1898. *May 20.*

In the Matter of the Last Will and Testament of KOLAMBAPATA-BENDIGE ABRAHAM PERERA, of Horatuduwa, deceased.

K. HARAMANIS PERERA and another, Applicants and Respondents.

And

K. JOHANA PERERA and eleven others, Respondents and Appellants.

D. C., Kalutara, 130.

Will—Execution in presence of five witnesses—Presence of notary—Validity of will—Roman-Dutch Law—Ordinance No. 7 of 1840, s. 3.

Per BONSER, C.J., and WITHERS, J. (*dissentiente* LAWRIE, J).—Under section 3 of Ordinance No. 7 of 1840 it is optional for an intending testator to make his will before a notary public or before five or more witnesses. The mere presence of a notary public when a will is executed before five witnesses does not render it invalid.

Per BONSER, C.J.—By the law of Holland a will might be made either before a notary and two witnesses, or without a notary by a will signed by the testator and seven witnesses.

By Ordinance No. 7 of 1834 the testamentary power was enlarged on the one hand and contracted on the other. It was provided that no devise of immovable property should be valid unless duly attested by a notary and two witnesses. On the other hand, a testator *in extremis* was allowed to make a nuncupative will in presence of two witnesses, who were to reduce it to writing and within twenty days from the death make a declaration before a notary. A will of movables signed by a testator in the presence of seven witnesses was still valid.

The Ordinance No. 7 of 1840 makes no distinction between wills of movables and wills of movable property. It abolished nuncupative wills, and reduced the number of witnesses required to attest a non-notarial will from seven to five.

The intention of the Legislature was to restore the option that testators had under the Roman-Dutch Law of having their wills either notarially attested or attested by witnesses.

The words in section 3 of Ordinance No. 7 of 1840, "if no notary shall be present," mean "if a notary shall not be present in his notarial capacity," or, in other words, "if the will be not attested by a notary."

IN this case two persons applied for probate of a will, bearing dated 5th June, 1896, said to have been executed by one Abraham Perera and his wife Johanna. Abraham Perera died on 10th June, 1896, five days after the execution of the will, leaving him surviving his widow.

After the application for probate was made she and two other persons interested in the estate of the deceased Abraham Perera appeared before the Court and objected to the will being admitted to probate. Their objections were heard by Mr. Haughton, District Judge, on 4th November, 1896, and on the 10th December,

1896, he made the order *nisi* absolute. An appeal was lodged against this order by some of the respondents, and the Appellate Court in setting aside this order remitted the case to the Court below for further inquiry on the following issues :—

(1) Did the deceased Abraham Perera put his mark to the paper sought to be propounded as his last will ?

(2) Was he of sound mind when he signed the document by his mark ?

The case came on for trial on these two issues before Mr. Roosmalecocq, who delivered the following judgment :—

" The notary who drew up the will states that he received instructions from the deceased Abraham Perera to draw it on the evening of 1st June, 1896, and he explains why he did not attest it in the usual way, namely, because the eighth respondent, Mututantrige Siman Fernando (the real opponent), threatened that he would impeach the will and spend hundreds of pounds in so doing, as he had heard that a valuable piece of land situate in the Cinnamon Gardens, Colombo, and which he claimed as his property, was to be included in the bequest made by the will. I shall advert to the subject of this land later on in my judgment. The notary further explains how the will was signed by a cross or mark only by the deceased, namely, because he was in too feeble a state to sign his name as usual, and this explanation has been fully borne out by the evidence of the attesting witnesses to the will. The widow (Johanna Perera) admits having signed the will in no less than six places, and she admits further that she saw the mark put on each of these six places as and for the signature of her husband at the time she signed, and she did not then question the fact that her husband himself had made this mark.

" So far, therefore, everything in connection with the making of the will and its being signed by the deceased man and its execution according to the requirement of the law seems to be satisfactorily proved, but then comes the question, Was the deceased of sound mind, memory, and understanding when he placed his mark on this paper propounded as his last will and testament ?

