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Present: Sir Charles Peter Layard, Kt., Chief Justice, Mr. Justice Wendt, and Mr. Justice Wood Renton.

PIERIS *v.* PIERIS *et al*

D. C., Colombo (Testamentary), 1,850 C.

Last will — " Due attestation " — Presence — " Explanation " — " Interpretation " formalities — Testamentary capacity — Suspicious circumstances— Undue influence—Onus—Difference between wills and gifts—Evidence Act (Ordinance 14 *of* 1895), *section* 3—*Ordinance No.* 7 *of* 1840, *section* 3—*Ordinance No.* 21 *of* 1900.

A testatrix who could not read English employed a Notary who was only licensed to practise in English to prepare a will. The Notary prepared the will in English and interpreted it to the testatrix clause by clause from English into Sinhalese.

One of the attesting witnesses was not in the room where the will was interpreted and did not hear what was being said, but he was in an adjoining room from where he could both see what was going on and hear, if he had chosen to listen, what was being said.

Held, that the will was duly executed within the meaning of Ordinance No. 7 of 1840, section 3.

(1) 1 *Vict. c.* 26.

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WOOD RENTON J.—Section 3 of the Notaries' Ordinance, 1900, does not prescribe fresh formalities on which the validity of wills depends. The object of the Ordinance in section 3 is a disciplinary one. It prescribes rules for the conduct of Notaries and attaches a penalty to the breach of such rules. It does not say that, if a notary fails to comply with any of them in the preparation or execution of a will, the will itself will be invalid, provided that the requirements of Ordinance No. 7 of 1840, section 3, have been satisfied.

WOOD RENTON J.—The explanation of a will to a testator and the making of such explanation in the hearing of the attesting witnesses are not pre-requisites to its validity, however important they may be from the standpoint of evidence of approval of its contents. It is sufficient if the testator, at the moment of execution, believes the will to be, and if the will is, in accordance with instructions previously given.

Perera v. Perera (1901) *A.C.* 354 and *Parker v. Felgate*, (1883) 8 *P.D.* 171, followed.

WOOD RENTON J.—(1) Undue influence is not to be presumed but must be proved by the party alleging it. (*Boyse v. Rossborough*, 6 *H. L. C.* 2).

(2) If, in the progress of a testamentary case circumstances of suspicion arise, whether from the fact that the parties propounding a will benefit largely under its provisions and have been instrumental in securing its execution or otherwise, the suspicion must be removed by the executors. They must satisfy the court that the will is the act of a free, as well as a capable, testator.

Fulton v. Andrew (7 Eng. and Ir. App. 448) and *Tyrrell v. Painton* (1894 P. 151) followed.

(3) In order to be undue, the influence must amount to coercion or fraud.

(4) In the case of wills, unlike that of gifts, the existence of a fiduciary relationship does not create any presumption of undue influence. An attorney or a child may legitimately importune a client or a parent for a legacy so long as the importunity does not amount to coercion or fraud.

Parfitt v. Lawless (*L. R.* 2 *P. & D.* 462) followed.

Section 3 of the Evidence Ordinance (No. 14 of 1895) is confined to transactions *inter partes* and does not alter the English rules as to wills.

It has not been the practice in Ceylon for District Judges to charge assessors on the law applicable to any issue of fact before them.

HEARING in review of the judgment of the Supreme Court (1) preparatory to appeal to His Majesty in Council.

The facts and arguments are fully set out in the judgment of Wood Renton J.

Walter Pereira, K.C. (*Elliott* with him), for the appellants.

Dornhorst, K.C., and *Sampayo*, K.C. (*H. J. C. Pereira* with them), for respondents.

Cur. adv. vult.

(1) 8 *N. L. R.* 179.

