1956 *Present :* Basnayake, C.J., and Pulle, J.

DAYANGANIE and another, Appellants, *and* SOMAWATHIE and another, Respondents

S.C. 203—D.C. (Inty.) Avissawella LA/279

Kandyan Law—Adoption—Inference from facts and circumstances—Oral public declaration not essential—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, s. 7.

Evidence of a public declaration by the adoptive parent on a formal occasion that a particular child was adopted for the purpose of inheriting his estate is not necessary in order to prove the fact of adoption of an heir under the Kandyan Law (prior to the commencement of the Kandyan Law Declaration and Amendment Ordinance). All that is needed is reliable, clear and unmistakable evidence in whatever form of the adoptive parent's intention to make the foster child his heir.

Tikiri Banda v. Loku Banda (1905) 2 Bal. R. 144 and *Tikiri Kumarihamy v. Punchi Banda* (1901) 2 Browne 299, not followed.

APPEAL from an order of the District Court, Avissawella.

Cyril E. S. Perera, Q.C., with *H. W. Jayewardene, Q.C., T. B. Dissanayake* and *P. Ranasinghe*, for 2nd and 3rd Defendant-Appellants.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C., Walter Jayawardena* and *A. S. Vanigasooriyar*, for 1st and 4th Defendant-Respondents.

Cur. adv. vult.

December 20, 1956. BASNAYAKE, C.J.—

The 1st defendant is the widow of one Peter Appuhamy (hereinafter referred to as the deceased), a rich land-owner who died in 1947 intestate and issueless. The 2nd defendant is the deceased's niece, the 3rd defendant his brother's widow, and the 4th defendant his adopted daughter.

The only question for decision in this appeal is whether the 4th defendant was adopted by the deceased in order that she may be his heir and inherit his property. It arises in a reference made to the District Court under section 11 of the Land Acquisition Ordinance for a decision as to the respective rights of the defendants who are claimants to a land acquired under the Ordinance.

It is not disputed that the parties are governed by Kandyan law, and it is agreed that section 7 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, has no application to this case as the adoption in question was effected before the commencement of that Ordinance.

The 4th defendant claims that she was adopted by the deceased as his daughter in order that she may inherit his property and that according to Kandyan law she is entitled to succeed to the deceased's estate.

2—J. N. B 65063—1,593 (4/57)

While admitting that the 4th defendant was brought up by the deceased, the 2nd and 3rd defendants dispute her right to succeed to the deceased's estate on the ground that her adoption lacks one of the essential features of a Kandyan adoption, namely, a public declaration on a formal occasion of an intention to make her the deceased's heir. It is convenient at this point to set out the evidence. Briefly it is as follows :—

According to the 1st defendant, the deceased adopted the 4th defendant when she was hardly a month old, as they were childless. The child at all times looked upon the deceased as her father and he regarded her at all times as his daughter. He gave her his "Ge" name and educated her at Musaeus College for about ten years. After she left school he took steps to arrange a suitable marriage for her and eventually she married one Reggie Perera, a person of equal social status with the deceased and a person who had been at one time a Member of Parliament. He gifted certain lands valued at Rs. 30,000 to her and in the deed of gift referred to her as his daughter. These are the very words of the instrument :—

> "Know all men by these Presents that Kuruwita Aratchillage Peter Appuhamy . . . . for and in consideration of the natural love and affection he has and bear unto his daughter Kuruwita Aratchillage Millie Yasoma Nona Mahatmaya of Imbulana aforesaid, and for divers other good causes and considerations hereunto moving, and in consideration of her future welfare, has hereby donated . . . . the properties and premises more fully described in the schedule . . . . "

In the invitations which were issued by the deceased and the 1st defendant, for the wedding of the 4th defendant, she was referred to as the daughter of Mr. & Mrs. K. A. Peter Appuhamy, and the deceased's residence was referred to as "the Bride's residence". After her marriage she continued to reside at her adoptive parent's house. In order to effect the change of "Ge" name the deceased gave evidence at an inquiry held by the Assistant Provincial Registrar appointed under the Births and Deaths Registration Ordinance and stated that he was adopting the 4th defendant and that he wished to give her his "Ge" name.

The other witnesses who give material evidence are an ex-Korale, aged 64, a man of standing who had held the office of Inquirer into Sudden Deaths and had also acted as Rate Mahatmaya and as President of Rural Courts—a friend of the deceased whom he had known for about 50 years; L. B. Goonetilleke, an Assistant Superintendent of Police, and a friend of the family; and Allan Senanayake, a Proctor of the Supreme Court, a Justice of the Peace, and an Unofficial Magistrate. The last named is an uncle of the 4th defendant's husband.

According to the ex-Korale, it was a well-known fact that the deceased adopted the 4th defendant as his daughter so that she may inherit his property. He states—

> "She was adopted by Peter Appuhamy as a daughter as he had no children. According to Kandyan custom she was adopted so that she may inherit any properties which Peter Appuhamy had. I also

knew and generally all knew that she was adopted as a child to inherit Peter Appuhamy's properties. That was a well-known fact . . . .