" To prove this and to prove the contrary no less than four medical men have been called. A Sinhalese vedarala and a young medical practitioner living in Moratuwa near the residence of the deceased Abraham Perera, both of whom seem to have been his regular medical attendants in his last illness, and two gentlemen holding high positions in Colombo and reputed to be the ablest men in their profession in the Island, namely, Dr. Rockwood and Dr. Marcus Fernando. But the only one of these

1898.
May 20.

medical witnesses whose evidence is of any practical value for the determination of the second issue to be tried by the Court is Dr. Rockwood, who saw the deceased on the evening of the 2nd June, 1896. Dr. Rockwood distinctly proves that the deceased was then in such a comatose lethargic state that he could not possibly have given any instruction regarding the disposition of his property, nor could he have spoken anything beyond answering 'yes' or 'no' to questions put to him; but the learned medico never saw his patient again, and he admits that it is just possible that the deceased might have rallied a little before he died. So that there is still the possibility of the deceased being able on the night between the 4th and 5th days of June to understand what was being done when the will was read out to him and when he put his mark to this document, and it must be distinctly noted that the instructions to the notary to draw the will were given on the evening of the 1st June, twenty-four hours before Dr. Rockwood saw the deceased. I think, therefore, that the evidence of the notary (a very respectable man) and of the attesting witnesses, particularly of the aged man Lewis Fernando, a brother of the opponent, Siman Fernando, should not be lightly brushed aside and treated as untrustworthy, strange as may appear some of the circumstances surrounding the execution of the will.

"The evidence of the medical attendant, Dr. Fonseka, clearly proves that a suggestion was made to the deceased to make his last will on some date between 30th May and 2nd June, and this witness goes so far as to admit that the deceased was on the 1st June sufficiently rational to make his will. This admission, coming from the son-in-law of the opponent, Siman Fernando, affords, I think, strong corroboration of the evidence given by the notary and attesting witnesses. Now, as to the evidence of the widow, she never attempted, when she filed her disclaimer through learned counsel on 12th October, 1896, to impeach the will in the manner she has done, since she never entered a caveat, and she admits she asked no questions about the deceased being able to put his mark to the will in six places, although she now avers that he had been unable to speak or to move from his bed for six or seven days before he died. On looking through the notes made by Mr. Haughton when he heard the argument of counsel in November, 1896, I find it recorded that Mr. Dias (counsel for the widow) said: 'First respondent admits the signing of the will, and has only a law issue for decision.' This clearly shows that she has been prompted by others to withdraw from her former attitude.

" Then, so as the crux of the opposition by the respondent, Siman Fernando. His own affidavit, filed on 19th August, 1896 (letter D), shows that he was playing a deep game, for he then deposes that Abraham Perera had left no will, whereas he knew that a will was about to be drawn on 4th June; and the affidavit filed by him on 26th October shows that his chief objection to the will was the inclusion of the valuable piece of land situate in Cinnamon Gardens, Colombo, which he claims as his own property. He has produced the Crown grant for it, and this appears to be made out in favour of Kolombapatabendige Abraham Perera, the deceased testator. A reference to the 15th clause of the will shows, too, that this valuable bit of land, estimated in the inventory to be worth Rs. 7,500, has been specially devised to the widow to be sold and the proceeds spent in building a suitable house for her to live in—a clear proof that she had a hand in giving instructions for the will to be drawn. All these circumstances go to show that the opposition to the will on the ground of the unsoundness of mind of the testator is not made *bonâ fide*, and that the opponents have been actuated by other motives. It was contended by the learned counsel for the opponents that Johannas de Mel was the real originator of the will, and that he conspired with the attesting witnesses to get it drawn by the notary, so as to get certain benefits under it for his wife. I do not deny that there is some cause for this allegation, but, as I said before, not a single person has ventured to enter a caveat against the will and to impeach it on the ground of fraud or undue influence.