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27th February, 1906. WOOD RENTON J.—

In our opinion the judgment under review, affirming that of the District Court of Colombo, is on all points sound and must be upheld. It is unnecessary to recapitulate the facts here. They have been fully dealt with, both by the Supreme Court on appeal and by the learned District Judge in his very clear and able decision. The case for the appellants, as it was presented before us, involves a consideration of three main questions. Was the will duly executed in point of form? Was the testatrix of sound mind at the date of its execution? Was the execution of the will brought about by the undue influence of Harry and Charles Pieris, who are, respectively, the son and son-in-law of the testatrix? By the concurrent judgments of the Supreme Court on appeal and the District Judge these three questions have been answered in favour of the validity of the will. On the questions of testamentary capacity and undue influence the assessors who sat with the judge in the Court of original jurisdiction unanimously took the same view. As to whether the will was duly executed they declined to express an opinion on the ground that it raised an issue of law. Two incidental points in regard to the weight to be attached to the findings of the assessors were made by the appellants' counsel: first, that, unlike a jury in the English Court of Probate, they received, before expressing their opinion, no direction from the Judge as to what the *criteria* of testamentary capacity and undue influence are; and secondly, that, as regards the issue of testamentary capacity, although the question propounded to them was whether at the date of the execution of the alleged will the testatrix was " of sound and disposing mind," they had only found as a fact that she was " of sound mind."

With reference to the first objection, it may be stated that it has admittedly never been the practice in this Colony for District Judges to charge assessors on the law applicable to any issue of fact before them, and that the expediency of taking this course was not suggested to the learned District Judge in the present case. The objection to the terms in which the assessors expressed their opinion on the question of testamentary capacity is not, in our opinion, one of substance. Two of the assessors at least answered the question as to the testatrix possessing a disposing mind directly in the affirmative; and in any event the words " disposing mind " are not sacramental terms. As a matter of pleading, the words " sound mind," or their equivalent, " sound mind, memory, and understanding," are the form in which the issue of testamentary capacity is usually raised, and the finding of the assessors that the testatrix at the critical moment was of " sound mind " is, alike in law and in fact, a finding in favour of her testamentary capacity.

We proceed now to consider in turn the three main issues, due execution, testamentary capacity, and undue influence. With regard to the question of due execution the material facts—found by the District Judge and accepted in the arguments in the Supreme Court, both on appeal and in review—were these. The will was written and attested in the English language. Mr. Alvis, the Notary who prepared it, is only licensed to practise in English. He understands, however, and can speak Sinhalese. The testatrix could not read English; accordingly Mr. Alvis interpreted the will to her clause by clause from English into Sinhalese. While he was doing so Mr. Sanmugam, one of the attesting witnesses, was not in the room. He was unconnected with the family, and it appears to have been thought desirable that the contents of the will should not be disclosed to him. Mr. Sanmugam was, however, in an adjoining room the door of which was open, and he could both see what was going on and—if he had chosen to listen—could have heard what was being said. Mr. Sanmugam did not, in fact, pay any attention to what Mr. Alvis was saying. When Mr. Alvis's explanation was completed, Mr. Sanmugam came back into the room where the testatrix was, and the will was signed by her in his presence and in that of the notary and the other attesting witness, Mr. R. F. de Saram, and attested by the notary and the two witnesses, Mr. de Saram and Mr. Sanmugam, in the presence of the testatrix and of each other. If Ordinance No. 7 of 1840 had stood alone it could not have been contended that this will was not duly executed under our local law. It was signed by the testatrix in the presence of a licensed notary public and two witnesses who were present at the same time and duly attested the execution (No. 7 of 1840, section 3). Their presence was an actual physical presence in the same room with the testatrix. Even if Mr. Sanmugam had then been in the adjoining room, under the conditions above stated, the execution would still, according to the English decisions under the Wills Act, 1837 (1) have been valid, provided that he saw, and was conscious of, the act that was being done (*Hudson v. Parker* (2), *Smith v. Smith* (3), *Brown Skirrow* (4). But at this part of the case no question of constructive presence arises. Mr. Walter Pereira, senior counsel for the appellants in the argument on review, contended, however, that we must read the provisions of Ordinance No. 7 of 1840, section 3, in the light of those of section 3 of the Notaries' Ordinance, 1900 (No. 21 of 1900). This section contains an enumeration of some 36 rules to be observed by notaries in the drawing and attestation of deeds and other

(1) 1 *Vict. c.* 26.
(2) (1844) 1 *Rob. E. R.*
(3) (1866) *L. R.* 1 *P.* and *D.* 143.
(4) (1902) *P.* 3.