"Generally people in the village knew that Peter Appuhamy had adopted this girl as a daughter."

Both Goonetilleke and Senanayake state that it was well known that the deceased had adopted the 4th defendant in order that she may inherit his property. The former had at the instance of the deceased tried to arrange a marriage between one Bennet Jayawardena, whose family also he well knew, and the 4th defendant. When entrusting the matter to him the deceased said that at the time of the marriage he would give substantial dowry and that after his death his daughter would inherit all he had. The latter testified that he knew that the 4th defendant was the deceased's adopted daughter and that it was well known that she was adopted as his heir, that Reggie Perera who married the 4th defendant was his sister's son, and that he had occasion to discuss the matter of the 4th defendant's dowry with the deceased at his sister's instance.

On the day on which the notice of the 4th defendant's marriage was given the deceased announced to the assembled relations and friends that he was giving Rs. 10,000 in cash and 50 acres of rubber as dowry and that the 4th defendant would inherit the remainder of his property.

The evidence of the witnesses I have referred to has been accepted by the learned trial Judge.

Whether or not the deceased intended to adopt the 4th defendant as his heir is a question of fact and the learned District Judge has resolved that question in her favour. Learned counsel has challenged that finding and has invited us to reject the evidence of the witnesses called on her behalf.

The learned District Judge has had the advantage of seeing and hearing the witnesses in the witness box and watching their demeanour. Learned counsel has not satisfied us that the trial Judge has failed to make proper use of that advantage, nor has he convinced us that the trial Judge is wrong. Sitting in appeal without that advantage we are not prepared to disturb the judgment of the trial Judge.

The principles that should guide an appellate Court in the exercise of its functions have been stated over and over again by this Court and by the Courts in England and elsewhere. It will be sufficient for the purpose of this appeal if I were to quote the words of Lord Shaw in the case of *Clerke v. Edinburgh and District Tramways* [1]—

"When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that Judgment is entitled to great respect, and that quite

[1] (1919) S. C. (H. L.) 35 at 36 and 37.

irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But, that is not the ordinary case of a cause in a Court of Justice. In Courts of Justice in the ordinary cases things are much more evenly divided, witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of the appellate Court ? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question : Am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong ? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

Counsel also submitted that the evidence which the learned Judge has accepted does not establish all the ingredients necessary for constituting an adoption for the purpose of inheriting the estate of the adoptive parent. He submitted that under Kandyan law an adopted child does not become entitled to succeed to the property of the adoptive parent unless there has been a public declaration by the adoptive parent on a formal occasion that the particular child was adopted for the purpose of inheriting his estate. I do not agree that the Kandyan law of adoption requires such a declaration on a formal occasion. Though such a declaration is not required by law, the learned trial Judge has found as a fact that such a declaration was made. We see no reason to disturb that finding.

I think I have now dealt with the facts sufficiently for the purposes of this case. I shall therefore turn to the law. We have had the advantage of a full and able argument from both sides.

No legal treatises on Kandyan law written in the times of the Kandyan kings are extant and in order to ascertain the Kandyan law on any particular topic we have to turn to the compilations of Kandyan Law made immediately after the establishment of the British Government in the Kandyan Kingdom. They are Sawers' Memoranda of the Laws of Inheritance, later known as Sawers' Digest, Armour's Grammar of Kandyan Law, and the *Niti Nighanduva.*

The first named was prepared about the year 1821. Sawers made his collection as a member of the Board of Commissioners constituted in 1816 to administer the affairs of the Kandyan Provinces at the request

of the British Government. The collection contains information gathered from the Chiefs of the Kandyan Provinces and others who acted as Assessors to the Board in its judicial administration. It was first published in 1839 and a second time in 1860 under the title of Sawers' Digest of the Kandyan Law.

The second named is a collection of Kandyan Law under the title of Grammar of Kandyan Law by John Armour who, prior to his elevation to the office of District Judge of Tangalle, later of Matara and finally of the Seven Korales, officiated as the Secretary of the District Court of Kandy. Armour's knowledge of Sinhalese gave him an advantage over other compilers of Kandyan Law and it is regrettable that he did not write his Grammar of Kandyan Law in Sinhalese. We would then have had the law stated in the very language of those from whom he ascertained it.

The third compilation known as the *Niti Nighanduva* was first written in Sinhalese and it was not translated till 1880. Both the Sinhalese text and the English translations have been printed at the Government Press under Government aegis. Both versions are now out of print. It is the only collection of Kandyan Law in the Sinhalese language, and was compiled after the cession of the Kandyan Kingdom. The compiler introduce his book thus—

"In this Island of Lanka there are three kinds of law. Of these, Royal law and Sacred law have been from ancient times set forth in books, but that kind of law which is called Traditional law has not as yet been committed to writing.

