## PIERIS *v.* PIERIS *et al.*

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

1904.
*July 18.*

*Last will—Ordinance No. 7 of 1840 s. 3—Ordinance No. 2 of 1877, s. 26, sub-s. 8, as amended by Ordinance No. 21 of 1900—Due attestation—Notary empowered to attest deeds in English—Duty of notary to read over and explain the instrument—Interpretation in Sinhalese —Execution of will by undue influence—Burden of proof as to use of undue influence by coercion or fraud—Opinion of assessors given many days after close of case.*

Where a notary public, authorized to draw, authenticate, and attest deeds or instruments in the English language only, did not read out the last will he had drawn for a testatrix in English, but interpreted and explained it clause by clause to her in her own language, which was Sinhalese, and where one of the attesting witnesses was in the next room during the greater part of the interpretation, but at such a distance that he could see the testatrix and those around her through the open door which connected the two rooms, and could have heard what was said to and by the testatrix if he had given ear to it,—

*Held*, that as, in terms of the Ordinance No. 7 of 1840, section 3, the will had been attested by a notary public and two witnesses, who saw the testatrix sign and thereafter subscribed their own names, all four persons being present together, it was duly attested.

Since "attestation" means execution of a deed or will in the presence of witnesses, and "attesting witness" means a person who has seen a party execute a deed or sign a written agreement, section 3 of the Ordinance No. 7 of 1840 must be construed as dealing only with the authentication and proof of the bare fact of signing by a party. Beyond that it contains nothing designed or calculated to secure the understanding by the party of the contents of the instrument, nor anything implying knowledge by the witnesses of such contents.

The notary need not necessarily know anything of the contents of the will which he attests.

Sub-section 8 of section 26 of Ordinance No. 2 of 1877, which forbids the notary to attest any deed or instrument whatever in any case in which the person executing the same shall be unable to read the same, unless and until he shall have read over and explained the same or caused the same to be explained in the presence and hearing of such person and of the attesting witnesses thereto, does not amount to an enactment that, in failure of the requirements of this rule being observed, the deed or instrument should be deemed not duly attested.

Where it was alleged, in opposition to the will propounded, that one of the sons of the testatrix, who had the management of her affairs and possession of her title deeds, had certain deeds of gift executed in his favour, and endeavoured to take advantage of her weak state of health to get her to execute a will which she declined, but eventually by undue influence he had obtained the will in question,—

*Held*, that where it has been once proved that a will has been duly executed by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under an undue influence is on the party who alleges it.

The equity rule in reference to gifts *inter vivos*, that the party benefited must show affirmatively that the other party could have formed a free unfettered judgment in the matter, does not apply to the making of wills.

1904.
*July 18.*

To vitiate a will the influence used must be either by coercion or fraud.

Where it was complained that the assessors, who were associated with the District Judge to hear the case, gave their opinion some days after the conclusion of the evidence and without the facts being recalled to their minds by a summing up of the Judge,—

*Held*, that this was not a fatal irregularity.

THIS was an application for probate of the last will of one Mrs. Jeronis Peiris by her executors, Mr. H. A. Pieris, Mr. Charles Pieris, and Mr. E. L. F. de Soysa. The first petitioner was a son of the testatrix, and the second and third were her sons-in-law. The application was opposed by four others of her children upon grounds set forth in an affidavit sworn to by the first respondent, Mr. R. S. Pieris, as follows:—

"That his mother, the testatrix, was for some weeks before her death suffering from diabetes; that on Saturday, 28th February, 1903, she was so ill that her doctor had given up all hopes of her recovery; that on Sunday morning, 1st March, she was unable to recognize or respond to him; that on that evening her condition was worse, so that she could not have been in a sound state of mind to have given instructions for the making of a will; that since 1897 she was more or less under the control of his brother Harry, who was her attorney and lived in the same house with her for the last two years; that he had more than once endeavoured by undue means to induce her to make a will devising to him a large portion of her estate; that he had instructions drawn out for a last will to be signed by their mother, which she declined to execute in accordance therewith; and that when the old lady had become too weak and feeble his brother Harry by undue means had prevailed upon her to consent to a will being prepared; and that the will now propounded is the will so prepared and signed."

The will was drawn up and attested by Mr. Arthur Alvis, proctor and notary, and the two witnesses thereto were Mr. R. F. de Saram and Mr. T. Sanmugam. Instructions for the will were alleged to have been given by the testatrix on 27th February, 1903, and the draft will was prepared and explained to her on 28th February. The will was signed on Sunday, 1st March, shortly before 4 P.M., and the testatrix died on Wednesday, 4th March, shortly after noon. It was a lengthy will dealing with property valued at about Rs. 2,000,000.

It was urged for the opponents of the will that on the authority of the rule laid down in *Tyrell v. Painton*, *L. R.* (*1894*) *151*, which in a case of suspicion of undue influence requires affirmative proof that the testator actually knew and approved of the contents of the document, Mrs. Jeronis Peiris's will should be rejected.

1904.
*July 18.*

The Additional District Judge, Mr. Felix Dias, and the three assessors drawn and sworn to try the issues of fact in this case were unanimously of opinion that the testatrix was of sound mind when she signed the will, and that there was no undue influence or coercion exercised over her.

On the question of law which was the third issue in the case, whether the will was duly executed and attested according to law, the District Judge held as follows:—

"This question as to the legality of the execution of this will was not one of the issues on which this inquiry commenced. It arose from a statement made by Mr. Charles Pieris in the course of his evidence that at the time the notary was explaining the will to the testatrix Mr. Sanmugam, one of the attesting witnesses, was not in the room. It appears that this was the case, for when Mr. Alvis began to explain the will seated by the side of the lady's couch, Mr. De Saram, who was standing near Mr. Sanmugam, thinking it advisable that the latter should not hear the particulars of the will, whispered to him to go into the next room till the reading was over. Mr. Sanmugam at once stepped into the adjoining room, which was also a bedroom, with an open doorway between the two, and stood in the middle of it talking to Mrs. H. A. Pieris, who happened to be there. The testatrix and the notary were both visible from the place where he stood, and he could have heard Mr. Alvis's explanation of the will if he chose to listen. The distance from the old lady's couch to the spot where Mr. Sanmugam stood was only some 24 feet, and we have examined the place for ourselves. We are quite satisfied with the truth of what the witnesses have stated on this subject. After Mr. Alvis finished his explanation, and while the lady was being assisted to sit up and sign the document, Mr. De Saram beckoned to Mr. Sanmugam with his hand to come in, and he at once joined them. The testatrix, the two witnesses, and the notary then signed the will one after the other, and the party left. These are the facts of the case, and we have to apply to them our law on the subject of wills and discover whether there is anything in it which is fatal to the validity of this document as a will."

The District Judge found that under the law of Ceylon the will was duly attested.

The opponents of the will appealed from this order.

The case was argued before Wendt, J., and Middleton, J.

*Eardley Norton* (*Walter Pereira*, *E. W. Jayawardene*, and *C. B. Elliott* with him), for appellants.

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

*Cur. adv. vult.*

1904.
*July 18.*

WENDT & MIDDLETON, JJ.