" As the matter stands before the Court now, I find on the two issues framed by the Appellate Court that (1) the deceased Kolombapatabendige Abraham Perera did put his mark to the paper (marked letter A and bearing date 5th day of June, 1896) sought to be propounded as his last will; and (2) that the said K. Abraham Perera was of sound mind when he signed the said paper by his mark.

" I therefore admit the said paper (letter A dated 5th June, 1896) to probate and make the order *nisi* entered in this case on 19th September, 1896, absolute. I further make order that the applicants, as executors of the will, do recover all their costs from the date of the said order from the fifth and eighth respondents (K. Bastian Perera and Mututantrige Siman Fernando), and that the widow (first respondent) do bear her own costs."

The fifth, sixth, seventh, and eighth respondents appealed.

Dornhorst, with *Morgan*, *Pieris*, and *Asserappa*, for appellants.

Grenier, with *W. Pereira* and *Rudra*, for applicants, respondents.

Cur. adv. vult.

1898.
May 20.

20th May, 1898. LAWRIE, J.—

By the Ordinance No. 7 of 1840, section 3, it is enacted that 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 signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and each signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, 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 and 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.

In my opinion this clearly means that a will subscribed in presence of five or more witnesses without a notary's attestation shall be valid only if no notary be present.

In the present case of the will the evidence led shows that a duly licensed notary public received instructions from the testator, that he carried out these instructions by drawing a will, that he brought that will to the house of the intending testator, and that a notary refused to attest the will, and that it was signed by the testator and five witnesses in the notary's presence, he taking no part in the signing.

This will, then, in my opinion, is not valid; it was executed in the presence of a notary, but it was not attested by him. It is not a document which can be admitted to probate, and I would set aside and dismiss the application with costs.

BROWNE, A.J.—

Section 14 of Ordinance No. 7 of 1840 and the decision in *9 S. C. C.* 146, have enlarged the opportunities for notarial attestation of any will by permitting any licensed notary whatsoever to attest a will, though the body of it be written in a language in which he may not be licensed to practise, and the place where it is executed is not within the district for which he is licensed. I therefore do not see why the words in section 3 of Ordinance No. 7 of 1840, "if no notary shall be present," should be construed as meaning anything else than the simple bodily presence on the occasion of any one who is then a licensed notary for any place and any language in Ceylon. If such a person be present, I would hold with my brother that he must as notary attest the execution of the will to give it due legal validity.

These judgments were brought up in review preparatory to an appeal to Her Majesty in the Privy Council, before BONSER, C.J., and LAWRIE and WITHERS, J.J.

Layard, A.-G., appeared for appellants.

Walter Pereira, for respondents.

Cur. adv. vult.

WITHERS, J.—

In this case we are called upon to review a decision of my brother LAWRIE and Mr. Acting Justice BROWNE, who held that a will made in the presence of five witnesses at the same time and subscribed by the witnesses in the presence of the testator was invalid, because at the time and place when the will was so made there was present a notary public of the district, licensed to practise in the language of the will. These testamentary proceedings had been the subject of a previous appeal to this Court, and the record had been remitted to the Court below to try and determine the following two issues: "Did the deceased "Abraham Perera put his mark to the paper sought to be pro-"pounded as his last will?" "Was he of sound mind when he "signed the document by his mark?" Both issues being found in favour of the propounder, the instrument was admitted to probate. The judgment of the Court below was appealed from, and I understand that, when it transpired in the course of argument that a notary was present when the will was being made, it was suggested by one or other of the learned Judges that the will so made was inoperative by reason of the provisions of section 3 of Ordinance No. 7 of 1840, entitled "An Ordinance "to provide more effectually for the prevention of Frauds and "Perjuries." The 3rd section of that Ordinance enacts "that "no will 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 in his presence "and by his discretion, and such signature shall be made or "acknowledged by the testator in the presence of a licensed notary "public and two or more witnesses, who shall be present at the "same time and duly attest at such execution; or if no notary "shall be present, then such signature shall be made or acknow-"ledged by the testator in the 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." Section 8 of the same Ordinance further enacts "that every will executed in manner hereinbefore required

1898.
May 20.

WITHERS, J.

