Present: Lyall Grant J. and Maartensz A.J. 1926.

GUNERATNE *v.* YAPA.

11—D. C. Tangalla, 2,285

Donation—Birth of a child—Right to revoke—Remuneration.

Where a person, who has no children, makes a gift of all his property, or the greater part of it, he is entitled to revoke it upon the subsequent birth of a child to him, unless he has expressly renounced his right of revocation.

THIS was an action by the plaintiff to revoke a deed of gift of property made in favour of his nephew, the defendant. The gift was made after the defendant's marriage in pursuance of a promise made some time before marriage. At the execution of the deed certain other properties were also added. The donor subsequently married, and brought the present action for the revocation of the deed on the ground, among others, that subsequent to its execution he had married and a child was born to him. The learned District Judge held with regard to the property which was not given as an inducement for the marriage the plaintiff was entitled to revoke the deed by reason of the subsequent birth of a child to him.

H. V. Perera, for defendant, appellant.

Soertsz (with *Rajapakse*), for plaintiff, respondent.

September 6, 1926. LYALL GRANT J.—

The plaintiff in this case sues for a revocation of deed of gift which he made to his nephew. The deed of gift bears to be in consideration for the natural love and affection which he has and bears unto his nephew Don Seadoris Rajapaksha Yapa, and he grants to the said donee as gift absolute and irrevocable the premises described in the deed for ever, the donor reserving to himself a life interest, and a clause follows by which he warrants to defend title. The gift was made after defendant's marriage, but some of the property mentioned in the schedule to the deed was promised before that marriage. The deed itself was not executed until some time after the marriage, and at that date a number of other properties were added. The donor subsequently married, and brought the present action. In the plaint he alleges several grounds on which he wished the deed revoked. One of those grounds is that subsequent to the execution of the said deed he contracted a second marriage and he expected to be the father of a child by the

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said marriage, and that at the time of the execution of the said deed of gift the plaintiff did not contemplate the possibility of his becoming the father of a legitimate child. The other grounds on which he sought to have the deed set aside were that the donee had been plotting against his life and creating false disputes, and that by such conduct he had been guilty of gross ingratitude to the plaintiff. Issues were framed for the trial of the case, of which the following only need be cited:—

(1) Did the defendant after the execution of the deed in question outrageously defame the plaintiff, or has the defendant been guilty of acts of ingratitude to plaintiff ?

(2) If so, do these acts constitute good grounds for cancellation of the deed ?

(3) Did plaintiff contract a marriage after the execution of the deed, and is there a child by that marriage?

(4) If issue No. 3 is answered in the affirmative, does it furnish cause for cancellation of the deed of gift?

(5) Was the child born before or after the institution of the action ? If child was born after the institution of this action, can plaintiff maintain this action?

(6) Was this deed given in consideration of the defendant marrying plaintiff's niece. If so, can the deed be cancelled ?

The learned District Judge answered the issues of fact as to defamation and ingratitude in the negative, and he accordingly dismissed the case on the first two issues.

The question whether the plaintiff contracted a marriage after the execution of the deed of gift and got a child by that marriage he answered in the affirmative, and it is agreed that he is correct.

On the issue whether the child was born before or after the institution of the action, the learned District Judge has decided that the child was born before the institution of the action.

It was argued on the appeal that there was no evidence to support this finding, but we consider that there is evidence upon which the learned Judge was entitled so to find, the facts being that the certificate of birth shows that the child was born on the 16th of the month. The plaint was actually filed on the 16th and initialled by the Judge on the 17th. On these facts we think the learned Judge was entitled to hold that the child was born before the institution of the action, and he dealt with the action as if the plaint had averred that a child was then in existence.

The real ground of dispute is whether the plaintiff is entitled to revoke the deed by reason of the subsequent birth of this child. In regard to certain properties the Judge has held that he is not so entitled, but for another reason—for the reason that this property, although given ostensibly as a gift, was in fact given in consideration of defendant's marriage with his first wife's elder sister's daughter.

There is no appeal by plaintiff, and accordingly there is no occasion for us to examine the correctness of the learned Judge's finding on this point.

The only point then before us for consideration is whether in regard to the other properties the plaintiff was entitled to revoke the deed by reason of the subsequent birth of a child. The learned District Judge has answered this question in the affirmative.

It was argued, in the first place, that the deed of gift must be read as one, and that it must be taken that all the properties were gifted in consideration of the defendant's marriage, but we are agreed that the learned District Judge was right in not so reading the deed. There is a vital difference between the properties which had been promised before the marriage and the properties which here afterwards added. In regard to these latter properties there is no local decision on the point as to whether a donor can revoke a gift in consequence of subsequent birth of the child, but we have been referred to Roman-Dutch authorities.