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documents. It was on the 8th of these rules that Mr. Pereira relied. It provides that a notary " shall not attest any deed or instrument whatever in any case in which the person executing or acknowledging the same shall be or profess to be unable to read the same, or in which such persons shall require him to read over the same, unless and until he shall have read over and explained the same or cause the same to be explained in the presence and hearing of such person and of the attesting witnesses thereto." The conditions prescribed by this rule, said Mr. Pereira in effect, are to be taken as having been incorporated by implication in section 3 of Ordinance No. 7 of 1840. In two vital points they were not complied with in the present case Mr. Alvis did not " explain " the will to the testatrix; he interpreted it. Interpretation is not explanation. When the Legislature means to provide for interpretation it says so in terms (see Criminal Procedure Code, No. 15 of 1898, sections 299 (3), 300 (1). Moreover, Mr. Alvis, being only licensed to practice in English, was not authorized to interpret any document from English into Sinhalese, or for that matter into any other language, as a preliminary to its attestation. This was Mr. Pereira's first point, but he argued also that inasmuch as Mr. Sanmugam, at the time when Mr. Alvis was explaining the contents of the will to the testatrix, had been sent out of the room, in order that he might not hear, and did not in fact hear what was said, the will was in any case not " explained " in his " hearing " within the meaning of rule 8.

We will assume, without deciding the point, that that rule applies to wills. There are, however, in our opinion, insuperable objections to Mr. Pereira's argument in all its branches. We do not think that section 3 of the Notaries' Ordinance, 1900, can be taken as prescribing fresh formalities on which the validity of wills can depend. The object of the Ordinance in section 3 is a disciplinary one. It prescribes rules for the conduct of Notaries and attaches a penalty to the breach of such rules. It nowhere says that if a Notary fails to comply with any of them in the preparation or execution of a will, the will itself will be invalid, provided that the requirements of Ordinance No. 7 of 1840, section 3, have been satisfied. Mr. Pereira called our attention in this connection to the concluding words in section 3 of the Notaries' Ordinance, 1900, which enact that " no instrument shall be deemed to be invalid in consequence of the non-observance by the Notary of the foregoing rules and regulations or any one of them in any matter of form," but that this proviso, shall not " give any validity to any instrument which may be invalid by reason of the provisions of any other law not having been complied with."

On the question as to the bearing of this proviso on the particular alleged breaches of notarial duty relied upon by the appellants we shall have something to say immediately. For the present it may suffice to observe that it is only a negative proviso, that it seems to point to the intention of the Legislature being to attach no sanction to the rules embodied in the section except the prescribed penalty, and that the saving clause only actively preserves the operation of grounds of invalidity arising under some other law. Even if there had been no other difficulty in the way, it seems in a high degree improbable that the Legislature should have modified such an enactment as section 3 of Ordinance No. 7 of 1840 by implication. As Mr. Dornhorst very properly pointed out, when it was intended to enable deeds relating to lands to be executed before a District Judge or Commissioner of Requests, the required modification of Ordinance No. 7 of 1840 was made in express terms (see Ordinance No. 17 of 1852, section 6). But the improbability to which we refer becomes far greater in view of the number and the varying importance of the rules enacted by section 3 of the Notaries' Ordinance, 1900. According to Mr. Pereira's construction of the proviso to that section, it is of those notarial rules only which do not relate to " any matter of form " that we have to take account. Can it really be supposed that the Legislature intended to subject the validity of wills to such an uncertain test as that which this contention involves, viz., the view that different Courts may chance to take as to which of the 36 rules in question are formal and which are substantial? The case of *Punchi Banda v. Ekanaike* (1) to which Mr. Pereira referred, does not, in our opinion, support his armugment on this point. It only shows that the Court, after having interpreted section 2 of Ordinance No. 7 of 1840, looked to the old Notaries' Ordinance of 1852, section 21 (5) , for confirmation of the soundness of its interpretation. It is not an authority for the proposition that the provisions of the latter Ordinance are to be treated as having been incorporated by implication in the former. The cases of D. C., Negombo, No. 5,742 (2) and *Siriwardene v. Loku Banda* (3), so far as they go, appear to point in the opposite direction. But supposing that section 3 of Ordinance No. 7 of 1840 is to be read in the light of section 3 of the Notaries' Ordinance, 1900, there would still remain the questions whether the particular conditions above-mentioned have in fact been violated in the present case, and whether, if so, they are anything but matters of form.

