1920.

Present: Bertram C.J. and De Sampayo J.

In re THE ESTATE OF DINGIRALA.

91—D. C. Kandy (Testamentary A).

Document executed by person when very ill—Document in the form of a deed—Intention to dispose of property by last will.

Where a document executed by a person was somewhat in the nature of a deed, but where it was clear that he intended that it should take effect as a testamentary disposition, the Court gave effect to the document as a last will.

THE facts are set out in the judgment.

This was an appeal from a refusal of the District Judge of Kandy to admit to probate the document which was put forward as a will, on the ground that it was not a document intended to take effect after the grantor's death, but an immediate gift.

The document (translation) was as follows: "Know all men by these presents that I, ... Dingirala, of . . . . , being now afflicted with the disease called *Ratta-attisara* (dysentery), and being convinced that by this disease my life will become extinct, and during the time I have my sound mind and memory, I am desirous of making over my *paraveni* lands to my son, who is with me, rendering me assistance, the following property [here follows the names and description of the property] . . . . ; these lands. . . . are hereby made over unto my legitimate son . . . . to be dealt with at his pleasure, in the presence of the undersigned witnesses.

(*Signed*) DINGIRALA.

"[Here follows signatures of 14 witnesses.]

"This was drawn by Appuhamy Korala of W . . . .

"(*Signed*) H. E. A. WELAPAHALA.

"26-5-19."

L. H. de Alwis (with him *Weerasinghe*), for appellant.—Although the document is partially in the form of a deed, it is clearly testamentary in character. It is the intention of the testator that must be looked to, not the form of the document. Allowance must be made for the crude draftsmanship of a layman. The testator did not expect to recover from his illness, and executed the document in contemplation of death, and the document must be regarded as intended to take effect upon his death.

Again, the document cannot take effect as a deed, for it is unstamped, nor executed with the formalities required by law for the transfer of immovable property. It is a maxim of law that if

a paper would be ineffectual in one way, endeavours should be made to give it effect in another way.

It has been held that a deed-poll and even an agreement or other instrument between parties has a testamentary operation. Counsel *cited Thorold v. Thorold;* [1] *In bonis Morgan;* [2] *Cock v. Cooke;* [3] *Green v. Froude;* [4] *In bonis Colyer;* [5] *Robertson v. Smith et al.;* [6] *In bonis Slinn;* [7] *In bonis Baxter.* [8]

January 22, 1920. BERTRAM C.J.—

This is a point of some interest. The action is a testamentary action, and the document which is put forward as a will commences "Know all men by these presents," and is otherwise, at first sight, in the form of an ordinary deed. It was drawn by the Korala at a time when the person executing it was very ill, and it was witnessed by no less than fourteen witnesses. The learned District Judge, from this point of view of the document, has made this note: "This document is not a document intended to take effect after the grantor's death, but an immediate gift. I decline to admit it to probate."

Mr. De Alwis and Mr. Weerasinghe, for the appellant, have drawn our attention to a number of cases in which it has been clearly laid down that if the intention was, in fact, testamentary, the Court will not be deterred by the form of the document from giving effect to it as a will. These cases are of early date. The earliest cited to us was the case of *Green v. Froude.*[4] They have also drawn our attention to the case of *Thorold v. Thorold,*[1] and also to more modern cases, amongst others, of *In the Goods of Slinn* [9] and *In the Goods of Colyer.*[10]

In all these cases the document admitted to probate was in form of a deed, commencing "Know all men by these presents," or some similar expression, and ending "signed, sealed, and delivered" in the usual form.

In *Thorold v. Thorold* [1] the Court said: "In deciding a point of this nature, a Court always looks to the substance, and not to the form of the instrument; to the intention of the writer, and not to the denomination he affixes to it."

It appears that testamentary intention may be collected both from expressions in the documents itself, and also from extrinsic circumstances. That is settled by the case of *In the Goods of Slinn.* [9] Now, in this document there are expressions which clearly indicate that it was executed in contemplation of death, and that the intention was testamentary. The writer says: "I think by this

[1] *(1809) 1 Phil. 1.*
[2] *(1866) 1 P. & D. 214.*
[3] *(1866) 1 P. & D. 241.*
[4] *(1674) 1 Mod. 117; 3 Keb. 310.*
[5] *(1889) 14 P. D. 48.*
[6] *(1870) 2 P. & D. 43.*
[7] *(1890) 15 P. D. 156.*
[8] *(1903) P. 12.*
[9] *(1890) 15 Pro. Div. 156.*
[10] *(1889) 14 Pro. Div. 48.*

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disease my life will become extinct, and during the time I have my sound mind and memory, I am desirous of making over my *paraveni* lands to my son." I think, therefore, that there is ample evidence of testamentary intention.

But, although at first sight any person reading this document would naturally construe it as a deed, still there is, in fact, nothing in its terms to prevent it being construed as a will. The maker of the document recited his conviction of his approaching end, his sound mind and memory, and his desire to make over his property to his son. He enumerates the property which he so makes over. There is no reason why those expressions should not be construed as expressions in a will, and there is, in fact, no need of any special proof of testamentary intention. The document in itself is capable of being construed as a will.

For all these reasons, I think, that the judgment should be set aside, and the document admitted as a testamentary document.

DE SAMPAYO J.—I agree.

Set aside.