Present : Middleton J.

1911.

KOMALIE *v.* KIRI.

370—C. R. Matale, 9,491.

Kandyan law—Revoation of deed of gift—Special clause of disinherison—What is paraveni *property?—Acquired property.*

A Kandyan woman revoked a donation of a land to her children, as they had failed and neglected to render assistance to her. Subsequently she donated it to her daughter-in-law; this deed contained a clause that none of her heirs, executors, administrators, or assigns should make any dispute with regard to the gift.

Held, that this clause had (in the circumstances) the effect of a special clause of disinherison.

A clause of disinherison is necessary only when all the *paraveni* lands are gifted.

THIS was an appeal from the following judgment of the Commissioner of Requests, Matale (W. Dunuwille, Esq.):—

The field in dispute was the acquired property of Tikirie. She gifted it among other lands under certain condition by deed No. 19,997 dated December 30, 1905, to her niece (daughter-in-law) Komalie, the plaintiff in this action. The donor died without revoking this gift, and plaintiff claims title under this deed.

The plaintiff complains that the defendant, who is the daughter of Tikirie, is in the wrongful possession of this field. The defendant claims title to the field in right of her mother and by right of prescriptive possession. Tikirie, the original owner, died two years ago, and in my opinion neither plaintiff nor defendant can succeed by right of prescriptive possession. Tikirie on January 25, 1884, appears to have executed a conditional deed of gift, No. 6,828, for this field and other lands in favour of defendant and her brother Kira (plaintiff's husband). She on April 11, revoked this gift by a deed No. 17,046 P, and executed on December 30, 1905, the deed of gift under which the plaintiff now claims. Tikirie's right to revoke the gift deed No. 6,828 is not disputed, nor do I think it can be; but it is contended that the gift in plaintiff's favour is bad in law, in that it does not contain a clause of disinherison as against Tikirie's daughter, the defendant. On this contention I hold that at the present day no clause of disinherison is needed in a Kandyan deed of gift, even if the gift was to a stranger, and even if such a clause is needed to disinherit the defendant, I hold that the execution by Tikirie of the deed of revocation No. 17,046 is proof of such disinherison. Then, again, as the plaintiff is the daughter-in-law of Tikirie, the gift in her favour did not require for validity a special clause.

I give judgment for plaintiff for the field with costs.

The defendant appealed.

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Grenier, for the defendant, appellant.—The deed of gift in favour of the plaintiff is invalid, as there is no special clause of disinherison. *Indejoti Unnanse v. Keerala;*[1] *Bandara Menika v. Palingo Menika;*[2] *Austin's Reports 192 and 203; Perera's Armour, p. 98, section 8.*

In *Appuhamy v. Kiri Menika*[3] it was decided that a clause of disinherison was not necessary when the deed is from husband to wife. Impliedly, therefore, if the deed was to any other than the wife, a clause of disinherison would be necessary. See also *Punchi Appu v. Baba Appu.*[4] *Sundara v. Peris*[5] assumes that a clause of disinherison is necessary; but this case draws a distinction between gifts *de presenti* and those which are to take effect after the death of the donor. It regards the latter class of deeds as wills, and therefore not requiring the clause. But this distinction is not one that is now recognized. At whatever time the deed is to take effect it is regarded as a gift. *Carolis v. Don Davith.*[6]

J. W. de Silva, for the plaintiff, respondent.—Under the Kandyan law an owner may dispose of his property as he pleases, by sale or gift or bequest (*Perera's Armour 93*). Ordinance No. 21 of 1844 gives every one full power of testamentary disposition. This deed is in the nature of a testamentary disposition.

The necessity for a clause of disinherison applies only to *paraveni* property. This is acquired property. See *Ukkurala v. Tillekeratna,*[7] *Mudalihami v. Bandirala,*[8] *Kiri Menika v. Muttu Menika.*[9]

The principle that in a case of donation to a wife a clause of disinherison is not necessary may be extended to gifts in favour of daughters-in-law.

Grenier, in reply.—Property purchased by a father and gifted to a son is *paraveni* property. See *3 N. L. R. 379.* The deed is not a testamentary disposition. See *Utuma Levai v. Mayatin Vava et al.*[10]

Cur. adv. vult.

November 2, 1911. MIDDLETON J.—

This was an action for declaration of title to a field called Ambedandekumbura, gifted to the plaintiff by her mother-in-law Tikirie by deed dated November 30, 1905, No. 1,997, of which it was alleged defendant, who is the daughter of Tikirie, had taken forcible possession. Tikirie died without revoking this deed. The land was first donated by deed of gift No. 6,828 dated January 25, 1884, by Tikirie to her daughter, the defendant, and her brother, the plaintiff's husband, but this deed was revoked by the deed of gift No. 17,046 of April 11, 1901, and the property, with other property, was

[1] *(1861) Ram. 109.*
[2] *(1861) Ram. 108.*
[3] *(1894) 3 C. L. R. 81.*
[4] *(1866) Ram. 211.*
[5] *(1878) 3 C. L. R. 81, footnote.*
[6] *(1907) 11 N. L. R. 17.*
[7] *(1862) 5 S. C. C. 46.*
[8] *(1898) 3 N. L. R. 209.*
[9] *(1899) 3 N. L. R. 376.*
[10] *(1907) 2 A. C. R. 133.*

subsequently donated by deed No. 1,997 to the plaintiff. The defendant also claimed by adverse possession, but the Commissioner of Requests held against both parties on this issue.