The following judgment of the Supreme Court, which was jointly prepared by the two Judges who heard the appeal, was delivered on 18th July, 1904:—

This is an appeal against a decree absolute of the District Court of Colombo granting probate of the last will of Caroline Francina Soysa, widow of the late Mr. Jeronis Pieris. The will, which is dated 1st May, 1903, was propounded by the three executors named in it, viz., Messrs. Henry Alexander Pieris (second son of the testatrix) and Charles Pieris and Edwin Lionel Frederick de Soysa (her son-in-law). To the executors' petition the other surviving children of the testatrix were made respondents, viz., (1) Richard Stewart Pieris (the eldest son), (2) Lambert Louis Pieris, (3) George Theobald Pieris, (4) Emily Hortensz Mendis, and (5) Caroline Lucilla de Soysa, wife of the third petitioner. Annie Engeltina, the wife of the second petitioner, had predeceased her mother, the testatrix, leaving issue one daughter, Annie Elsie. The petition, which disclosed that the testatrix died on 4th May, 1903, was supported by the affidavit of the petitioners and by the affidavit of the notary and witnesses who had attested the will, and the Court on 17th March, 1903, made a decree *nisi* in terms of the prayer of the petition. The first, second, third, and fourth respondents opposed the grant of probate on the grounds set forth in the affidavit of the first respondent, R. S. Pieris, dated 17th April, 1903. Counsel for parties on 28th April agreed upon the following issues:—

(1) Had testatrix at the time of the alleged execution of the will a sound and disposing mind ?

(2) Was the execution of the said will due to coercion and undue influence exercised on the testatrix by the petitioner H. A. Peiris ?

The trial began on the 12th May, 1903. On the 29th May, after the examination of the first witness, Mr. Charles Pieris, was completed, an additional issue was, upon the application of the respondents, framed in the following terms:—

(3) Was this will duly executed and attested according to law ?

It is convenient to consider this issue first of all. The facts bearing upon it are as follows. The testatrix was a Sinhalese able to read and write her native language, but knowing nothing of English beyond the ability to sign her name in English characters. The will was in English and was drafted by Mr. Arthur Alvis and engrossed by one of his clerks. It was attested by Mr. Alvis as notary public, and two witnesses, Mr. R. F. de Saram (a proctor and notary and Mr. Alvis's partner) and Mr. Tambyah Sanmugam, a broker. Mr. Alvis was a proctor, and also held a

warrant authorizing him as notary to draw, authenticate, and attest deeds or instruments in the English language alone. In his attestation clause to the will he certified, following the form prescribed by Ordinance No. 2 of 1877, section 26, sub-section 23, as amended by Ordinance No. 21 of 1900, section 8, that the will was read over and explained by him to the testatrix in the presence of the two subscribing witnesses, all three being known to him, and was signed by the testatrix and witnesses and himself as notary in the presence of one another, all being present at the same time. The evidence showed that Mr. Alvis did not read out the will in English to the testatrix, but interpreted and explained it clause by clause to her in the Sinhalese language, with which she was well acquainted; that while this was being done, Mr. De Saram was standing close by and heard and understood all that was said, but that during the greater part of that time Mr. Sanmugam was in the next room, but at such a distance that he could see the testatrix and those round her through the open door which connected the two rooms, and could have heard what was said to and by the testatrix if he had given ear to it. The explanation concluded, Mr. Sanmugam returned to the testatrix's bedside, and he, the notary, and Mr. De Saram saw her sign the will, and themselves thereafter signed it in her presence and in the presence of each other.

Upon these facts the opponents of the will contend that it was not read over, because reading over means reading out the actual words in which the instrument is couched, nor " explained, " because (1) that means explained in the language in which the instrument is drawn, and the will was not so explained but interpreted into Sinhalese, and because (2) Mr. Alvis was not authorized to use the Sinhalese language, but only the English, and that only to those who understood it. Lastly, it is objected that if the will was in point of law explained, it was not explained in the presence of the witnesses, inasmuch as Mr. Sanmugam was not then present.

The law which prescribes the formalities necessary for the execution of wills is the Ordinance of Frauds and Perjuries, No. 7 of 1840. Section 3 of that Ordinance runs as follows: " No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever, shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses,

1904.
*July 18.*
WENDT & MIDDLETON, JJ.

who shall be present at the same time and duly attest such execution, or if no notary shall be present, then such signature shall be made or acknowledged by the testator in presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The petitioners says that in a question as to due execution this section is all that should be looked at, and that, the evidence establishing that the testatrix's signature was made in the presence of a licensed notary public and two witnesses present at the same time, who thereupon subscribed the will in the presence of the testatrix and of each other, the will was duly executed. But the respondents contend that in view of the requirement that the notary shall " duly " attest the execution, we have to look at the existing enactments which regulate the practice of notaries, to see whether the notary in this case acted conformably to them in his attestation, and that if he did not he cannot be said to have duly attested the will. Accordingly, they rely on sub-section 8 of section 26 of Ordinance No. 2 of 1877, as amended by Ordinance No. 21 of 1900, section 8 of which forbids the notary " to attest any deed or instrument whatever in any case in which the person executing the same shall be unable to read the same.....unless and until he shall have read over and explained the same or caused the same to be explained in the presence and hearing of such person and of the attesting witnesses thereto."

This sub-section is a re-enactment of the original sub-section 8 of the Ordinance of 1877, which in turn was a re-enactment of sub-section 8 of section 2, of the older Ordinance No. 16 of 1852 with the omission of the words " if need be," which occurred before the word " explained ". The sections quoted from the Ordinances of 1852 and 1877 contain a number of " rules and regulations " which it is declared to be the duty of every notary in this Island strictly to observe and act in conformity with. They contain provisions designed to secure among many other details the perfect understanding of the contents of instruments by parties executing them, the due identification of such parties by witnesses who know them, and the prevention of frauds. In each Ordinance the section renders a notary violating the rules guilty of an offence and punishable with fine, but with the proviso that " no instrument shall be deemed to be invalid in consequence of the non-observance by the notary of the foregoing rules or any of them in any matter of form, " to which is added in the Ordinance of 1877 and the Ordinance amending it the words,— " but nothing in this proviso contained shall give any validity to

any instrument which may be invalid by reason of the provisions of any other law not having been complied with."

Now, the Notaries Ordinance contains no affirmative enactment rendering invalid any instrument attested by a notary and witnesses in a manner which contravenes the "rules and regulations." To prove such invalidity the Ordinance of Frauds and Perjuries must be invoked, which relates to deeds *inter vivos* as well as to wills. The question is whether "duly attested" by a notary means "attested in accordance with the rules for the time being in force and binding upon the notary."

Wharton's Lexicon, citing *2 Blackstone's Commentaries, 307*, defines "attestation" as "the execution of a deed or will in the presence of witnesses," and an "attesting witness" as "a person who has seen a party execute a deed or sign a written agreement." He then subscribes his signature for the purpose of "identification and proof at any future period." In the light of these definitions it will be seen that the Ordinance No. 7 of 1840, section 3, deals only with the authentication and proof of the bare fact of signing by a party. Beyond that it contains nothing designed or calculated to secure the understanding by the party of the contents of the instrument nor anything implying knowledge by the witnesses of such contents. There is nothing to prevent a testator producing to the notary and witnesses a document and, without reading or showing its contents to them, telling them that it is his last will, and then in their presence making or acknowledging his signature and asking them to attest it—somewhat in the way in which "close" wills used to be executed in former days (see *Tennant's Notary's Manual, Ed. 1844, p. 124*). Section 15 of the same Ordinance, which requires notarial instruments to be executed and attested in duplicate, expressly excludes wills, and hence the express exemptions of wills from the provisions of all the Notarial Ordinances, beginning with No. 16 of 1852, which require the transmission of duplicates to the District Court or Registrar of Lands. The notary therefore need not necessarily know anything of the contents of the will which he attests.

