April. 12, 1911

Present : Lascelles C.J. and Grenier J.

In re the Last Will and Testament of Duncan Young.

JANE YOUNG *v.* LOKU NONA *et al.*

344—*D. C. Kandy*, 2,742.

Bequests by testator to woman with whom he was living in adultery—Validity—Undue influence—Costs.

A bequest by a testator to a married woman with whom he was living in adultery is valid.

IN this case the petitioner-respondent (who was executor under the will) sought to obtain probate of the last will and testament of one Peter Duncan Young, who had died on October 23, 1909. The appellant, the only sister of the deceased, and one of the heirs in the event of the intestacy, opposed the granting of probate on several grounds.

At the trial the second respondent (Loku Nona), the sole heiress under the will, was added as a party respondent at the instance of the Court, the learned District Judge being of opinion that it was advisable that she should be added in order that she might safeguard her interests.

The facts material to this report are set out in the following portion of the judgment of the learned District Judge (F. R. Dias, Esq.) :—

"There is no difficulty as regards the first two questions, because it is admitted that Loku Nona was lawfully married to Don James, who is still alive, and from whom she has not been legally divorced, and that she was living with Mr. Young in his bungalow as his mistress at least since May, 1, 1908, and up to his death. The third issue is a pure issue at law, as to which also there is no difficulty, for it is covered by authority. If we are governed by the Roman-Dutch law, pure and simple, there can be no question that this bequest is bad. The general doctrine of that system of law opposes to adultery so strong, a reprobation, that once adultery has been committed there results to the guilty parties an incapacity ever to marry one another or to take testamentary gifts from one another. Before we adopt this principle, however, we must pause and inquire whether the conditions under which we live are the same as those in regard to which alone that law was applicable. As we all know, under the Roman-Dutch law adultery was a crime, and a union between parties guilty of it was prohibited. But under our law, adultery, unlike incest, is not a criminal offence, nor is it prohibited by law, and after the dissolution of the marriage which made the relationship adulterous, the parties may even marry. (Vide *Karonchihamy v. Angohamy.*[1]) Section 31 of Ordinance No. 6 of

[1] *(1904) 8 N.L. R. 1.*

1847, recognizes the marriage of adulterers as valid, and it has been so held by our Supreme Court in the same case above cited, and also by the Privy Council in the recent case of *Rabot v. Silva*.[1] Hence, in view of the fact that the living law of Ceylon recognizes the marriage of adulterers and the validity of testamentary gifts from one to the other, it is no longer possible to contend that such persons living in this country suffer from any of the disabilities imposed on them by the Roman-Dutch law.

"The only difference between the case last cited and the present one is, that in the former the testator married the woman with whom he had been living in adultery after she became a widow, while Mr. Young had not married Loku Nona. That, however, is not an element which has in any way influenced the decisions regarding the principle. Applying the same reasoning which was applied both by the Supreme Court and by the Privy Council in their decision, that the Roman Dutch law no longer applied to the question of marriages between persons who had lived in adultery, because adultery was not an offence in this country, it must be similarly held that testamentary gifts made by and between such parties are no longer obnoxious to our law. The one was a necessary corollary to the other."

The learned District Judge declared the will proved.

The caveator appealed.

Bawa (with him *Elliott*), for the executor-respondent, took the preliminary objection that the appellant had no interest in Young's estate, whether the will was held proved or not. If the present will was held to be invalid the will of 1908 would revive ; under that will the appellant took nothing. To object to a will, a person must have some interest in the estate. This objection was ruled out by the District Judge as having been taken at too late a stage of the case. (Lascelles C.J.—It is not necessary to entertain the objection at this stage. If in the course of the argument it becomes necessary it will receive our attention.)