As regard the former of these questions it appears to us that the answer must be in the negative. Explanation must include

(1) (1881) 4 *S. C. C.* 119. (2) *Grenier's Reports, D. C., pt.* 3, *p.* 39.
(3) (1892) 1 *S. C. R.* 218.

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interpretation when that is necessary to effectuate the purpose which the law has in view, viz., to make sure that the party signing the instrument understands its nature and contents. This construction of rule 8 cited *in extenso* above seems to be supported by the words in that rule " or cause the same to be explained," words which apparently contemplate the case of the Notary not himself understanding the language in which the explanation has to be conveyed. Mr. Pereira suggested that in using these words the Legislature might have had in view the case of a Notary who, after having " read over " an instrument to the person who was about to execute it, had to leave the task of explaining it, owing to some call of business elsewhere, to his clerk or other representative. It seems improbable that such a minute contingency should have been provided for by legislation. The express provision—to which Mr. Pereira also referred—in the Criminal Procedure Code for the interpretation of evidence to witnesses (section 299 (3)) and prisoners (section 300 (1)) who do not understand English does not, in our opinion, really strengthen his case on this point. Section 219 of the Code only provides for the indictment being " read over and explained " to an accused person on arraignment, and yet its contents have to be brought to his knowledge by interpretation. If then, as a matter of construction, explanation may legitimately include interpretation, was there anything to prevent Mr. Alvis from having recourse to it in the present case? In our opinion there was not. Rule 8 of section 3 of the Notaries' Ordinance, 1900, is an almost literal reproduction of section 21 (8) of the old Notaries' Ordinance, 1852 (No. 16 of 1852). It is a literal reproduction of section 26 (8) of the Notaries' Ordinance, 1877 (No. 2 of 1877). Yet it was admitted at the Bar that from 1852 downwards it had been the practice of Notaries, whose license extended to the English language alone, to act as Mr. Alvis did in the present case, and that in no single instance, in spite of the numerous litigations as to deeds and wills that have come before the Courts of the Colony, had the legality of that practice been challenged.

When we turn to the Notaries' Ordinances themselves the reason for this significant circumstance becomes apparent. The law defines what it means by a Notary being licensed to practice in a particular language. His warrant of appointment specifies and defines " the language or languages in which he is authorized to draw, authenticate or attest deeds or other instruments " (No. 2 of 1877, section 11); and he is now prohibited—Ordinance No. 21 of 1900, section 3 (7)—from attesting any instrument " in any language other than that in which he is authorized to practice," or " drawn " in any such language. These are disabling provisions, and they must be construed strictly. They do not prohibit a notary either from receiving instructions

in a language in which he is not authorized to practice, or from interpreting the instrument into any such language, provided that it is drawn, authenticated, and attested in the authorized language. We have no right to impose a fresh restriction upon the Notary by implication from rule 8. The fact that the Legislature has expressly dealt, in the preceding rule (rule 7), with the limitation arising from his being authorized to practise only in a particular language, militates strongly against any such implication *Expressio unius est exclusio alterius*. Mr. Pereira sought to derive some support for this branch of his argument from a *dictum* of Mr. Justice Dias in the case of *Peiris v. Fernando* (1). We do not think that that case can help the appellants. It merely decides that, under the law as it then stood, a Tamil will could be attested in English. Mr. Justice Dias adds that if the law were otherwise, a Tamil testator might (he does not say would) die intestate although an English-speaking Notary were present. But this dictum must be taken *secundum subjectam materiem*.