The Ordinance of 1840 no doubt advisedly omitted to make any provision directed to securing that a testator knew and appreciated the contents of the paper he was signing, because as we have said, it was dealing with the bare formalities of execution, and it was rendering a will absolutely invalid if those formalities were not observed. Very wisely the Legislature had prior to the Ordinance of 1840 enacted rules, and subsequently it enacted further rules, for the regulation of notaries, and with the view of securing due appreciation by the grantors of deeds of the nature and effect of

1904.
*July 18.*

WENDT & MIDDLETON, JJ.

their acts, but these rules nowhere declared that the violation of them would invalidate a deed, and without such an express enactment we do not think we can imply one in matters of substance from the saving proviso that irregularities in matters of form shall not violate the deed.

There is no subsequent Ordinance which in unmistakable language declares that "due attestation" in section 3 of the Ordinance of Frauds and Perjuries shall mean the observance of such and such formalities. If there were, then obviously we should be bound to hold that in the absence of any of these formalities a deed was not duly attested. But in our opinion the notaries' rules and regulations do not amount to such an enactment. Neither is there any provision in the Ordinance of Frauds and Perjuries or the Notaries Ordinances which requires that an instrument shall be drawn in a language understood of the person executing it, or that, if expressed in an unknown tongue, it shall be interpreted to him. The meaning of sub-section 8, it is said, is that the reading over and explaining must be in the language of the instrument. The argument therefore leads to this absurdity, viz., that if Alvis had read the will over in English and explained it in that language the attestation would have been beyond cavil, although the testatrix had not understood a word she heard.

None of the local cases cited are very directly in point on the question in hand. We shall mention them in order of date.

In D. C., Colombo, 5,036, Morg. Dig. 260 (1835), it was held that the omission to execute a deed in duplicate, as required by Ordinance No. 7 of 1834 (the first Ordinance of Frauds and Perjuries), did not render the deed invalid. But the provision requiring a duplicate was contained, as in the Ordinance of 1840, in a separate section from that dealing with attestation, and had no words declaring the omission fatal.

In D. C., Kandy, 18,633, *Austin*, 97 (*1846*), a deed executed in Kurunegala was attested by a notary licensed to practise in the Central Province. The District Judge on a demurrer said: "There is nothing contained in the Ordinance No. 2 of 1839 or Ordinance No. 7 of 1840 referred to in the argument which declares a deed to be void for being attested by a notary other than the notary of the place wherein the deed has been executed, though the notary may be subject to have his warrant recalled if he exceeded his authority. *Non constat* also that the notary who had styled himself a notary of the Central Province may not be likewise a notary of Kurunegala.....This is a matter for evidence, and.....cannot be ground for demurrer." The

Supreme Court merely "disallowed the demurrer for the reasons given by the District Court."

In D. C., Kandy, 22,401, *Austin, 139 (1849)*, the question was the same as in *Morgan's Digest*, and was decided in the same way But it would seem that the grantor had signed a blank "ola," which was afterwards filled up. The District Court, however, held that as there was evidence that the grantor acknowledged the execution of the deed in the presence of the notary and witnesses, that was a sufficient compliance with the Ordinance (note here the difference between section 2 of the Ordinance No. 7 of 1834 and section 2 of the Ordinance of 1840). In appeal this Court affirmed the decision, but no reasons are reported.

In D. C., Negombo, 5,742, *Grenier, 39 (1874)*, the due attestation of a mortgage was challenged in appeal because the notary's attestation clause did not state the names and residences of the witnesses, as required by Ordinance No. 16 of 1852, section 21, sub-sections 6, 7, and 20, and therefore the bond was not "duly" attested. The respondent relied on the proviso to the section, and it would seem that the question was not raised at the trial. This Court affirmed the judgment upholding the instrument, but again no reasons are reported. What the facts were as to the execution of the bond we do not know. The case may perhaps be taken as establishing that an informality in the attestation clause does not render the instrument invalid.

In *Appuhami v. Mohotti, Ram. (1876) 299*, the question related to a will attested by a notary and two witnesses, the attestation clause stating that they and the testator all signed in each other's presence. The proof showed, however, that the witnesses did not sign in the testator's presence, and the will was declared invalid. Clarence, J., after expressing the opinion that by the Roman-Dutch Law the witnesses had to append their attestation in the presence of the testator, held that the last words of section 3 of the Ordinance of 1840, as to subscription in the testator's presence, and as to no form of attestation being necessary, applied as well to notarial wills as to those attested by five witnesses. The Ordinance No. 16 of 1852, to which he had been referred in argument, he declared to have "no bearing on the matter."

In *Punchi Baba v. Ekanayake, 4 S. C. C. 116 (1881)*, the Supreme Court extended this decision to the case of deeds *inter vivos*, to which section 2 of the Ordinance of Frauds and Perjuries applied. Dias, J., followed the opinion of Clarence, J., and said: "We cannot see any difference in principle between an ordinary notarial deed and a notarial will, and we hold that the deed in question should have been signed by the attesting witnesses in the presence

1904.
*July 18.*
WENDT & MIDDLETON, JJ.

of the grantor, and this view is supported by the Ordinance No. 16 of 1852, clause 21, sub-section 5, which requires that all notarial instruments shall be executed by the grantor and the attesting witnesses in the presence of the notary and in the presence of one another." The question there was one affecting the mode of attestation alone in the sense in which we have defined it; and Dias J., does not rest his decision on the Ordinance of 1852, but on the case of *Appuhami v. Mohotti*, and he refers to that Ordinance merely to show that the Legislature in prescribing rules for the evidence of notaries took the same view of the matter. He therefore lends no support to the appellant's contention that in a question as to " due attestation " we must resort to the notarial rules of practice for the time being in force. And I do not think that Grenier, A.J., meant to convey more than his colleague had said, by his dictum that the words " duly attest, when read in connection with section 21, sub-section 5 of the Ordinance No. 16 of 1852, must I think be taken to mean the signing by the witnesses in the presence of each other and of both the grantor and the notary."

*Peiris v. Fernando, 9 S. C. C. 146 (1891)*, was the case of a will in the Tamil language attested by a notary authorized to practise in English alone, and therefore forbidden by sub-section 20 of the Ordinance of 1877 to attest in any other language. The propounders of the will were content to rely on the fact that the notary had in fact " attested in English, " because his signature and attestation clause were in that language, and they did not raise the question as to the effect of the Ordinance of 1877 on that of 1840. This Court supported the will, and Clarence, J., said : " We need not for the purposes of this appeal speculate as to what details are included in the ' attestation ' as contemplated by the Ordinance, or to what length these details should be transacted in the language named in the notary's warrant. All that I think it necessary to say upon this appeal is that I can seen no impossibility in a Tamil will being attested in English; that this attestation purports *in facie* to have been attested in English, and there is no material advanced by the opposition to the contrary." The Ordinance of 1900 has added a further prohibition, which was not part of the law at the time of this decision, viz., that the notary shall not attest any deed drawn in a language other than that in which he is authorized to practise. Had this been in the older Ordinance, the decision in that case would have been of some direct assistance to us in the present question, but so far as it goes it is not inconsistent with the view we have already expressed as to the construction of section 3 of the Ordinance No. 7 of 1840.

1904.
*July 18.*

WENDT & MIDDLETON, JJ.