"As the law therefore must have been doubtful and uncertain, in the interests of the Sinhalese community, that the dispensers of justice may learn what is, and avoid bias in their investigations, and that Sinhalese law may be better known, I undertake this work.

"It is called Niti-Nighanduva, and is compiled from the archives of the Court of Kandy with the help of elders versed in the ancient law." *

I shall now set out the relevant text of each of these sources of Kandyan Law.

Sawers :

Laws which regulate the Adoption of Children

1. A regularly adopted child, if the adopting parent had no issue of his or her own body, inherits the whole estate of the parent adopting him or her ; but should the adopting parent have issue, male or female, of his or her own body, in that case, the adopted child will have but an inferior portion of the estate with the issue of the parent.

* Translation by Le Mesurier and Panabokke, Ceylon Government Press, 1880.

N. B. The Chiefs are not prepared to say what proportion such share should bear to the share of one of the issue, but they think it should be a fourth of the share, which falls to such issue.

2. A regular adoption must be publicly declared and acknowledged, and it must have been declared and generally understood that such child was to be an heir of the adopting parent's estate.

3. The adopted child must be of the same caste as the adopting parent, otherwise the adopted child cannot inherit the hereditary property of the parent.

4. A child being reared in a family, even if a near relative, is not to be construed into a regular adoption, without its having been openly avowed and clearly understood that the child was adopted on purpose to *inherit the property.*

Armour :

Chapter III—PARENTS AND CHILDREN

Section 10—What Constitutes Adoption :

There are no prescribed forms and ceremonies of affiliation and therefore it is not practicable to ascertain in every instance whether an orphan child, or a child who was removed from the parent's care in its infancy and who was educated by another person, was merely a foster child and protege of that person, or whether the said child was adopted and affiliated by that person.

However, this much is certain, that unless the child, and the person who had brought up and educated that child, were of the same caste, and unless that person had publicly declared that he or she adopted that child and resolved that the said child should be an heir to his or her estate, that child will not be recognised as adopted and affiliated, and will not therefore be admitted as an heir to the estate of the patron or foster-parent, on the ground of adoption.

Section 11. What is not sufficient to constitute a regular Adoption :

If the patron or foster-father permitted the protege to remain in his house after having attained the years of discretion, and even to contract a marriage and to continue to dwell, with his wife, in the house of the patron ; if the protege was also employed by the patron to manage the cultivation of his lands and to perform the *Rajakaria* services on account thereof ; yet after all, if the patron did not publicly declare that he had adopted the said protege as a child, to be an heir to his estate, he the said protege will have no right to any portion of that estate, on the ground of adoption.

If a daughter who was married and settled in *Beena* in her father's house, died before her father, leaving issue, a daughter for instance, if the father then permitted the son-in-law to remain in his house, and

there to contract a second marriage ; if the son-in-law with his second family continued to dwell in that house until the death of the father-in-law : yet for all that, the said son-in-law and the issue of his second marriage will not be recognised as heirs by adoption to any portion of the deceased's estate, which will devolve entirely to the aforesaid grandchild.

If the son died before his mother, leaving a widow and children ; if the son's widow continued to dwell in her mother-in-law's house and was even allowed to contract a second marriage and to leave (*sic*) with her second husband in that house ; for all that, the said son's widow will not be recognised as an adopted heiress of her mother-in-law, and she will therefore have no right to a share of the mother-in-law's estate ; the whole estate will devolve to the son's children to the exclusion of their mother and their mother's other children, born to the second husband.

Section 12. What may in some instances be deemed Adoption :

If a son, who had a wife in *Deega* in his father's house, died before his father, without issue : if the father then detained his son's widow and had her married again and settled in his own house, and if the daughter-in-law continued to dwell there and rendered assistance to her father-in-law until his demise, these facts will warrant the conclusion that the deceased had decidedly adopted his daughter-in-law and she will therefore be entitled to inherit her father-in-law's estates if he died intestate and left no issue.

But if the father-in-law did leave legitimate issue, a son or a grandson, in that case the daughter-in-law will be entitled only to that portion of the estate which her father-in-law may have specially allotted or bequeathed to her. "

Niti Nighanduva. As the original of this compilation is in Sinhalese I shall quote the relevant text in that language first and then set out its translation below.

ඇතිකරගත් දරුවන්ගේ උරුමය

1. කවද වස්තුහිමි පුරුෂයාට ඥාතකනොවූ වස්තුහිමි ස්ත්‍රියද නොවැදූ අයමත් ඇතැම් යකිවලදී පියඋරුමයද මව්උරුමයද පිහිටනවා ඇත. යම්කෙනෙක් විසින් සමකුලයෙහි ලදරුවෙක් හාරගෙණ මෙවැනි දරුවා මා නැතිකල මගේ නම ගම දියුණු වන පිණිස " මගේම දරුවාය කියාද මගේඋරුමක්කාරයා කියාද මා විසින් ඇතිකරගත්තාවා කියාද " ලොවට දන්වා . ඇතිකරගත්තේවිනම් එවැනි දරුවාට ඇතිකරගත් මව්පියන්ගේ වස්තු ඔවුන් නැතිනළ උරුමවෙනවා ඇත.