It is clear from the language of both judges that they were confining themselves strictly to the class of case before them; and we take it that all that Mr. Justice Dias meant to say was that a Tamil testator who had drawn up his will in his own language might be *in articulo mortis* and die intestate if he had to wait for its attestation by a Tamil Notary. No *dictum* of this kind can prevail against the unbroken practice to which we have already referred, supported, as it seems to us to be, by the clear text of the law.

With regard to the question as to whether the will was read in Mr. Sanmugam's "hearing," within the meaning of rule 8, we think that the English decisions, above cited, as to constructive presence should be applied by analogy, and that it is sufficient if the witness is—as Mr. Sanmugam undoubtedly was—within hearing and conscious of the nature of the act that was being done. But—and here we reach the last point in this part of the case—even if the requirements under consideration were not complied with, are they anything but "matters of form," whose non-observance under the proviso to section 3 of the Notaries' Ordinance, 1900, is not fatal?

It has been held by the Supreme Court (*Appuhami v. Mohotti* (2)) that in the interpretation of Ordinance No. 7 of 1840, closely following as it did in point of time, and does in point of structure, the provisions of the English Wills Act, 1837 (1 Vict. c. 26), the principles of English, and not of Roman-Dutch law, are to be applied. If we adopt this view, it is clear that the explanation of a will to a testator and the making of such an explanation in the hearing of the attesting witnesses

(1) (1891) *S. C. C.* 146. (2) (1876) *Ramanathan*, (1872-76,) *p.* 296.

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are not pre-requisites to its validity, however important they may be from the standpoint of evidence of approval of its contents. It is sufficient if the testator, at the moment of execution, believes the will to be, and if the will is, in accordance with the instructions previously given (*Perera v Perera* (1) an appeal from this colony; *Parker v. Felgate* (2)).

Mr. Walter Pereira admits that it is impossible to gather from the Notaries' Ordinance, 1900, that the requirements of rule 9 are substantial, and not merely formal. But he says that they acquire their substantial character from the words " duly attest " in section 3 of Ordinance No. 7 of 1840. Due attestation under that Ordinance means, he says, attestation in accordance with the law as to Notaries for the time being. For the reasons given above we do not think that the provisions of the Notaries' Ordinance are to be incorporated in section 3 of Ordinance No. 7 of 1840.

We hold that the will in dispute was " duly executed " under the law of Ceylon. The issues of testamentary capacity and undue influence may be disposed of briefly. There is no suggestion in this case of insane delusion or of unsoundness of mind in the ordinary sense of the term. It was alleged, however, by the opponents of the will, that the testatrix, who undoubtedly dies of diabetes on 4th March, 1903, must have been incapacitated by diabetic coma from making a valid testamentary disposition of her property on 1st March, 1903—the date on which her will was executed. This hypothesis is directly contradicted by the evidence of Mr. Alvis, the Notary who prepared and explained the will, and of the attesting witnesses—a class of evidence to which if, as in the present case, it is credible, courts of law have always assigned high importance, *Perera v. Perera* (3), of Dr. Rockwood, the medical man who attended the lady in her last illness, and of Mr. Ireland Jones, an Anglican clergyman who visited her on the afternoon of the day on which the will was executed. It is contradicted indirectly—but with scarcely less weight—by the facts that the will in dispute not only was drafted from instructions given by the testatrix on the 27th and 28th February, when the evidence of her capacity was still clearer and more cogent, but was strictly in harmony with her undoubted feelings and views in regard to the various members of her family—feelings and views evidenced by deeds of gift as far back as 1900, at a time when her competency stands quite unchallenged.