Mr. Walter Pereira in his *Laws of Ceylon* at page 611 has stated the law thus :—

> "If after a gift of all his property or the greater part of it or of an individual thing of very great value or worth, at the time when the donor had no children, children should be born to him, the gift is invalidated for the condition, 'unless the donor has children,' seems to be tacitly included in a gift. It is usually left to the judgment and discretion of the Judge to decide, considering the condition both of the donor and the donee and the other circumstances, whether it is likely that the donor would not have given a thing of such value if he had thought of his children."

That statement has practically been taken direct from Van Leeuwen's *Censura Forensis, Part I., Book IV., Chap XII., tit. 1 s. 20.* It is to be found at page 92 of Barber and Macfayden's Translation.

The position has been extensively commented on by Voet in *Bk. XXXIX. tit. 5.* Other institutional writers seem to consider that the deed is *ipso facto* revoked by the subsequent birth of children to the donor, but Voet himself comes to the opinion that the presumption of law, that the gift is subject to the condition that the donor does not afterwards beget children, may cease to operate, but that it ought not do so unless a clear intention to the contrary on the donor's part appears. He says that this power of revocation is available only to the donor because it seems to have been introduced, not for the benefit of the after-born children, but for the benefit of himself, namely, in order that the donor may fulfil his own obligations towards his after-born children; but Voet is of opinion that the donor is not entitled to seek cancellation if he has

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expressly renounced his right to revoke for that cause, and he adds that as the presumed intention of the donor is that which gives room for the revocation, so it is only right that, by a clear manifestation of the contrary intention to renounce the right to revoke, that right should be taken away. The accepted position appears to be that there must be clear and unambiguous evidence of the intention in the deed itself that at the time the gift was made the donor had in his mind the possibility that he might some day wish to revoke it, or that he might some day have children ; and he must make it quite clear, if he wishes to renounce his right to revoke on that point, that he has this possibility in his mind.

The words used in the present deed are: . "On the occasion . . . . to the said donee as gift absolute and irrevocable . . . . absolutely for ever, &c. "

The learned District Judge has not considered that these words make it quite plain that the possible birth of future children was present in the donor's mind when he signed this document, and on this point we agree. It must be made perfectly plain by unequivocal words in the deed that the donor intended to renounce his undoubted right of revocation after the subsequent birth of children. The appeal is dismissed, with costs.

MAARTENSZ A.J.—

The main question argued in appeal was whether a donor could revoke a gift of property on the birth of a legitimate child.

The principle underlying the revocability of gifts by a childless person on the subsequent birth of a child is that the condition is implied that the donor would have no children subsequently. This condition is inferred from the fact that if he had in mind the birth of possible children he would not have given away all or a considerable part of his property, or have made such a valuable donation.

The Roman-Dutch commentators, Grotius, Van Leeuwen, and Vander Keessel, appear to be of the opinion that the deed is *ipso facto* a nullity by the birth of a child if the Judge is of opinion that the donor had not the birth of children in his mind. Grotius puts it this way. He says:—

> " A donation of all property or a greater part thereof, by a person who has no children, or probably thought that he would have no children, is considered to be cancelled and revoked if afterwards he begets and leaves any children who may claim back the donation, because such a condition is considered to be tacitly implied in the transaction. " (Kotze's *Roman-Dutch Law Vol. II. p. 240.*)

Voet disapproves of the principle altogether but accedes to it on the weight of authority. It is only Voet who lays down that the right of revocation may be renounced by the donor. The words he uses are: "The donor himself is not entitled to such a cancellation of the donation on account of the subsequent birth of children if he has expressly renounced his right to revoke for that cause." (*Voet XXXIX. tit. 5 s. 31.*) That amplifies an earlier passage, in which he says that "the presumption of law, namely, that the gift is subject to the condition, if the donor do not afterwards beget children, ought not to cease to operate unless a clear intention to the contrary, on the donor's part appears." (*Voet XXXIX. tit. 5 s. 30.*) My reading of these passages of Voet is that there must be a renunciation in express terms of the right of revocation on the birth of the child, and that it cannot be inferred from general words to the effect that the deed shall be deemed to be irrevocable.

I am, therefore, of opinion that the plaintiff has not renounced his right to revoke the gift on the birth of a child, and I agree that the appeal should be dismissed, with costs.

Appeal dismissed.