*In Kiri Banda v. Ukkuwa, 1 S. C. R. 216 (1892)*, the question was whether the notary was an attesting witness within the meaning of the rules of evidence, which require an attesting witness to be called in order to prove an instrument requiring attestation. The Court held that he was. Burnside, C.J., said: "To this deed is appended the word 'witnesses,' and under it are the signatures of the two witnesses and of the notary, J. H. E. Mudianse, notary public. This seems to me to be all that the law requires. But besides this the notary has signed the formal attestation which, the rules contained in the Notaries Ordinance, No. 16 of 1852, laid down for the guidance of notaries. The learned District Judge has said that the first signature below that of the witnesses was surplusage. "I emphatically hold that it was all that was necessary to do in satisfaction of the provision of the Frauds Ordinance requiring the attestation by a notary and two witnesses, because although the Notaries Ordinance directs that there shall be a formal attestation of the notary which shall contain many particulars, yet it has been careful to say that the omission of this formal attestation or any of its particulars shall not make the deed invalid. It penalizes the notary, but does not touch the validity of the deed." We believe there is an older case in appeal from the District Court of Colombo, upon which we have been unable to lay our hand, and in which it was held that the absence altogether of an attestation clause did not affect the validity of a notarial deed, as the signatures of the notary and witnesses appeared at the foot of it.

In *Lokuhamy v. Don Simon (3 N. L. R. 317)* Bonser, C.J., made the remark *obiter* that a last will was included among the instruments of which Ordinance No. 2 of 1877, section 26, sub-section 12, requires a notary to preserve a draft minute or copy, and the case was cited to us to show that the expression "deed or instrument" in sub-section 8 of the amended section also includes a will. If it were necessary to decide the point we should be prepared to hold that it does, especially in view of sub-section 25 which expressly speaks of a will or codicil as an instrument, which undoubtedly it is. No supposed practice of notaries to treat sub-section 8 as not applying to wills could override the clear effects of the words.

For the reasons already given we think that the will in question, being attested by a licensed notary public and two witnesses who saw the testatrix sign and thereafter subscribed their own names, all four persons being present together, was duly attested as required by law. Whether it was duly executed in the sense of whether the testatrix understood and approved of what she was signing is another part of the case.

1904.
*July 18.*

WENDT & MIDDLETON, JJ.

In the view we have taken it is unnecessary to consider the signification of the terms "read over," "explained," and "in the presence of the witnesses."

We come now to the first and second issues in the case.

Jeronis Peiris, the husband of the testatrix, died in July, 1894, and left a joint will with his widow, the present testatrix, dated 9th February, 1894, which, after declaring that they had by certain deeds settled considerable property on their eldest son Richard and their eldest daughter Annie, gave specific devises of houses and property to each of the seven children and devised the entire residue—movable and immovable—to the survivor, with full power to dispose of by will or otherwise in such manner as such survivor deemed proper, but providing that if the survivor died without disposing of it, it should be divided share and share alike amongst all the children, the child or children of a deceased child to take *per stirpes*.

We have recited the terms of the joint will, as we consider it has some bearing on the questions we have to decide.

The action for probate was tried in the District Court with three assessors, and they unanimously found on the first issue that the testatrix was of sound mind at the time of execution of the will; on the second issue that the execution of the will was not due to coercion or undue influence exercised on the testatrix by the petitioner, H. A. Pieris; on the third issue, as to whether the will was duly executed and attested according to law, the District Judge found in the affirmative, but the assessors were unable—and properly so—to express any satisfactory opinion. On the special question submitted to them by the District Judge, they unanimously found that the will was signed by the testatrix and by Mr. Sanmugam at the same time and place and in the presence of each other.

The points raised by the able and learned counsel who represented the appellants were not very systematically formulated or arranged, but we have discussed them more or less in the order they were presented to us.

Before examining into the points raised in the case it is advisable to remember that the evidence shows that the person whose conduct and position is most impugned in this case, viz., Mr. H. A. Pieris, was the favourite son of the testatrix, who managed her business for her and lived at Elscourt, the family house, with his mother from 1901 to her death. Charles is also not a stranger, but the husband of the deceased daughter Annie, whose child Elsie, since dead, was a favourite of the testatrix and also generally lived at Elscourt.

This was practically admitted by counsel for the appellants, as also that the children were not all on good terms with each other. It is also necessary to remember the position taken up by counsel for the appellants. As regards the witnesses called, Charles was challenged and accused of falsehood, and Spittel, the clerk, Dr. Rockwood, and Sanmugan were charged with falsehood, and nothing practically said against Alvis, De Saram, or any of the others. According to Spittel, the clerk, whose evidence we shall refer to later on, the testatrix took a shrewd and lively interest in her business, frequented the office, and knew all her affairs, and Charles says she was an active, strong-minded person of business capacity.

The opposition to the will apparently springs from the alleged disproportion between the shares of the children benefiting under it. It is alleged that if the properties are valued as the opponents say they should be, Harry and Charles's daughter Elsie will receive a considerable amount more than Richard, Lambert, or Theobald. If, however, the valuations as given by the executors in the schedule are taken there is no great difference, and in fact Mrs. Caroline de Soysa and Emily Mendis would apparently get almost exactly the same sums. It is noticeable that all the children are provided for under the will, and it was elicited from Charles (page 79) that between the 27th February and the signing of the will the testatrix did not lead him to believe that it was either her intention or her wish to make an uneven distribution of her property. It seems, however, that a very considerable amount of property was conveyed by deeds of gift, some eleven parcels to Harry in the year 1900, some three parcels also were conveyed to Lambert, two to Elsie, two to Caroline, and one between Lambert and Emily. Those conveyed to Harry and Elsie were accepted, but not the others, the other donees not being even aware of the execution of the deeds of gift. With these deeds of gift Harry's and Elsie's shares considerably overtop the shares of the other heirs, but, even if so, such preference, considering the relationship of the parties, was not unnatural, and is possibly to be accounted for without recurring to undue influence involving fraud or coercion.

The affidavit of Richard Pieris in opposition to probate of the will alleges incapacity on the part of the testatrix to speak or recognize him, her son, on Sunday, 1st March, and avers that Harry, having the sole management of her affairs and possession of her title deeds, had certain deeds of gift executed in his favour, and endeavoured to take advantage of her weak state of health to get her to execute a will, which she declined, but eventually by undue influence he had obtained the will in question.

1904.
*July 18.*
WENDT & MIDDLETON JJ.

It is suggested by counsel for the appellants that Charles and Harry, with the corrupt assistance of Dr. Rockwood, have been enabled to obtain this will from their mother as though she were a free and capable testatrix. The suspicious circumstance most emphasized, and in fact almost the only one pointed out, was that Harry Pieris, who from Charles Pieris's evidence must have been as well if not better acquainted than the latter with the testatrix's business and testamentary intentions, was not called as a witness, and we were asked to presume that his evidence would therefore have been unfavourable to the propounders of the will.

Counsel for the propounders took upon himself the entire responsibility of not calling this witness, repeating his assertion made at an early stage in the trial that he would not put Harry into the box until there was some evidence led against him of undue influence, which he denied. No action or saying of Harry's could be pointed to as indicating any actual fraudulent influence on his part, but the argument was that he was in a position to do evil, and evil having been done in the shape of undue preference given to him both under the deeds of gifts and the will, it was his duty to come forward and explain how these things occurred, or the conscience of the Judge would not be satisfied as to his position in the matter. We think that probably if we had been trying the case in the Court below we should have intimated or obtained an intimation from the assessors that Harry should be called, but, looking at the fact that Charles was cross-examined most minutely for eleven days without disclosing anything that directly pointed to a corrupt conspiracy between himself, Harry, and the alleged medical conspirator, and that Alvis's evidence is accepted, we are inclined to think that the ground for suspicion as regards Harry's absence is not a cogent one.