2. එහෙත් මේප්‍රකාර ඇතිකරගත්තා බව ලොවට දැන්නෙව්වොත් මිය යම් කෙනෙක් විසින් ලදරුවෙක් අරගෙන ඔහු වැඩිවිය පැමිනිකළ සහයකුත් කරදීලා සිටියේවිනුවුවුත් ඒ ආරක්ෂාකාරයාගේ ඉඩමේදි එවැනි අයට දරුවවුත් ඉපද සිටියේවි නුවුවුත් ඇතිකරගත් දරුවෙක්සේ ඔහුට ඉහතකී ආරක්ෂකයාගෙන් පියඋරුමයක් පිහිටන්නේ නැත.

(Translation)

"*How adopted children inherit Lands*

In some instances the paternal and maternal right of inheritance will devolve on persons who have not been begotten by the proprietor or born of the proprietress.

If any person takes charge of and adopts a child of equal caste, and in order that the child may at his death inherit his name and lands, makes known to the world that the child is his, his heir, and that he has adopted him, that child will inherit the property of his adopting parents at their death. But, unless the fact of such adoption is made known to the world, even though a child has been taken charge of by any person and a marriage has been contracted for it when of age by that person; even though issue has been born on the premises of the guardian; the child will not, like an adopted child, be entitled to the paternal inheritance of the abovementioned guardian."

I shall now proceed to examine the statements of each of the writers I have quoted above in order to ascertain what are the essentials of a Kandyan adoption as heir. Sawers states that a "regularly adopted child" is entitled to inherit the estate of the parent adopting him. He then goes on to state the requirements of a regular adoption. The child must be of the same caste. The fact that the child is being adopted in order to succeed to the property of the adoptive parent must —

(*a*) be publicly declared and acknowledged, and

(*b*) have been declared and generally understood, and

(*c*) have been openly avowed and clearly understood.

The statements do not indicate what is required with clarity and exactness. The import of the expression "publicly declared and acknowledged" is not the same as "declared and generally understood" nor is it the same as "openly avowed and clearly understood". A fact can be declared and generally understood without a public declaration. Again "generally understood" and "clearly understood" are not the same. A clear understanding of a fact can exist among a few while a fact cannot be said to be "generally understood" unless a relatively large number understand the fact. Besides what is generally understood need not necessarily be clearly understood. The requirement of a public declaration and a public acknowledgment without an indication of the forum before which the declaration and acknowledgment are to be made renders the requirement unworkable and of little practical value.

These words are responsible for the course some of the judgments of this Court on the subject of adoption have taken. I think that when Sawers' entire statement is read, with emphasis on the spirit and not on the mere words, it reduces itself to this—that the fact that a child has been adopted in order that he may inherit the property of his adoptive parent should be known and the adoptive parent should have indicated

his intention clearly. It is not necessary that the adoptive parent should go before any public authority and make a solemn declaration or acknowledgment nor is it necessary that he should make a formal, oral or written declaration. It is sufficient if his intention has been made known, whether it be in the course of conversation or otherwise.

This view of the matter finds support in Armour's statement which I shall now consider. He states : "There are no prescribed forms and ceremonies of affiliation." For that reason, he says, it is not practicable to ascertain in every instance whether a child who was brought up and educated by a person other than one of its parents was merely a foster child and protege of that person or whether the child was adopted by that person. He goes on to state that a child who was so brought up will not be recognized as adopted "unless that person had publicly declared that he or she adopted that child and resolved that the said child should be an heir to his or her estate."

Even this statement is not free from ambiguity. Undoubtedly, to begin with, there should be in existence a child that is being brought up by a person other than its parent. Next there must be an intention to make that child his heir and a public declaration that the person had adopted the child and resolved that the child should be his heir. There being no prescribed forms and ceremonies, before whom is the public declaration to be made ? No functionary is prescribed and there will always be a dispute as to whether a particular statement is a declaration and whether it is public. Is a statement made in the course of conversation a declaration ? What is the amount of publicity that a statement should receive ? As no forms and ceremonies are required there is always a difficulty in ascertaining from any one single act of his the intention of the adoptive parent. A person who has brought up a foster child and at one moment intended that the child should be his heir is not tied down to that intention. He is free to change has mind. He can say : "I once meant to make this foster child my heir, but I do not now propose to do so. I have changed my mind." It would appear therefore that a statement however formal and public that the adoptive parent meant to adopt the foster child as heir is not by itself sufficient, because its maker can change his mind, and, if he does so, not all the public statements will have any effect. We must therefore read Sawers' statement as conveying no other idea than that conveyed by Armour. The public declaration Sawers refers to is not a formal statement on a public occasion, but an unqualified disclosure of the parent's intention to adopt the foster child as his heir. The disclosure must be evident to those who matter in his circle. The disclosure might be by word or overt act and the intention must be one that persists from the date of adoption throughout the life of the adoptive parent, especially at the time of his death. The question of succession is one that arises after the death of the adoptive parent, and as he is not alive his mind has to be ascertained from his words, written or oral, and overt acts. The law requires that he should have made known his intention in unmistakable terms to those whose evidence as to his intention can be relied on and acted upon.