"shall be valid without any other publication thereof, *i.e.*, during "the lifetime of the testator or testatrix."

The facts of the case before us are briefly these. When this will was being executed there was present a notary public competent to attest its execution, but he declined to act as a notary in the matter. Different reasons were suggested for his declining to act. So long as he did decline to act—and this is admitted—I do not think it matters what his reasons were. What, then, is the meaning of the words in the 3rd section of Ordinance No. 7 of 1840, "or if no notary is present." I must confess that until the judgment in review was read to us, I had always understood this section to mean that it was optional for an intending testator to make his will before a notary public or before five or more witnesses. The contrary opinion of the two learned Judges who concurred in that judgment naturally arouses a distrust in my own opinion. At the same time, and with all deference to those learned Judges, I retain the opinion which I always had on the matter.

The mere presence of a notary incompetent from some affection of the mind or body to perform the functions of a notary would prevent the testator from summoning five witnesses to attest the execution of a will, which it might be of the utmost importance immediately to execute. The intention of the section is to my mind best brought out if we mentally add the words "for that purpose," *i.e.*, if no notary shall be present for that purpose. In other words, you can call in a competent notary to make your will. If you do not choose to employ a notary, you can call in five or more witnesses. The learned Attorney-General argued that if the Legislature had intended to give a testator such a free option the Legislature would have expressed itself in clear, unambiguous language. To my mind this intention is clearly enough expressed.

In my opinion, the judgment in review should be reversed and the judgment in the Court below restored.

LAWRIE, J.—

An Ordinance of the Legislature of Ceylon must be construed in the same way as an English Act of Parliament. "We must "apply the rule of construction that an Act of Parliament is to be "construed according to the ordinary meaning of the words in the "English language as applied to the subject-matter, unless there "is some strong ground derived from the context why it should "not be so construed."

The words "or if no notary shall be present" are unambiguous.

It is unnecessary to discuss the question (asked by the Chief Justice in his judgment) whether a man be present, if he be asleep, or drunk, or of unsound mind, nor is it necessary to determine what proximity constitutes presence, for in the case before us the notary was of sound mind, he fully understood and indeed directed what was done, he was in the room where the sick man lay. It seems to me unnecessary to enter on the question whether, if a notary was present, not in his professional capacity, but as a friend or relation or as an accidental visitor, it could be said that a notary was present. For here the notary was present as notary; he had been instructed to draw up a will at the request of the intending testator; he brought it prepared for signature; the testator desired him to attest it. The notary gave professional advice. He advised that the will prepared by him should be signed in the presence of five witnesses; he said that the will would be valid if so signed. He was present when the testator made a mark and when five witnesses signed. His clerk (whom he had brought with him) wrote an attestation clause. If ever a notary was present, he was present on the occasion referred to. To me it seems clear that the Legislature enacted that a will made in a notary's presence is invalid unless he attest it. This will was in fact signed in the notary's presence, and in fact he did not attest it; if he believed the testator to be of sound mind and understanding, he was bound to attest it; it was unlawful to refuse to perform the duties of his office.

The Ordinance No. 7 of 1840 was passed to provide more effectually for the prevention of frauds and perjuries. In Ceylon two of the evils to be prevented were forgery and perjury.

Confidence was placed in the integrity of notaries public; the Legislature enacted that no writing permanently affecting immovable property should be valid unless executed before a notary.

The next section enacted that all wills must be executed in the same way as writings affecting lands—they too must be executed before a notary, but an exception was introduced in favour of wills made when no notary was present. In such a case (but in no other case) would a will be valid if executed before witnesses only. The absence of a notary excuses the want of a notary's attestation, but there is no other excuse. This will, in my opinion, cannot be admitted to probate because its execution by the testator and witnesses was not attested by the duly licensed notary public, who, it is proved, and whom himself admits, was present.

