, in which case the children mentioned under the condition are not considered further or otherwise than anything else made subject to a condition; as if I said, I appoint John my heir, if at the time of my death he possesses a certain house or horse, it would be absurd to say that the inheritance must follow the house or horse."

[1] *2 C. W. R. 208.*

I would, therefore, hold that the contesting defendants did not acquire any *fidei commissary* rights in the property by virtue of 2 D 1. The deed P 4 was for that reason effectual to convey an absolute right to a half share of the property to the plaintiff and the contesting defendants can make no claim to that share.

The decision I have reached on the question of the rights of Punchirala and his children under 2 D 2 renders it unnecessary for me to decide the third point stated by me earlier. But, as it raises an important question of law and was fully argued before us, I would state my opinion upon it.

The plaintiff's claim is based on the deed of gift P 2 of 1897 by Mudalihamy and the deed of transfer P 4 of 1916 by Punchirala registered in 1916. The contesting defendants state that Mudalihamy revoked P2 in 1904 and have produced the deed of revocation 2D2 as evidence of such revocation. They base their claim on that deed and the deed of Gift 2D1 of 1904 executed by Mudalihamy. The deeds 2D1 and 2D2 are not registered.

If the provisions of section 7 of the Registration of Documents Ordinance apply to the competing deeds, then clearly a claim based on P 4 ought to prevail over an adverse claim based on 2 D 1, even if 2 D 1 created *fidei commissary* rights in favour of the contesting defendants, in view of the registration of P 4 which is a "subsequent instrument" for "valuable consideration". But do the provisions of section 7 apply in this case? When Mudalihamy revoked P 2 in 1904, that deed ceased to have any legal effect That result was brought about by the mere fact of revocation and not by reason of any fact of registration. The position, therefore, that has to be considered in this case is different from that existing in the cases which usually arise for consideration under section 7 of the Registration of Documents Ordinance. The cases generally considered are of the following type—A sells or gifts property to B in 1897 and B sells the property to C by a registered deed in 1916. The title of C is contested by X claiming on an unregistered deed executed by A in 1904. In such a case C gets better title (*vide James v. Carolis*[1]). But there is clearly a difference between that case and the present case. In that case, the execution of the deed by A in favour of X in 1904 did not destroy or affect in any way the title conveyed to B and, in fact, X got no title under that deed at the time of its execution. B still had title to the land but he ran the risk of losing his title if he permitted X to register X's deed before him and thus gain priority under section 7. In the present case, however, the deeds 2 D 1 and 2 D 2 effectually pushed P 2 out of their way in 1904 the moment they were executed even if P 2 was registered at the time. The position becomes still clearer if we accept as correct the law laid down in (1874) 3 Grenier 24 and hold that, before the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, a mere resumption of the land by the donor was sufficient to annul a deed of gift and it was not necessary to execute a deed of revocation in accordance with the provisions of Ordinance No. 7 of 1840. In such a case there would not be a deed which could be registered. The position that arises as a result of the revocation of a Kandyan deed of gift appears to be somewhat analogous to the position created by a partition decree

[1] *17 N. L. R. 76 at 79.*

and considered in *Bernard v. Fernando*[1]. In that case, a co-owner sold his undivided rights after a land had been partitioned under Ordinance No. 10 of 1863 and the purchaser having registered his conveyance claimed priority over all persons basing their rights on the unregistered partition decree. This court held that the question of title had to be considered independently of the Law of Registration as the entering of the partition decree wiped out all previous rights. In the present case when Mudalihamy executed the deed of revocation 2 D 2 in 1904, the very foundation of the title of Punchirala based on P 2 was destroyed and Punchirala had, therefore, no right based on that deed which he could transmit to a vendee and enable such vendee to set up title against those claiming adverse interests under D 2 and 2 D 1. I think that the title, if any, of the contesting defendants is not defeated by the prior registration of P 4.

As I hold that under the deed 2 D 1, no *fidei commissary* rights devolved on the contesting defendants, I dismiss the appeal with costs.

DE KRETSER J.—I agree.

Appeal dismissed.