I now come to the last named of the compilations I have cited above. As I said before we have the advantage of having in the *Niti Nighanduva* the law stated in the very language of those who were custodians of it. In this work the Sinhalese for what Sawers and Armour translate as "publicly declared" is "එළිවෙ දක්වා". The literal rendering of these words in English is "made known to the world" or "made known to all" or "indicated to the public" or "letting others know". The law as stated in this work does not bring in the idea of a "public declaration" and in my opinion rightly. All that is needed in a Kandyan adoption is that the adoptive parent should manifest his intention to make the foster child his heir. This manifestation can be done in a variety of ways and whether he has so manifested his intention is a question of fact which has to be ascertained by examining all the circumstances relating to the adoption. What the adoptive parent said in regard to his foster child and his attitude and conduct towards him would have an important bearing on the question at issue, namely, whether he intended to make him his heir.

In my opinion the law as stated in the Sinhalese version of the *Niti Nighanduva* is a correct statement of the law and the statements of Sawers and Armour (which are not expressed in the very language in which the chiefs and others versed in Kandyan customary law conveyed it to them) that the adoption must be pubicly declared and acknowledged must be understood in the sense of "එළිවෙ දක්වා". As the work was not translated till 1880 the earlier judgments of this Court make no reference to it. It is a matter for regret that this only legal publication in Sinhalese is and has been out of print for quite a long time.

Learned counsel submitted that the *Niti Nighanduva* should not be regarded as authoritative and he called in aid the following observations of Burnside C.J. in *Siriya v. Kalua*[1] :—

> "I cannot regard the dicta in Marshall and Armour, and even the Niti Nighanduva, whatever may be its pretensions as a legal authority, as sufficient to disturb a solemn decision of the Court."

These observations cannot be regarded as a pronouncement that the customary law of the Kandyans on the question of adoption is not correctly recorded in the *Niti Nighanduva*. Burnside C.J. has dealt with Marshall and Armour in the same breath. It has never been suggested that this observation has affected the value of Armour's Kandyan Law.

The view I have expressed above finds support in Chapter III, section 12, of Armour. There he gives the case of a *deega* married woman living in her husband's father's house who, after her husband's death, is detained in his house by her father-in-law, who arranges a second marriage for her and allows her to remain in his house and render assistance to him till his death. Armour states: "These facts will warrant the conclusion that the deceased has decidedly adopted his daughter-in-law, and she will therefore be entitled to inherit her father-in-law's estate if he died

[1] *(1889) 9 S C. C. 45.*

intestate and left no issue." This statement shows that an oral public declaration is not essential to a Kandyan adoption, and that an adoption as heir may be inferred from circumstances.

I shall now proceed to consider the previous decisions of this Court on the subject of adoption as heir in Kandyan law. They are conflicting and do not indicate that there has been a consistent attitude towards the essentials of the adoption of an heir under Kandyan law. Some of the earlier cases take what I hold to be the true view, while others have taken too literal a view of the statements in Sawers, Armour or Solomons [1].

In one of the earliest reported decisions [2] the declaration of adoption in a deed was accepted as sufficient proof of adoption as heir. This view that an oral public declaration was not essential was maintained in the case reported in *Grenier's Reports* (1873), Part III, pages 117–119, wherein this Court approved the judgment of Cayley (afterwards Sir Richard Cayley), District Judge of Kandy, who later became a Judge of this Court, in which he stated as follows :—

> "There being no special formalities to constitute a valid adoption prescribed by the law, some kind of public declaration only being required, and as it appears that the Basnaike Nillemey himself always considered the 1st defendant to have been adopted by him, and stated such to be the case at an important family discussion, and that the relatives always recognised the 1st defendant as his adopted daughter : I think that it may be presumed that the adoption was sufficiently declared and made public to satisfy the requirements of the Kandyan Law, with which these people must be supposed to have been acquainted."

It would appear from District Judge Cayley's judgment that a declaration may be presumed from facts and circumstances.