The selected points counsel referred to in his reply, which he submitted Harry was called upon to explain, were (1) his presence at the interview with Caderamen when B was read for the first time; (2) his absence at the interview when arrangements were made for the equalization of the children's share (page 19); (3) his sending Spittel with the deeds to Caderamen on the 24th February, 1900 (page 21), and his sending Sieket to have the deeds returned; (4) his part in the interview in May, 1900, between Alvis and the testatrix; (5) his noting alterations on B 2; (6) his dealing with the Bambalapitiya plans (page 71); (7) the testatrix executing deeds at his house in July, 1900; and (8) his getting deeds of gift for so large an amount of property as Rs. 656,000; (9) his putting donees' names on the back of the Dunkanawa plans (page 74); (10) his getting his mother's votes in the Municipality for Alvis.

It seems to us that all these alleged points of suspicion, except the absence from the family interview, may be accounted for by the fact that Harry held his father's power of attorney, and was his mother's attorney, amanuensis, and favourite son, that she could not write or speak English, and was practically obliged to have some one whom she could trust to do so for her. As regards Charles's evidence, it was pointed out that he had given three explanations as to why Fincastle was included in the will; had made a false statement in saying he got the title deeds sent to Caderaman back from L. B. Fernando; had contradicted himself as to the testatrix speaking to him often about her will (p. 489); and was contradicted by Alvis as to his seeing B at Alvis's house after the latter took it there. We do not attach much importance to these discrepancies in the explanations as regards Fincastle, a subject which we shall discuss more fully later on. The witness was apparently trying to speak, as witnesses here will speak, with a profession of knowledge that he did not possess, and consequently being acutely cross-examined got into difficulties.

We do not think he is really speaking falsely, but rather trying to account for something which he felt he ought to account for and had not the knowledge to do so.

As to the statement about getting the deeds back from L. B. Fernando, he admitted (page 21) that his answer in examination-in-chief was incorrect and a lapse of memory.

With regard to speaking about the will, there appears to be a contradiction, unless the witness was purposely distinguishing between the words " work " and " will, " which is quite possible, as he is evidently a man acute and self-possessed.

As to the contradiction between him and Alvis as to seeing document B at Alvis's' house while Alvis was preparing the will, Charles asserts it and Alvis denies it. There is no occult reason which suggests itself for the denial by Alvis or the assertion by Charles, and it may be that one of them has forgotten. Looking at Charles's evidence as a whole, and considering that he was under examination for about fifteen days, during eleven of which he was subject to the cross-examination of a hostile intellect more powerful than his own, and that these are apparently the only exceptions taken to his evidence, we see no reason to doubt that he was a witness of the truth to the best of his ability.

Spittel's evidence is also impugned on the ground of falsehood with respect to the insertion of the dates " 17-2-1900 " and " 29-6-1900 " on B 2, the omission of " schoolroom," or " 5, Park street," from B 2 and the will, and his explanation as to Lathpandura and

1904. *July 18.*

WENDT & MIDDLETON, JJ.

Attanagala (pages 195 and 930), and he was alleged to have been bribed by the doubling of the legacy left to him.

We shall show in another place later on how, in our opinion, Spittel's evidence as to the insertion of these dates is supported by our conclusion that B 2 was in existence in 1900.

We see no reason to doubt Spittel when he says that " 5, Park street," was omitted by mistake.

His explanation as to Lathpandura and Attanagalla are not consistent, but it appears he was ill at the time of his examination, and may suffer from the common habit or fault of witnesses in this Island of giving some reason or explanation from their imagination, when the real answer would be " I do not remember " or " I do not know. "

As to the alleged bribe, it does not appear to us unnatural that Spittel should, as an old servant, have called attention to the small amount of his original legacy, or that the testatrix should have recognized the justice of his complaint, nor that it should be done through Harry.

We now come to consider whether the appellants have raised any doubt in our minds that the District Judge and assessors were mistaken in finding that the testatrix was of sound mind.

Exception was taken to the words " sound mind," it being contended that it did not necessarily mean of sound disposing mind.

We, however, cannot help thinking that the District Judge and the assessors intended to mean of sound disposing mind, as their finding was in connection with the dispositions under the will.

Counsel for the appellants does not suggest that the testatrix was of unsound mind, but say that the will was not hers, inasmuch as she was suffering from the prodromal symptoms of diabetic coma, which would cloud her will, memory, and judgment to the extent of preventing her from appreciating the value and amount of her property, the moral obligation she was under with regard to its disposal, and that she would not be able to grasp who was taking and what shares of her property were given, and thus would in consequence be most susceptible to undue influence.

There is no issue as to this condition of mind, as the learned counsel himself admitted.

We do not think it necessary, considering the views we hold, to go at great length into our reasons for agreeing with the District Judge and his assessors.

We feel it necessary, however, to refer to the evidence of Dr. Rockwood in this connection, which has been forcibly impugned as false and fraudulent. There is no doubt that the testatrix died of diabetic coma, and that fact has been grasped by the appellant's

counsel with all the ability he possesses to found the theory that the recognized prodromal symptoms of that malady must have developed themselves on or about the 27th February, 1903, which, he says, Dr. Rockwood's prescriptions, produced before the Court, prove.

In the first place, there is not a scintilla of evidence to found any suspicion that Dr. Rockwood, who is a man most eminent in his profession and of high and unblemished character in that profession and in his public and private life, was concerned in the medical treatment of the testatrix in any other way than he would have been towards any other patient.

Dr. Rockwood distinctly denies that his treatment was for the prodromal symptoms of coma. We are not prepared to disbelieve him when he says so, even if Dr. Thomasz, whose opinion is certainly entitled to weight, may deem that some of the doses ordered by Dr. Rockwood were of an heroic character, or that the treatment was not what Dr. Thomasz would have adopted under the assumed circumstances.

Dr. Thomasz was also certainly of opinion that when he saw the testatrix on the 3rd March her mental condition was still intact, although he suspected that coma would come on sooner or later.

Dr. Rockwood was the regular medical attendant of the testatrix, and presumably better acquainted with her system and constitution than Dr. Thomasz, and we should attach more weight to the former's opinion as to the mode of treatment proper in her case than to the latter's.

Even if the cross-examination of Dr. Rockwood may be said to show that his treatment of the patient was not altogether inconsistent with apparent knowledge on his part of pending prodromal symptoms of diabetic coma, we are not prepared to accept that view in the face of the doctor's denial and in the absence of any evidence to found suspicion of his good faith in the matter. As regards Dr. Paul's evidence, counsel for appellants was prepared to be judged without reference to it.

In our judgment that evidence was entirely opinionative, and its weight depended completely upon premises which were not proved to exist in case of the testatrix.

Much emphasis was laid on the monosyllabic form of assent used by the testatrix in relation to her instructions for the will, but it seems to us that in taking instructions for any will involving the disposal of numerous specific parcels of property the legal adviser should ask questions which might constantly require such answers.

Again, it appears to have been rather supposed that the testatrix might have exhibited a higher form of conversational powers and

1904. *July 18.*

WENDT & MIDDLETON, JJ.

greater signs of culture and attainment than she manifested from the 27th February to 1st March.

We are not aware from anything in the evidence or the position in life of the testatrix that there is ground for such a supposition.

The testatrix was apparently a plain intelligent woman of business who knew her own mind, but would not at any time, even while in the best of health, be vivacious or particularly sprightly in her conversation, and especially when not feeling well, as admittedly was the case during the days of the preparation and signing of the will.