The Commissioner—a Kandyan Dissave—held also on the second issue, "Whether the plaintiff's deed was valid in law," that it was not necessary at the present day that a Kandyan deed of gift should contain a special clause of disherison even if the gift was to a stranger, but in any case the execution of deed No. 17,046 was sufficient proof of disherison; but that as the gift was to a daughter-in-law it did not require for validity any such special clause, and gave judgment for the plaintiff.

The defendant appealed, and for him it was contended, on the authority of *Indejoti Unnanse v. Keerala* (D. C. Kandy, 27,150),[1] that deed No. 1,997 ought to have contained a special clause of disherison, and set out the reasons for it. I was also referred to *Appuhamy v. Kiri Menika*[2] and to *Sundara v. Peris*,[3] reported as a note to that case, and to page 98, section 8 of *Perera's Armour.*

In my opinion the spirit and intention of that section which required a talipot or other deed has been carried out here. By deed No. 17,046, for the reasons given in it of neglect and failure of the defendant to render asistance as apparently agreed, Tikirie revoked her deed of gift No. 6,828 to her two children, indicating in the same deed a necessity for sale of the property. By deed No. 1,997 the property was then donated to the plaintiff for the purpose of her rendering that assistance which the defendant apparently had neglected to give. The deed No. 1,997 also contained a clause that none of Tikirie's heirs, executors, administrators, or assigns should make any dispute with regard to the gift. This would clearly include the defendant, and to my mind would have the effect of a special clause of disherison, the reasons being indicated, though, perhaps, the formula—whatever it may be—which is alluded to in section 8 (*ubi supra*) does not appear. No one could contend that a talipot deed, and not a paper deed, would be required at the present day. I think also that the judgments of Lawrie J. in *Appuhamy v. Kiri Menika*[2] and of Phear C.J. in *Sundara v. Peris* (*ubi supra*) recognize the necessity of applying the Kandyan law on this question only in such cases as are most manifestly within the decision in No. 27,150 Kandy, which, as Phear C.J. said, involved the question whether the donor intended the gift and enjoyment to continue after his death to the disinheriting of his heirs. The Kandyan law as to disherison would not apply to the case of a testamentary disposition. (Section 1 of Ordinance No. 21 of 1844.)

In the present case, also as in the case of *Sundara v. Peris*,[3] No. 1,997 constitutes a deed of gift, which is to take effect practically only after the death of Tikirie, although, perhaps, the usufruct of the

[1] *(1861) Ram. 109.* [2] *(1894) 3 C. L. R. 81.*

[3] *(1878) 3 C. L. R. 81, footnote.*

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land was to be vested in the donee for the purpose of rendering that assistance to the donor which the deed contemplated. As Wendt J. said in *Carolis v. Don Davith*,[1] " there are in it words of immediate conveyance "; the document is registered, stamped, and numbered as a deed, and bears on the face of it an acceptance by the donee, and calls itself a deed of gift. At the same time I think it only vested the usufruct with an implied reservation of the dominium until after the death of the donor. To this extent only it is testamentary, although it was not executed strictly on the face of it in accordance with the provisions of the first part of section 3 of Ordinance No. 7 of 1840. I doubt, therefore, if it can be called a testamentary disposition within the terms of Ordinance No. 21 of 1844.

It was argued also that deed No. 1,997 dealt with all the *paraveni* property of Tikirie, and was therefore repugnant to the Kandyan law, and the evidence of Aluwihare Ratemahatmaya was relied on to show that Tikirie had donated all her lands by it. This, to my mind, was not clear from that evidence, and the burden was on the defendant to prove it. As to this point also Lawrie J., an authority on Kandyan law, held in *Appuhamy v. Kiri Menika* (*ubi supra*) that a clause of disherison was necessary only when all the *paraveni* lands were gifted.

I think also that the deed No. 1,997 itself proves that Ambedandekumbura was not *paraveni* property in the sense used in the Kandyan law, which implies a descent by heritance. (*Perera's Armour, Gloss. 143*).

It might have become so if it had descended on Tikirie's heirs, but as between Tikirie and her heirs it had not yet become *paraveni*, but still remained as acquired property at the time of the deed No. 1,997, which intercepted its descent by inheritance.

In my opinion, therefore, the ruling of the Commissoner is in effect right, and I dismiss the appeal with costs.

Appeal dismissed.

[1] *(1907) 11 N. L. R. 19.*