In a later case reported in *Ramanathan's Reports* (1877) pages 251–255, Lawrie (afterwards Sir Archibald Lawrie) who at the time was District Judge of Kandy and later became a Judge of this Court, took the same view as Cayley, viz., that adoption may be inferred from facts and circumstances. In his judgment he stated :

> "Then as to publicity of the declaration, can it be maintained that a public declaration is necessary, after the decision of the Supreme Court in the cases 53309 and 55778. In the one case the declaration was only a conversation between the adopter and another Chief who had come to solicit the child as wife for his son. In the other case, the declaration was made when giving instructions to draw up a deed of gift. I think these cases warrant the conclusion that a public declaration is not necessary. But is it the Kandyan Law that there must be even a private declaration by the adopter ? I shall assume

[1] *Manual of Kandyan Law.* [2] *Beven and Siebel's Reports 61 (1860).*

for a moment that it is, and I find in this case the uncontradicted evidence of the second plaintiff, that the deceased called him son and that he told him to take care of the lands, and that there is no one else who will get them. I am entitled to hold it proved, because, as I said, there is no contradiction of this, that the conduct of the deceased to the plaintiffs was a continual declaration by acts, though not by words, that they were his adopted sons and heirs. It is consistent with Kandyan Law to infer adoption from facts and circumstances, apart from declarations by the adopter. The authority for that is the 12th section of *Armour* (Perera's Edn., p. 39) where it is said that certain given facts will warrant a conclusion that the deceased had decidedly adopted his daughter-in-law."

The view that adoption as heir may be presumed or inferred from facts and circumstances seemed established till 1883 when it was disturbed by the case of *Karunaratne v. Andreweve* [1]. In that case, Clarence J. stated that unless a statement of the fact of adoption as heir was made in public or on a notable occasion the requirement of the law was not satisfied. He refused to regard a statement made by the deceased to a friend of his, a mohandiram, as sufficient in law. It is difficult to reconcile the observations of Dias J., the other Judge who heard the appeal, with the decision in the case. He said :

"According to Kandyan Law, as I understand it, the intention to adopt must be clearly evidenced by declarations or other overt acts made in as public a manner as possible. *Henry Martyn* seems to have been a man of intelligence, above the average Kandyan, and if he really intended to follow the old fashioned law of adoption he would have done it by some writing about which there could be no dispute."

The above observations indicate that oral public declarations of the fact of adoption are not essential and that overt acts other than oral declarations or a writing declaring the fact of adoption will afford sufficient proof of adoption. The observations of Dias J. failed to influence the decision of *Tikiri Kumarihamy v. Punchi Banda* [2], where despite clear and definite evidence of adoption of a child as heir the Court rejected the claim of adoption on the technical ground that the deceased had said that he would "give" his property to the adopted child and that he did not say that the child would "inherit" his property. The appellant was the nephew of the deceased who was childless and who adopted him when quite a boy. When the appellant had grown to manhood the deceased negotiated a marriage for him, and, when discussing the marriage proposal with the bride's parents, the deceased stated to them that he had adopted the appellant as his son, and intended "giving" him his property. The widow of the adoptive parent did not at first contest the appellant's right to inherit; but subsequently she did so though she admitted that the deceased's intention when he adopted the appellant was that the appellant should "inherit" the property of the deceased upon his death. Upon his death-bed the deceased sent for a notary and

[1] *(1883) Wendt's Reports 285.* [2] *(1901) 2 Browne 299.*

instructed him to draw up a deed of gift in favour of the appellant of all his property. On these facts this Court held against the appellant. Bonser C.J. upheld the District Judge's view that the conversations between the deceased and the appellant's bride's parents were insufficient proof of adoption for the purpose of inheritance. Referring to the conversations the District Judge stated :

> " Both the witnesses agree that the intestate did not say that the appellant was to *inherit* his property, but that he would *give* him his property, which is quite another matter . . . . The witnesses are supported in what they say by the appellant, who stated that the intestate sent for a notary a few days before he died, and instructed him to prepare a deed in the appellant's favour, which would have been unnecessary if he had adopted him to inherit his property. "

In this case both Bonser C.J. and Moncrieff J. quoted with approval the judgment of District Judge Cayley. It is difficult to reconcile their adherence to the principles enunciated by him with the decision in this case. Their observations are also inconsistent with the conclusion reached by them. Moncrieff J. took the view that even accepting the evidence on behalf of the appellant as true the adoption lacked " the essential requisites of publicity and of clear expression of the fact that the adoption was made with a view to inheritance ".

His observations which I quote below are somewhat puzzling and leave me in doubt as to what his view of the Kandyan Law of adoption was :—

> " I think that the *dictum* of Dias J., to the effect that the intestate he spoke of, if he had meant to adopt, would have made his intention clear by putting it in writing, was not so extravagant as is pretended. The intestate in this case was a man of position. He must have known the absolute necessity of publicity, and publicity of the fact that the adoption was made with a view to inheritance. It is to my mind curious that during a period of forty years he should have abstained from either putting his intention in writing, or expressing it on occasions which could be described as public. "

On account of its infirmities *Tikiri Kumarihamy's* case has not been treated as a decision that should be followed.