Sampayo, K.C. (with him (*H. J. C. Pereira*)), for the appellant.—The will was bad by reason of the undue influence exercised by Loku Nona. Counsel cited *Mountain v. Bennett*,[2] *Mars v. Tyroll*,[3] *Tyrrell v. Painton*,[4] *Wingrove v. Wingrove*.[5]

Under the Roman-Dutch law a person cannot bequeath anything to a person with whom he was living in adultery. The case of *Rabot v. Silva* [1] is no authority for the proposition that under the present law of Ceylon such bequests are valid. All that was decided there was that parties who had lived in adultery are not incapacitated under the present law from marrying one another. Once the parties are married there is no law which would prohibit bequests between

[1] *(1907) 12 N. L. R. 81.*
[2] *1 Cox 353 ; English and Irish. Cases 448, at page 460.*
[3] *2 Haggard's Reports 84 (page 87).*
[4] *(1894) Probate 151.*
[5] *11 Probate 81.*

April 12, 1911

Jane Young v. Loku Nona

husband and wife. *Rabot v. Silva* is no authority in the present case, as Young had not married Loku Nona.

The District Judge was wrong in ordering the caveator to pay the petitioner's costs. The will was quite unexpected ; the caveator had sufficient grounds to put the petitioner to the proof of the will by her opposition. *Orton v. Smith*,[1] *Wilson v. Basill.*[2]

Bawa, for the executor.—Adultery is no longer a crime under our law. The reason for making the bequest invalid under the Roman-Dutch law does not exist now. *Rabot v. Silva* is a direct authority in favour of the respondent. Counsel also referred to *Sendris Appu v. Santakahamy*,[3] *Rabot v. Silva*,[4] *Karonchihamy v. Angohamy.*[5]

The Supreme Court has often held that an order as to costs should not be varied in appeal, except for very grave reasons. See *The Government Agent of Uva v. Banda.*[6] Counsel also referred to *Williams on Executors*, 10 *ed., pp.* 247 *and* 286 ; *Peris Will Case.*[7]

Labrooy (with him *Molamure*), for the second respondent (legatee), cited *Sendris Appu v. Santakahamy.*[8]

Sampayo, K.C., in reply.—Adultery was a crime under the Roman-Dutch law, and two consequences flowed from it: one was personal—marriage between the parties was forbidden ; the other related to property—bequest by one to the other was rendered invalid. These two consequences were independent of each other. In *Rabot v. Silva*[9] the Privy Council only declared that the marriage between the parties was valid. Counsel also referred to *Davies v. Gregory.*[10]

Cur. adv. vult.

April 12, 1911. LASCELLES C.J.—

This is an appeal from a judgment of the District Court of Kandy making absolute an order *nisi* declaring the will of the late Mr. P. D. Young to be proved.

The first of the six issues with regard to which any question now arises is whether Loku Nona, who is the sole beneficiary under the will, is entitled in law to take under the will.

The question involved is whether Loku Nona is incapacitated from taking under the will by the rule of the Roman-Dutch law, which prohibits bequests by a man to a woman with whom he has lived in adultery. In my opinion the question is concluded by previous decisions of this Court. In *Karonchihamy v. Angohamy.*[5] the question was whether it was illegal in Ceylon for a man who had lived in adultery with a woman during the lifetime of his wife to

[1] *3 Probate and Divorce 23.*
[2] *(1903) Probate 239.*
[3] *(1910) 13 N. L. R. 237.*
[4] *(1905) 8 N. L. R. 82 : (1907) 10 N. L. R. 140.*
[5] *(1904) 8 N. L. R. 1.*
[6] *(1910) 13 N. L. R. 341.*
[7] *(1906 9 N. L. R. 14, at page 25.*
[8] *(1910) 13 N. L. R. 237, at page 240*
[9] *(1909) 12 N. L. R. 82.*
[10] *3 Probate and Divorce 28.*

marry such woman after the death of his wife. It was there decided that the rule forbidding such marriages was no part of the law of Ceylon.