We see no reason from the evidence of the witnesses called for the propounders to doubt that the testatrix on the 27th and 28th February and 1st March, 1900, was fully capable of understanding what property belonged to her and how she wished to dispose of it and of giving instructions to her proctor to that effect: in fact, that she was a free and capable testatrix of sound disposing mind.

As regards the documents which are said by the propounders to represent the testatrix's intentions, we think the evidence established the untainted genesis of the document marked B in the fashion described by the District Judge at page 236 as representing the intentions of the testatrix in 1900.

If B represents the intentions of the testatrix in 1900 as regards her children, it appears to us clear that she intended then, when admittedly in sound health and in full possession of all her faculties, that Harry should have a larger share of her property than the other children.

We also think that B 2 had its origin in 1900 at Spittel's hands by direction of the textatrix, and we will proceed to show the reason for our belief. In document B items 24 and 25, Nos. 4 and 5, Bankshall street, are allocated to Harry. In B 2 they are put on the first page as allocated to Harry's batch of property, but having against them a bracket and Caroline's name in pencil, and by deeds of gift numbered respectively 2,200 and 2,201, and dated 23rd July, 1900, these properties were conveyed by the testatrix to Caroline. If, therefore, B 2 had not been written in 1900, we should have expected to find those two items in the batch allotted to Caroline in B 2 and not in the batch allotted to Harry.

This also shows that the textatrix, while admittedly in sound health, changed her mind and gave property which in B was allotted to Harry to her daughter Caroline in 1900.

The same inferences are deducible from the item Park Store, which in B is allocated to Harry and put by Spittel in Harry's batch in B 2, but conveyed to Lambert and Emily by deed No. 2,202 on the 23rd July, 1900, although in B Harry's name has been crossed

out and " L and E " substituted for it. Charles says (page 4) that B 2 was produced in the presence of Alvis in May, 1900, but Alvis says he did not notice it.

Presumably then it was blank, except for the batches of properties and Spittel's figures "17-2-00." It may be that Alvis really saw B 2 in May, 1900, though he does not recollect it; at any rate, he must have had instructions different from or intended to alter those noted in B, which he took away, as he prepared deeds Nos. 2,200 and 2,201 for Bankshall street and deed No. 2,202 for Park store. These instructions must have come from the testatrix, as she herself executed the deeds on the 23rd July, 1900, when there is no question as to the healthy condition of her mind and body.

It is true that in B, against the item Park store, Harry's name was crossed out and " L and E " written in, but there is no such alteration as regards the Bankshall street properties, the instructions as to which, although Alvis does not recollect them, must certainly have come from the textatrix.

Again, the crossing out of Harry's name in B in reference to Park store, and the insertion of " Lambert and Emily, " which was apparently done by Harry, was, if the values are correct, a clear loss of Rs. 15,000 to Harry if Daniel's valuations (page 216) are to be accepted, as Harry appears to have received Oyanwatta under the will. worth Rs. 15,000. in exchange for Park store, which Daniel valued at Rs. 30,000.

If B 2 is thus shown circumstantially to have been in existence in 1900, then Spittel's statements as to marking the dates of 17-2-00 on it, when he forwarded certain deeds to Caderaman, receive substantial corroboration, and coupled with the evidence of Charles give rise to a strong presumption that B 2 was a genuine document founded on B, which had its origin in 1900, as Charles and Spittel allege.

If B 2 really existed in 1900, a considerable portion of the suspicion which the appellants rely on is removed, and the impeachment of Spittel's evidence falls to the ground.

There is the further internal evidence that B 2 was founded on B to be obtained from the fact that all the properties mentioned in B find a place in one or other of the groups in B 2 except Attanagala. Apparently B 2 passed through Spittel's hands on the 20th June, 1900, the day after the first batch of deeds of gift was signed, and was brought to him, he says, by the testatrix.

Charles deposes (page 4) to handing it over to Mrs. Pieris in May, 1900, and there is no evidence with regard to it until it appears from the almirah on the 27th February, 1903, at the

1904. *July 18.*

WENDT & MIDDLETON, JJ.

interview between Alvis and Mrs. Pieris, when he went to take her instructions for her will.

According to Alvis (page 141)—and there is no reason to doubt him on this point—it then became the substance of his final instructions for drawing the will, which he says he drafted on B 2 alone (page 145).

It is contended by counsel for the appellants that B 2 differs very materially from the will, and that those variations were made by Harry without the assent or authority of the testatrix.

A number of properties have been alluded to in this connection, and we consider it our duty to take each in turn to see how far the argument of counsel is in this respect well founded.

We have already mentioned the variations as regards Bankshall street and Park store, which do not come into the will, but show that the testatrix must have changed her mind in 1900 with respect to the distribution of these properties by deeds of gift.

We take (1) the Ella Cottage—in B given to Julia and Lucy and put in B 2 in Harry's group, " Julia and Lucy " being crossed out in B and the word " Harry " written against them. If B 2 was drawn up by the testatrix's orders by Spittel, as we find it was, then a change of intention is manifest on the part of the testatrix, and the alteration in B must have been made before B 2 was written.

At the same time, Maliban street and Norris road, which were given to Harry in B, have his name crossed out there and the names of Julia and Lucy substituted, while in B 2 those two properties are entered by Spittel in group 9. This looks as if a change of intention has taken place in 1900 on the part of the testatrix, and the will carries out that change of intention. Now, it is noticeable that in B the rental of Ella Cottage is Rs. 360, while the combined rental of Norris road and Maliban street is Rs. 480, thus making the exchange on the rents to the detriment of Harry.

It may have been Harry's hand which made the alteration in B, but it is confirmed by the testatrix to Alvis in B 2 by his writing " Julia and Lucy " against the items Maliban street and Norris road and " H.A.P. " and " to be devised to H.A.P. " against Ella Cottage.

If Charles Pieris (pages 61 and 62) is speaking the truth—and Alvis was not questioned on the point—the one acre of land was marked in pencil under Ella Cottage in B by Cadiramen, and was allocated to Harry as the balance of the block at Mrs. Pieris's suggestion.

No particular instructions appear to have been given as to this acre to Alvis, but it is inserted in the draft will as described by a figure of survey, and it does not appear that Harry was responsible for it being so inserted. Assuming the testatrix to have been capable of appreciating the contents of the draft, it would appear to have got into this will with her knowledge and consent as a bequest to Harry.

*Fincastle.* In a perusal of the deeds we ascertained the following. The land on which this house stands was bought by Jeronis Pieris and Sir William Mitchell from Ossen Lebbe, and each took one rood and six perches.

The deed of gift to Harry prepared by Alvis was founded on this old deed of Jeronis, and only conveyed one rood and six perches. After the purchase of this land by Jeronis Fincastle was apparently built, and it is clear from the figure of survey describing it, made in August, 1900, that it then contained within its wall three roods and five perches, showing that Jeronis Pieris must have added land of his own, which, as stated in the documents, bounded the land which he bought from Ossen Lebbe. The deed of gift was dated 28th June, 1900 (Z 6) and clearly conveyed less than was intended under B and B 2.

Alvis's explanation (at pages 152 and 153) as to why it was not in the draft will and that he was practically wrong are by no means improbable, considering our belief that the actual circumstances did not appear to be fully appreciated even at the argument by counsel for the respondents, and we have no difficulty in concluding that Fincastle was put into the will to cure the deficiency in the deed of gift (Z 6), apparently with the testatrix's knowledge and assent.

*Galkissa lands.* It is said these lands are omitted from the will, and that this shows again it is not the testatrix's will.