1893.
May 20.

BONSER, C.J.—

The only question before us on this application for review is, whether a will was validly executed which was signed by the testator in the presence of five witnesses, who at the same time and in the presence of one another and the testator subscribed their names as witnesses. The circumstances under which the will was executed appear to be as follows.

The testator gave instructions to a notary to prepare a will to be executed before and attested by the notary in the usual way. The notary prepared the will according to the instructions and took it over and explained it to him. The testator being satisfied that it carried out his wishes prepared to execute it then and there in the presence of the notary and two witnesses. The notary, however, declined to attest the will, being unwilling, as he says, to offend an influential client, who objected to the will. He suggested that another notary should be sent for, and accordingly another notary was sent for, but was unable to come. The notary then went away, taking the draft with him. The same evening he was sent for by the testator and went to the testator's house with the draft will. The testator again requested him to attest the will. He again refused to do so, and suggested its being signed by the testator and five witnesses. Five persons were then called into the room, and in their presence the testator signed the will, and they in the testator's presence and in the presence of one another subscribed their names as witnesses.

It has been held by this Court in the judgment under review that the will is invalid because the notary was in the room at the time the will was signed.

The validity or otherwise of the will depends on section 3 of Ordinance No. 7 of 1840, which runs as follows : " And it is further " enacted that 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 whatever, 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 some other person in his presence and " by his direction ; and such signature shall be made or acknow- " ledged by the testator in the presence of a licensed notary " public and two or more witnesses 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."

It will be useful to ascertain the state of the law as to testamentary instruments at the date of the passing of Ordinance No. 7 of 1840.

By the law of Holland a will might be made either before a notary and two witnesses, or without a notary by a will signed by the testator and seven witnesses.

By Ordinance No. 7 of 1834 the testamentary power was enlarged on the one hand contracted on the other. The power of making a will without a notary was taken away as regards immovable property, and it was provided that no devise of immovable property should be valid unless duly attested by a notary and two witnesses. On the other hand, a testator *in extremis* was allowed to make a nuncupative will in presence of two witnesses, who were to reduce it to writing and within twenty days from the death make a declaration before a notary. A will of movables signed by a testator in the presence of seven witnesses was still valid.

The Ordinance No. 7 of 1840 made no distinction between wills of movables and wills of immovable property. It abolished nuncupative wills and reduced the number of witnesses required to attest a non-notarial will from seven to five, possibly because five was the number of witnesses required by the later Roman Law.

Van Leeuwen, in his Commentaries (3, 2, 7), states that wills executed before a notary and two witnesses were in his time considered to include and be of equal validity with those executed before five witnesses ; for by the Roman Law a notary alone had as much credit as three other witnesses, and that he being added to the two witnesses made up the required number of five witnesses.

The Attorney-General contended that the Ordinance of 1840 did not give testators the option between a notarially executed will and a will executed attested by five witnesses, but that if it was possible to obtain the presence of a notary it was not competent to a testator to make any other than a notarial will.

It seems to me that that would be a very inconvenient state of the law, for in that case it would be necessary, whenever a non-notarial will is propounded, to inquire whether the attendance of a notary could have been procured. To my mind it would seem more reasonable to hold that the Legislature intended to restore the option that they had under the Roman-Dutch Law of having their testaments either notarially attested or attested by witnesses.

I construe the words "if a notary shall not be present" to mean "if a notary shall not be present in his notarial capacity," or, in other words, "if the will be not attested by a notary." Some

1898.
May 20.

qualification of the words is obviously necessary. Is the presence of a notary who is drunk or asleep, or lunatic, or not known to be a notary, or mad, or otherwise incapacitated from acting, a presence within the meaning of the Ordinance? I think not, and I am of opinion that the mere presence of a notary in the room, when this will was executed, did not render it invalid.