In *Rabot v. Silva* [1] a bequest to a woman with whom the testator had previously lived in adultery was upheld by the Full Court. Hutchinson C.J., quoting from *Voet* 34, 9, 3, pointed out the principle on which the prohibition was based. Under the Roman-Dutch law the bequest was bad even if the testator married the woman, but that was because *ipsum matrimonium ob proecedens adulterium invalidum pronunciatur,* a rule which it was decided in *Karonchihamy v. Angohamy* has no application in Ceylon. Wendt J. in the same case held that the prohibition depended upon the peculiar reprobation with which the law regarded such a connection, and when that view of the law was so far modified as to permit of a lawful marriage being contracted between the guilty parties, the prohibition disappeared.

In the Privy Council the judgment proceeded upon somewhat different grounds, and it may be contended that the judgment applies only in cases where a valid marriage had been subsequently contracted between the persons who had lived in adultery. But the language of the last paragraph of the judgment, in my opinion, goes further, and supports the view taken in the Ceylon Courts, that the Roman-Dutch rule with regard to the effects of adultery is not authoritative in Ceylon. Whether or not this be the construction of the judgment of the Privy Council, the decision in this Court of *Rabot v. Silva* is unaffected, and is conclusive of the present question. The third issue must therefore be answered in the affirmative.

His Lordship dealt with the other issues, and continued :—

With regard to the issue of "undue influence," the appellant contended that Loku Nona had acquired an influence over the testator of the character described in *Mountain v. Bennett*,[2] namely, a dominion acquired by any person "over a mind of sufficient sanity to general purposes and of sufficient soundness and discretion to regulate his affairs in general," which nevertheless prevented the exercise of such discretion.

Now, throughout the case there is no evidence that Loku Nona exercised any dominion or ascendency over the mind of the testator, or that he acted otherwise than as a free agent either in the ordinary affairs of his life or in the execution of this will. We are asked to infer the existence of such an influence from the fact that the will now propounded does not contain the legacies to friends and charities which appeared in the wills which the testator made in 1904, 1906, and 1908 ; from the part which the testator and Loku Nona took in repelling Mr. Scott's well-intentioned, but entirely unlawful, attempt

[1] *(1907) 10 N. L. R. 142.*

[2] *1 Cox. 355.*

April 12, 1911

LASCELLES, C.J.

Jane Young v. Loku Nona

to remove him forcibly from his estate in January, 1909 ; from the dislike which the testator evinced to Mr. Gourlay, when the latter came to the estate in April, 1908 ; and from similar circumstances. An explanation of each of these circumstances, if indeed they call for any explanation at all, can readily be given. The plea of undue influence fails entirely in my opinion. I can find no evidence whatever that Loku Nona exercised any influence whatever over the testator in business matters.

The only other point which remains for consideration is that of costs. The learned District Judge was of opinion that the opposition had been most rashly embarked upon and most rashly persisted in, and he condemned the caveator to pay the petitioner and the added respondent all their costs consequent on the opposition.

I think that this decision is too hard on the caveator. It must be admitted that the circumstances under which this will was made, the relations between the testator and the beneficiary, the intemperate habits of the testator, and the conduct of the attesting notary, afforded ground for reasonable suspicion with regard to the due execution of the will. On the other hand, the plea of "undue influence" was advanced and persisted in without justification. Witnesses were cross-examined and examined at enormous length on the chance of eliciting something in support of this plea, with the result that the trial has been unduly protracted and very heavy costs have been incurred. I think that the caveator may fairly be relieved of the order to pay the costs of the petitioner and the added respondent, but I do not think that it would be proper to direct her costs to be paid out of the estate. In this connection it is material that her interest in opposing the will is remote. It would appear to depend upon the double contingency of probate being refused to the present will, and of the will of 1908 being lawfully revoked.

In the result the judgment of the District Court is confirmed, except so far as it orders the caveator to pay the costs of the petitioner and of the added respondent.

GRENIER J.—

I have had the advantage of reading the judgment of my lord, and as I am in complete agreement with him on all the points discussed in it, it is needless to go over the ground already covered. I agree to affirm the judgment of the Court below, and I also agree to the order as to the costs of the caveator.

Appeal dismissed.