As regards Fernando's Galkissa land, a clear explanation was given by Charles (at pages 39, 40, and 96) as to its being conveyed to Lambert. This has not been denied by Lambert. The debt due to the estate of Jeronis on the mortgage bond appears to be a valueless asset.

As regards the other Galkissa land, this was conveyed to Lambert by deed of gift No. 2,177, dated 28th July, 1900, and there was no necessity to put it in the will.

*Elscourt.* It was objected that the terms of the devise of this property were at variance with the testatrix's intentions, if they were expressed in B 2 to be the same as those to affect Banyan Tree House.

1904.
*July 18.*

WENDT & MIDDLETON, JJ.

According to B 2 it was to go to Elsie, and by the will it was left to Elsie, to be held and possessed by her father till Elsie's marriage, which apparently were the terms on which Banyan Tree House was given. We fail to see that there is any material variation between B 2 and the will as to the terms on which the rent was to be fixed and to be paid by Harry.

We think, therefore, that B 2 and the will are not at variance here.

*Bambalapitiya lands.* There is a variance here between B and B 2, but not between B 2 and the will. The lands were apparently divided into five portions in figures of survey in 1900, which *primâ facie* would show that it was done by the testatrix's instructions. Harry noted the acreage in B 2. Alvis apparently took instructions on the subject, as he noted on page 3 of B 2 "give extent," but in the draft will the portions are devised on four of the surveys and the remaining portion given to Harry. The will follows the draft will on this point, and, presuming the draft will was fully understood and appreciated by the testatrix, it is clear she approved of the variance.

*Dunkannawa.* It is suggested as regards this property by the appellant's counsel (1) that it was overvalued; (2) that there had been a compromise between the two executors Harry and Charles as to the payment of legacies from the income.

As to the first point, we are by no means certain from the terms of Mr. Scott's report (page 271) as to the possibilities of the estate, whether he has not very considerably undervalued it, as the respondents assert. The property at any rate was divided into six portions and surveyed in 1900 on six plans, upon which the names of the devisees were marked, and was devised to the persons for whom it was destined in B and B 2, except that Richard's wife received Richard's portion, and it cannot be said that the will does not carry out what were the testatrix's wishes in that respect in 1900, and again when instructions for the will were given on B 2.

As to the second point, as to the crossed-out notes in B 2, page 3, Charles's answer at page 75 (364) appears to meet the insinuation, and the inference may be drawn, as contended by counsel for respondents, that the executors were not then scheming to increase the residue, an imputation that has been strongly pressed against them.

*Kandy houses.* It is said by the appellant's counsel that the devise of the Kandy houses was a gift of litigation, for which it is suggested Charles and Harry are responsible. B however gives them to Theobald and Richard, while the initials of Lambert

are added in B 2 and Alvis's note is that they are to be left to Mrs. R. S. Pieris, Lambert, and Theobald. If they are a gift of litigation, the testatrix apparently intended originally that it should be shared by Richard and Theobald, as they are so noted in Caderaman's handwriting; and if Alvis's note is to be relied on in B 2, the testatrix instructed him that these properties were to be left to the wife of Richard, Lambert, and Theobald, instead of to Richard and Theobald, as she originally intended. From Charles's evidence at page 36 it does not appear that he knows much of them, but they are put on the inventory of Jeronis's will (vol. 3, page 27) at a value of Rs. 12,000. They also appear in the draft will as devised to these persons, and there is no evidence to show that Charles or Harry by word or deed induced the testatrix so to devise them.

*Illukgalla, Labugolla, and Gangoda near Labugolla.* The same observations apply to these properties, and the same points are taken by the appellants in respect to them as are taken about the Kandy houses. As regards the valuation, which appears at Rs. 20,000 in the schedule to the disputed will (vol. I, page 14), while in Jeronis's schedule (vol. III, page 28) it appears at Rs. 2,000, it is possible that the over-valuation may be the mistake of adding an additional cypher made by a clerk, as suggested by counsel for the respondents.

*Kelankaduwa.* As regards these properties the appellants allege that No. 101 was not only gifted to Harry by deed No. 2,172, but also left to him by the will, which shows that the testatrix did not know what she was doing.

This has admittedly occurred. By B three lots at Kirillapone were to be given to Harry. On B 2 is noted D/G 2,172 against Kirillapone. Deed No. 2,122 is the deed dated 1900 marked Z 8, which admittedly conveys No. 101, Kelankaduwawatta, and two other parcels, Ambagahawatta and Madangahawatta, and therefore it was Kirillapone three lots, as Spittel says, which were conveyed by deed of gift. No deed of gift for Kelankaduwa, as it appears on B and B 2, was prepared, although Alvis has noted D/G against it.

There is no Kelankaduwawatta in the schedule under the disputed will—why, it is difficult to say. In addition, two pieces of land 58 and 60 at Wellawatta, which apparently have some connection with the name Kelankaduwa, have been inserted in the will. Pamankada (which we believe is the name of a village) does not appear to have been disposed of either by deed or will unless it represents the two properties under 58 and 60 just mentioned. Alvis does not appear to have been questioned about Kelan-

1904' *July 18.*

WENDT & MIDDLETON, JJ.

kaduwa, and the inference is that No. 101 was put into the will by a mistake of Alvis. That the testatrix did not notice this when there were apparently several other properties of the same name, all of which were destined by B to go to Harry, does not prove that she did not understand the dispositions of the will.

*Schoolroom.* This was to go to Lambert in B, but was not inserted in B 2, and is described as " 5, Hyde Park street " or " Hyde Park gardens " in the schedule, and valued at Rs. 20,000, and has not been devised specifically by the will.

It is suggested by counsel for the appellants that this was purposely omitted from devise in the will in order that it might swell the residue for the benefit of the executors.

Spittel says it was a mistake that it was not put into B 2, and Charles says he told Lambert that his impression was he had received it with Fern Bank under the joint will. Lambert has not been called to deny this. If there was no conveyance by the textatrix as executrix of Jeronis to Lambert of Fern Bank, it is plausible that it was assumed that Lambert got 5, Hyde Park street. If B 2 was the foundation of Alvis's instructions, and B was not referred to but kept in a box, the circumstances are consistent with an oversight.

*Lathpandura.* This has a place both in B and B 2, but no allocation in either. It does not appear in either schedule. Charles says it was intentionally omitted at the request of the testatrix as a valueless properity which had been exploited for plumbago and abandoned. There is no evidence to show it is valuable on the part of the appellants, and though Charles's evidence is challenged it is not contradicted, and the District Judge has believed it. We do not see any ground for supposing even from Alvis's statements at pages 158 and 159 that this was a valuable property which was purposely omitted from specific devise in order to swell the residue.

*Galkandawatta.* This is neither in B nor in B 2, but appears in both schedules at a value of Rs. 80. There does not appear to be any inference adverse to the executors to be derived from this property falling into the residue as it apparently has.

*Kongahawatta.* The same remark apply to this land as to Galkandawatta. It is valued in both schedules at Rs. 500.

*Attanagala.* This appears in B unallocated, not in B 2, but in both schedules at a value of Rs. 250. Being in the schedule under the disputed will, attention is called to it. We see nothing suspicious in this parcel falling into the residue.