In the subsequent case of *Loku Banda v. Dehigama Kumarihami*[1], Middleton J. departed from the highly technical view taken in the cases of *Karunaratne* (*supra*) and *Tikiri Kumarihamy* (*supra*), and reverted to what I shall call the true view that, what is important is not the form in which the intention of the deceased was conveyed, but a clear indication of his intention to adopt as heir. In his judgment In Review he stated :—

> " In my opinion there should be no doubt whatever as to the happening of an event the consequence of which would be so important to a family as adoption for inheritance. There should be clear and

[1] *(1904) 10 N. L. R. 100.*

unmistakable evidence of a deceased's intention to put a person in place of an heir who without such a nomination would have no right whatever in the property of the deceased."

In the very next decision what I have herein termed the true view suffered a reverse. Wood Renton J. in *Tikiri Banda v. Loku Banda* [1] reverted to the old technical view where he refused to recognise an adoption because the deceased had not used the word "inherit". Despite strong and clear evidence of the adoptive parents' intention to adopt the child as heir the claim of the adopted child was rejected. It would be helpful if I were to state the facts. The widow of the deceased, Medduma Banda, whose adopted child the plaintiff claimed to be, stated in evidence that as they had no children they wished to adopt a child who would look after them in their illness and who would inherit their property. They went to her elder sister, and asked her to let them adopt her child, the plaintiff, who was then about 4 years of age. Medduma Banda told his sister and his brother-in-law: "You must give us this son (meaning the plaintiff) because we have no one to render us help during our illness, and no one to give our lands to". The plaintiff's parents agreed, and then Medduma Banda took the plaintiff to his house. When the plaintiff grew up, Medduma Banda got him a wife. The plaintiff's father-in-law (Loku Banda Basnayake Nilame) said that Medduma Banda proposed that the plaintiff, his adopted son, should marry his (the Basnayake Nilame's) daughter. He asked them: "How did the adopted child become possessed of landed property", whereupon Medduma Banda replied: "We have adopted the child intending to give all our property to him". The Basnayake Nilame then consented to the marriage. Some days afterwards he went to Medduma Banda's house and spoke to him and his wife and said: "I have come to see about the child's matter." They both replied: "We are adopting the child to give all our property. Do not be afraid." On these facts this Court held that there was no proof of adoption. In his judgment Wood Renton J. stated:—

> "The intention to adopt him, as heir, if expressed, was not communicated to anybody. The word 'inherit' was never used in the negotiations with the bride's parents. These negotiations merely amounted to an assurance of the intention of the appellant's adoptive parents to provide for him."

The statement that the intention to adopt as heir was not communicated to anybody cannot be reconciled with the evidence. It was communicated, as in the case of D. C. Kandy Case No. 53309 [2] on the occasion of a marriage proposal. The fact of adoption is not dependent so much on the use of words as "inherit", "tanagatta", "ayithiwende" as on the clear manifestation of the intention of the adoptive parent to make the adopted child his heir.

[1] *(1905) 2 Balasingham's Reports 144.*

[2] *(1872) 3 Grenier 117.*

In *Ukku v. Sinna* [1] statements made to two Korales and a Vel Vidane were accepted as sufficient proof of adoption as heir. It does not lay down any important rule of law, but the following observations of Ennis J. seem to indicate that he had difficulty in accepting the decision in *Tikiri Kumarihamy's* case (*supra*).

> " The previous decisions on this subject indicate that an adoption for the purpose of inheritance must be made publicly, formally and openly. The exact scope of these terms is not so easy to understand. In one case (2 Browne 299) where the evidence consisted of conversations as in this case, the decision was based on the use of the word " give " instead of " inherit " used in conversation by the deceased when speaking of the ultimate disposal of the property, rather than the publicity, formality and openness of the conversations. "

In the case of *D. Davidu Peries v. Benedict Fernando* [2] Wood Renton C. J. and De Sampayo J. righted the situation created by a rigid adherence to technicalities in *Tikiri Kumarihamy's* case (*supra*) and *Tikiri Banda's* case (*supra*). Wood Renton C.J. observed :—

> " It is not to be expected that witnesses of this class should describe the ceremony of adoption for purposes of inheritance with the detail or the accuracy that we should expect in a treatise on Kandyan Law. But their evidence clearly establishes two vital points, viz., the fact of adoption and the intention of the adopting parent that the adopted child should be his heir.

De Sampayo J. said :—

> " It appears that at the same time he said that he had intended to give a deed to her but he had failed to do so, and this fact is strongly pressed as negativing the idea of an adoption according to Kandyan Law. Nothing is said as to the kind of deed which Punchirala had in his mind. It may after all be one containing the very declaration he made before the persons whom he called together for the purpose. But even if it was to be a deed of gift, I do not see that such a gift, would have detracted from the legal status of Bandi Etena . . . . an adopted child under the Kandyan Law would not be affected by the fact of the adoptive parent having intended to gift to him what he would otherwise have got as heir. "

Wood Renton C.J. disposed of *Tikiri Kumarihamy's* case (*supra*), which was cited in support of the argument that the deceased's intention to execute a deed in favour of the adopted child negatived the theory of adoption, with the observation that it does not enunciate a general principle, and that it was a mere ruling on the particular facts of that case. De Sampayo J. also refused to follow that case. He said that the fact of adoption was always a matter of evidence, and that each case must depend on its own circumstances.