Moreover, the theory that, on the 1st March, the testatrix was already under the influence of diabetic coma in its final stages is discredited by the evidence of Mrs. de Soysa—a witness called by the appellants themselves—who proved that on 3rd of March—

(1) 1901) *A. C.* 354. (2) (1863), 8 *P. D.* 171. (3) (1901), *A. C.* 354.

the day preceding her death—the testatrix succeeded in bringing about a certain family reconciliation, and herself suggested that the event should be celebrated over a bottle of wine. We are invited by the appellants to set aside all this concurring testimony by one of the strangest and boldest arguments that was surely ever addressed in such a case to a court of law. The books, it is said, show that diabetic coma has recognized "prodromal symptoms," which have to be warded off by equally recognized remedies. These prodromal symptoms were present in the case of the testatrix at and about the critical period, and Dr. Rockwood's prescriptions show that he was treating them as such. Nausea, for instance, is a "prodromal symptom." Hydrocyanic acid is the remedy by which it is warded off. The testatrix was suffering from nausea on the 26th or 27th of February. Dr. Rockwood was prescribing hydrocyanic acid. Therefore he was face to face—and must have known that he was face to face—with a prodromal sympton of diabetic coma. So with abdominal pains and drowsiness. Dr. Rockwood denied that prodromal symptoms were present, or that his prescriptions were intended to ward them off. The patient's nausea, he said, was due to the simple fact that he had persuaded her to take a dish of chicken broth, to which she had a great aversion. Now, Dr. Rockwood is shown by the evidence to be a man of unblemished character and European reputation. He takes no interest of any kind under the will. His statements as to the competency of the testatrix are supported by every scrap of reliable evidence in the case.

But we are told Dr. Rockwood's word is not to be trusted. And why? Not because he has been contradicted by other medical witnesses. Dr. Thomaz agrees with him. Dr. Paul, the only expert called on the other side, has been dropped. We are to disbelieve Dr. Rockwood's word because, if we look into the books, we shall be forced to the conclusion that the testatrix must have been in a state of diabetic coma on the day when her will was executed. We decline under the circumstances of the present case to enter upon any such inquiry. The cross-examination to which Dr. Rockwood was subjected was—in view of the materials at the appellants' disposal—an abuse of the license of counsel. His evidence is entirely worthy of acceptance, and the capacity of the testatrix has been fully proved.

We come now to the issue of undue influence. The principles of law to be kept in view are these:—

(i.) Undue influence is not to be presumed; the party alleging it must prove the fact *Boyse v. Rossborough* (1).

(1) (1856) 6 *H. L. C.* 2.

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(ii.) But, if in the progress of a testamentary case circumstances of suspicion arise, whether from the fact that the parties propounding a will benefit largely under its provisions and have been instrumental in securing its execution (*Fulton v. Andrew* (1); *Parker v. Duncan* (2) or otherwise for the rule has been held to be one of general application (*Tyrrell v. Painton* (3)), the suspicion must be removed by the executors. They must satisfy the Court that the will is the act of a free, as well as a capable, testator.

(iii.) In order to be " undue " the influence must amount to coercion or fraud (*Boyse v. Rossborough ubi. sup. at p.* 34).

(iv.) In the case of wills, unlike that of gifts, the existence of a fiduciary relationship does not create any presumption of undue influence. An attorney or a child—to take the relationship in point in the present case—may legitimately importune a client or a parent for a legacy so long as the importunity does not amount to coercion or fraud (*Parfitt v. Lawless* (4)). Section 3 of the Evidence Ordinance (Ordinance No. 14 of 1895) is confined to transactions *inter partes* and does not alter the English rules as to wills.