*Oyanwatta,* in B given to Emily, in B 2 is not in Emily's group, but having Harry's initials in his handwriting against it and

devised by the will to Harry. Alvis apparently wrote the word "will" against it in B 2 in conformity with the testatrix's instructions, but cannot say why she changed her mind as regards the property. Charles (at page 60) says it was exchanged for Park store, which was given to Lambert and Emily, an exchange to which we have before alluded, under the head of "Park store," as being detrimental to Harry's interest to the extent of Rs. 15,000. It was given by the draft will to Harry and ratified by the disputed will. We do not consider therefore that B 2 does differ in such material particulars from the will itself as to cause us to hold that the will could not have been founded on it, or B 2 differs so materially from B as to oblige us to say that it does not practically represent the same thing.

Charles's explanation (page 76) as to the alterations on the last page of B 2 in the shares of the jewellery appear reasonable and satisfactory.

The crossing out of the words "no commission," which were written by Harry, has not been altogether explained by Charles, but he gives a reason why perhaps Alvis may have struck them out, and there is nothing in the will apparently relating to commission, although the residue out of which the commission would come was to be divided amongst the executors. Whoever inserted them knew that the executors would get commission if it was not barred, and if it was Harry who did so it was a self-disserving act on his part as an executor to write it, whether he did so on his own account or as indicating the testatrix's wishes.

As regards the legacies, we see no reason to doubt that these were dicated by the testatrix herself and written down by Harry on the last page of B 2, and confirmed to Alvis and by him embodied in the will. Alvis's evidence as to the testatrix's remarks about Elsie's ayah and the added legacy to Mrs. Bastian Perera do not arouse our suspicion that these were apparently natural incidents falsely introduced by the alleged conspirators to tinge with reality the grave fraud they were engaged in committing, but we think they are really natural incidents which did in fact occur.

It has been alleged by counsel for the opponents that the disputed will is a long and complicated one. It is not a short will, but we fail to see that it is at all complicated. If analysed, it consists almost entirely of a series of specific bequests to specified persons in the simplest manner, a recital of the effect of the joint will and the textatrix's position thereunder, the confirmation of the deeds of gift, appointment of executors and guardian, and directions to the former as to the office staff and as to certain debts due to the estate and the position that the testatrix desired Elsie and her son

1904. *July 18.* WENDT & MIDDLETON, JJ.

Richard to fill in regard to the property devised to the former and to the latter's children. It presents no difficulty to the understanding of even the most ordinary person in our opinion, and would be easy of comprehension to a person like the testatrix, who apparently took a personal interest in her properties and business affairs. As to the debts due to the estate Mrs. Mendis (page 226), a witness for the defence, deposes to the arrangement for equalizing the shares made by Mr. Caderamen, and she is confirmed by Spittel and Charles.

Some emphasis was laid on the fact that so long a period elapsed between the testatrix's request to Alvis in 1900 to make her will and the actual making of the will in 1903. We think Alvis's explanation meets this. An elderly lady says to her proctor, "You must make my will," but she does not send for him or give him any further instructions. It was not unnatural that he should take no steps without any further intimation. It is also said that the will was made in a hurry. To a certain extent that is probably true. It is not an uncommon thing for people to delay making their wills until they are reminded of impending dissolution, and it is quite probable that on the 26th February, 1903, the testatrix's illness may have reminded her that she had not made that provision for the future which she intended to do in 1900, and that it was advisable to take the matter in hand. We do not understand the propounders of the will to maintain that the testatrix was not ill at the time she gave instructions for her will, or that there might not have been some hurry in carrying them out. We are prepared to accept the evidence of Alvis, which is corroborated by Charles, that he took his instructions from the testatrix upon B 2 and drafted the will upon them. We do not see any reason to doubt that these instructions were conveyed by the testatrix herself, although everything may have passed in the presence of Harry and Charles, and that the draft will was submitted to and approved of by her, and that she signed the disputed will with a full knowledge of its contents in the presence of the witnesses who have deposed to the fact.

If Alvis is to be believed, and we have no reason whatever to doubt him (page 147), he explained in Sinhalese the contents of the draft will, clause by clause, to Mrs. Pieris, reading in the gaps which had been filled in at his request. Again (page 143) upon the signing of the will he explained the whole will, clause by clause, to Mrs. Pieris, and he says on his oath that, although he may have omitted the number of a title plan or some detail like that, the substantial material contents of the will were explained by him; that so far as he was able to observe, she followed the explanations

intelligently and knew and understood the contents of the document; that he had no doubt whatever that day that there was no deficiency or incapacity of mind in the lady; that there was not the slightest indication of any failure of the mind; and that if he had the slightest suspicion that she was wanting in capacity, he would certainly not have taken her signature. There is nothing urged against the competency of the interpreter, which appears to be practically admitted.

As regards the evidence of Sanmugan and Fernando, we do not believe that either witness stated knowingly what was false. The remark which Fernando put in the mouth of Sanmugan was, as it appears in evidence, of an ironical character. It may well be that Sanmugan did say something of an ironical character which to Fernando may have borne the impression which Fernando has conveyed of it, and Sanmugan in denying it denies the imputation which the remark might have conveyed to Fernando, and hence an apparent contradiction. We do not see any reason in this for holding against the finding of the District Judge and assessors on the question of Sanmugan's presence at, and due attestation of, testatrix's signature.

We then come to the question of undue influence, which in order to be sufficient to vitiate a will must be influence either by coercion or fraud (*per* Lord Cranworth, L.C., in *Boyse v. Rossborough, 6 H. L. 48*), and the Lord Chancellor goes on to say (page 49): " One point, however, is beyond dispute, and that is that when once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under an undue influence is on the party who alleges it. Undue influence cannot be presumed. " Following these principles as our guide, there is no evidence adduced by the opponents of the will which calls upon us to say that the District Judge and assessors were wrong in their finding on the second issue. There are insinuations and suggestions, but no proof, and Richard Pieris did not go into the witness box to substantiate the allegations set out in his affidavit, nor were any witnesses called by the opponents with a view to proving them. It was argued that there was a suspicious secrecy about the preparation and execution of the will, but it was not suggested that any attempt was made to conceal the fact that a will was in prepartion, nor after its execution to mislead any one to the belief that no will had been made. That those members of the family acquainted with the fact that a will had been made did not mention it to the others, is accounted for by the state of feeling in the family.

1904.
*July 18.*
WENDT & MIDDLETON, JJ.

Counsel also commented adversely on the fact that the assessors gave their opinion some days after the conclusion of the evidence, and without the facts being recalled to their minds by a summing up of the Judge. It is nowhere laid down in the Code that the Judge is obliged to sum up the case to the assessors, and therefore such a proceeding is not essential, and doubtless the memories of the assessors were sufficiently refreshed by the addresses of counsel on both sides following the conclusion of the evidence and immediately preceding the expression of their opinion.

One of the last arguments raised by counsel for the appellants in reply was that, taking into consideration section 111 of the Evidence Act, the Court might apply to the case of a will the principles following in the case of donations in *Powell v. Powell*, *69 L. J. Ch. (1900) 164*, and in *Bright v. Carter*, *72, L. J. Ch. (1902) 138*, that gifts *inter vivos* must be set aside between certain parties unless the party benefited can show affirmatevely that the other party could have formed a free unfettered judgment in the matter. It was admitted that in *Parfitt v. Lawless* (*L. R. 2, P. & D. 462*) Lord Peinzance, whose judgment was assented to by Brett, J., had held that the equity rule in relation to such gifts was not applicable to the making of wills, but we were invited to consider the question anew on our own account, having in view the amalgamation of law and equity in the English Courts. We regret that we must decline to embark on this investigation, being content to accept Lord Penzance's view, which, although given in 1872, does not appear to have been questioned.

In our view the judgment of the District Court should be affirmed, and the costs of this appeal and in that of the Court below should be borne by the opponents.