[1] *(1913) 1 Balasingham's Notes of Cases 75.* [2] *(1915) 1 C. W. R. 1.*

The view that an oral public declaration or a public statement on a formal occasion was not an essential of a Kandyan adoption as heir was gaining ground despite the setbacks it had in *Tikiri Kumarihamy's* case (*supra*) and *Tikiri Banda's* case (*supra*), and in the case of *Dunuwille v. Kumarihamy* [1] this Court went to the extent of holding that a statement in a will that a legatee was the testator's adopted son was sufficient proof of adoption. Ennis J. expressed his view thus :—

> " The 1st plaintiff, in giving evidence, said that the testator had left property to Dullewe Loku Banda ' as adopted heir ' and this clearly appears to have been the testator's intention. The will is not capable of any other construction and the adoptive parent could hardly have taken a more effective way of showing that he had adopted Dullewe Loku Banda as his heir, than by executing a will describing him as an adopted son and leaving him all the residue of the estate. Whether or not a person has been adopted as heir is a question of fact only. "

He went on to say :—

> " A will, however, is a definite declaration of the intention of the testator for the devolution of his property on his death and the appointment of an adopted son as residuary legatee to the exclusion of all other heirs, shows, in my opinion, that the adopted son was adopted for the purpose of inheriting the adoptive parent's property. "

A survey of the cases leaves one with the impression that *Tikiri Banda v. Loku Banda* (*supra*) and *Tikiri Kumarihamy v. Punhi Banda* (*supra*) do not contain a true view of the law and have been regarded as decisions that should not be followed, and I think rightly. In *Tikiri Kumarihamy v. Niyarapola et al.* [2] Maartensz J. in pointing out that *Tikiri Banda's* case (*supra*) and *Tikiri Kumarihamy's* case (*supra*) had adopted too technical a view of the law observed as follows :—

> " With all due deference, I think the learned Judges in the last two cases have attached too much importance to the actual words used and not considered the circumstances in which they were used. A child may be brought up in a house as an act of charity or adopted for the purpose of inheriting the property of the adoptive parent. If an adoptive parent on an occasion, as a proposal of marriage, says : ' I have adopted the child to give him my property ', I cannot see what other inference there can be but that the adoption of the child was for the purpose of the child inheriting the property of the adoptive parent."

He held that the intestate's statement to the schoolmaster that she was bringing up the children and that she intended to give her property to the children was a manifestation of his intention to adopt the children with a view to making them her heirs. He also expressed the view that what Sawers meant when he stated that the adoption must be publicly

[1] *(1917) 4 C. W. R. 99.* [2] *(1937) 41 N. L. R. 476.*

declared was that there must be evidence of persons to whom the fact of adoption was expressed. I am in entire agreement with the opinion that the Kandyan Law does not require that the fact of adoption should be "formally declared". In his judgment in the same case Hearne J. rightly observed :

> "I am unable to find any authority for the view that declarations made in the course of conversation do not amount to such declarations as a Court of Law would act upon."

He summed up his view of the various dicta in the cases referred to him thus :—

> "If no particular formalities are necessary the declaration need not be according to a particular formula as long as it is clearly understood that the adoption was for purposes of inheritance ; if no ceremonies are prescribed the declaration need not be made on a "ceremonious occasion". It is agreed that the declaration need not be made when members of the public are assembled together for the purpose of hearing the declaration or that the declaration need be made in a public place."

Although I agree with Hearne J. in the main, I find myself unable to agree with his view that the fact of adoption must be communicated by spoken words to members of the public as distinct from members of the adoptive parent's household or relatives or even persons interested in the question of the adoption. I have already expressed my opinion in the earlier part of this judgment that all that is required is a clear and open manifestation of the fact of adoption of a child as heir whether the fact is made to appear by either word or conduct or both.

The view taken by Maartensz and Hearne JJ. was approved by a Bench of three Judges in the case of *Ukku Banda Ambahera et al. v. Somawathie Kumarihamy* [1]. The cases of *Kobbekaduwa v. Seneviratne* [2] and *Herat v. Amunugama* [3] to which counsel referred us proceeded on the assumption that the law was settled by the case of *Ukku Banda Ambahera v. Somawathie Kumarihamy* and therefore need no discussion.

I have referred to all the reported cases that matter, on the subject of adoption, and to my mind it is clear that the true view of the Kandyan Law of adoption is that set out in the *Niti Nighanduva*. No oral declaration whether public or not or on a formal occasion or otherwise is necessary. All that is needed is reliable, clear and unmistakable evidence in whatever form of the deceased's intention to adopt the adopted child as his heir.

For the above reasons the appeal is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

[1] *(1913) 44 N. L. R. 457.* [2] *(1951) 53 N. L. R. 354*
[3] *(1955) 56 N. L. R. 529.*