Mr. Elliott, who argued this part of the appellant's case and displayed a thorough mastery of the facts in doing so, admitted that he was not in a position to prove affirmatively undue influence as above defined. But he asked us to infer the existence of such influence from a series of circumstances showing, according to him, the finger of Harry and of Charles Peiris in the preparation of the will. He contended further, as a proposition of law, which he sought to deduce from the cases of *Fulton v. Andrew* (*ubi sup.*) and *Parker v. Duncan*, that whenever it appeared that Harry Peiris took a large interest under the will, and had been instrumental in procuring its execution, it was the duty of the executors to call him as a witness to remove the suspicion of undue influence which these facts created, and that, as this had not been done, the case ought, in any event to be remitted to the District Court for further evidence. It may be, as the Supreme Court pointed out in the judgment on appeal, that the District Judge might, with advantage, have taken the opinion of the assessors as to whether they desired Mr. Harry Peiris to be called. But there is, in our opinion, no rule of law to be deduced from either *Fulton v. Andrew* (*ubi sup.*) or *Parker v. Duncan* (*ubi sup.*) to the effect that every party propounding a will under which he benefits largely, and in the preparation of which he has been instrumental, must necessarily be called as a witness on pain of undue influence being otherwise held to be

(1) (1875) 7 *Eng. and Ir. App.* 448.
(2) (1890) 62 *L. T.* (642).
(3) (1894) *P.* 151.
(4) (1872) *L. R.* 2 *P. & D.* 462.

established. All that these cases decide is that where circumstances of suspicion as to the free volition of a testator have once emerged, they must be removed by the party propounding the will. As to the kind of proof by which that result can be effected, these authorities do not, and could not, lay down any general rule. On this point we have practically nothing to add to the judgements of the District Court and the Supreme Court on appeal. The suspicion, if suspicion there was, has been removed. It does not, as a fact, appear that Mr. Harry Peiris was instrumental in securing the execution of the will. His pencil annotations on Mr. Alvis's instructions either have no relation to the benefits which accrued to himself or, as in the case of the Grand Oriental Hotel shares, are entries in favour of some of the respondents. Even if Mr. Harry Peiris and Mr. Charles Peiris, who is a Proctor, had been shown to have exercised some pressure on the testatrix to secure dispositions in their favour, they were perfectly entitled, the former as her son and the latter as her son-in-law, to do so, provided that her will was not subjected to coercion or fraud. Of any such influence there is not a vestige of proof. The testatrix had her own independent legal adviser, Mr. Alvis—a point which radically distinguishes the present case from *Fulton v. Andrew* and *Parker v. Duncan*—and, although Mr. Alvis did not see her alone, it is impossible to attach weight to the circumstance in view of the absence of any proof of undue influence, and of ths fact that the dispositions of the will were in accordance with the proved feelings and intentions of the testatrix as far back as 1900.

We were invited by the appellants, in any case, to allow them their costs out of the estate. There is, of course, clear authority, both under Ceylon, (*in re Dr. Raymond* (1). and under English (*Browning v. Rudd* (2)), decisions, for the power to make such an order. But in this case, the circumstances of which bear a strange resemblance to those of an English case, *Foxwell v. Pollock* (3) brought to our notice by counsel since the conclusion of the argument, in which a similar view was taken by Sir Gorell Barnes, costs must follow the event. The appellants made no attempt to prove their charges. Mr. Richard Peiris, who put them forward in his affidavit in support of the opposition to the will, did not venture into the witness box to substantiate them on oath. His wife, who was called as a witness, was asked no questions as to the undue influence of Harry Peiris; and Mrs. Mendis, the testatrix's daughter, and one of the opponents who gave evidence for the appellants, made no statement on the subject except one—which ought not to have

(1) *Ram.* 1863-68, *p.* 183. (2) (1848) 6 *Moo. P. C.* 430.

(3) *Times*, *Jan.* 19, 1906.

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been admitted in evidence as it consisted simply of something alleged to have been said to her by Mr. Caderamen—a former notary of her mother—now deceased. The appellants relied almost exclusively on what they could elicit from Mr. Chas. Peiris in the course of a cross-examination protracted over a period of fourteen days, based on no materials which they meant to bring forward, and constituting, in our opinion, like that of Dr. Rockwood, an abuse of the rights of counsel and, in addition, to that, a monstrous waste of public time.

The judgment in review is affirmed with costs.

LAYARD C.J. and WENDT J.—concurred.