Present: Dalton and Akbar JJ.

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GOONEWARDENE *v.* GOONEWARDENE.

207—D. C. (Inty.) Galle, 6,510.

Last will—Bequest of money invested in mortgage bonds and promissory notes—Confirmation of will by codicil—Increase of investments—Effect of codicil—Ordinance No. 21 of 1844, s. 5.

A testator by his last will dated August 7, 1913, bequeathed to his wife "all the moneys now invested by me on mortgage bonds or promissory notes and all cash in deposit to my credit in my No. 2 account, subject to the direction that she is to have the interest derived therefrom up to the time of her death or re-marriage. Thereafter the same shall vest absolutely in my three nieces."

By a codicil dated August 9, 1927, he made fresh bequests and declared as follows:—"Save as hereby altered or modified, I hereby confirm the said will."

In August, 1913, the deceased had a sum of Rs. 39,000 invested on mortgage bonds and promissory notes and Rs. 1,250 in No. 2 account. These bonds or notes were not in existence in 1927, but at the date of the codicil he had a sum of Rs. 214,300 invested in bonds and promissory notes and a sum of Rs. 6,920 in No. 2 account.

Held, that the nieces of the testator were entitled to the reversion of all the moneys invested on mortgage bonds and promissory notes and all the cash in deposit in No. 2 account at the date of the codicil.

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APPEAL from a judgment of the District Judge of Galle.

D. G. G., by his will dated August 7, 1913, directed *inter alia* as follows:—"I give and bequeath to my said wife all the moneys now invested by me on mortgage bonds or promissory notes and all cash in deposit to my credit in my No. 2 account in the Mercantile Bank of India, Ltd., Galle, subject to the direction that she is to have the interest derived therefrom up to the time of her death or remarriage as aforesaid. Thereafter the same shall vest absolutely in my three nieces . . . ."

"I make the following bequests . . . . (2) The rest and residue of my cash found in my possession at the time of my demise and also the money in deposit to my credit in my No. 1 account in the Mercantile Bank of India, Ltd., Galle, in the Bank of Madras, Colombo, in the Government Savings Bank, and in the Post Office Savings Bank, and the amount of my policy of insurance, together with the profit thereof, and all other movable property absolutely to my said wife Margaret."

By a codicil dated August 9, 1927, he made a few fresh bequests and declared as follows:—"Save as hereby altered or modified, I hereby confirm the said will."

In August, 1913, the deceased had a sum of Rs. 39,000 invested on mortgage and promissory notes and Rs. 1,250 in his No. 2 account in the Mercantile Bank. None of these bonds or notes were in existence in 1927, but in August, 1927, the deceased had the sum of Rs. 214,300 invested in bonds and promissory notes and the sum in the No. 2 account amounted to Rs. 6,920.

The contest was between the widow and her nieces. The former contended that she was entitled absolutely to the sum of Rs. 214,300 which was invested subsequent to the date of the will and to the money in No. 2 account. The District Judge held that the effect of section 5 of Ordinance No. 21 of 1844 was to bring the date of the will down to the date of the codicil, and that accordingly the nieces were entitled to the reversion of the Rs. 214,300 and Rs. 6,920. The widow appealed.

Soertsz, for appellant.—Roman-Dutch law principles must be applied in this case. The District Judge has based his judgment on English law. Even if this is applicable the District Judge is wrong. Ordinances No. 7 of 1840 and No. 21 of 1844 must be considered. Provisions of Ordinance No. 21 of 1844 have been taken over from the Wills Act, 1837. Section 5 of that Ordinance has the words "for the purpose of this Ordinance". Wills that were bad for non-compliance with the old regulations could be made valid by the testator confirming it by a codicil.

This will is dated 1913, " now " means in 1913. All investments after 1913 went under the residuary clause to the widow.

A codicil has a very much more limited effect under our law than under English law. If English law applies, the presumption is that wills should be read as though made at the death of the testator, yet if there is a contrary intention in the will itself that presumption will not arise. Further, this is a specific bequest and as the bonds and notes were realized the legacy was adeemed. But Roman-Dutch law has application (*Mohamed Cassim v. Hassen*[1].) English law has been introduced into Ceylon for certain purposes by Ordinances No. 5 of 1852 and No. 22 of 1866. When not so introduced, the common law must apply.

[AKBAR J.—If Roman-Dutch law applies, how does it help you?]

In Roman-Dutch law there is no presumption that wills must be read as made at date of death.

The word " now " must be given a meaning (*Cole v. Scott.*[2] *Hutchinson v. Barrow,*[3] *Lloyd v. Hatchet*[4]).

This was a specific bequest and hence there was an ademption in English law and a revocation in Roman-Dutch law. With regard to ademption see *Theobald on Wills 175, 178, In re Slater.*[5]

If the legacy was a debt due to testator and the debt had been paid the legacy failed (*Re Pilkington's Trusts,*[6] *Stanley v. Potter,*[7] *Fryers v. Morris*[8]).

Same principle in Roman-Dutch law (*1 Maasdorp, 188, 189: 4 Nathan, 1884*).

We now come to the question of the codicil and what effect it has on the will. It does not operate to bring the date of the will down to the date of the codicil. Section 24 of the Wills Act was not taken over in its entirety by our Ordinance. Effect of codicil limited to " for the purpose of the Ordinance."

[DALTON J.—Why does not this will executed in 1913, confirmed by codicil, gain the benefit of section 5 of our Ordinance?]

Because it is not such a will as contemplated by the section, *i.e.*, because the will was a good one. Section 5 only dealt with invalid wills. Even under present canditions a will made by a male under 21 can be revived by codicil. Similarly a will made by a Ceylonese in France (*Brooks v. Kent,*[9] *In re Park*[10]).

[1] *29 N. L. R. 89.*
[2] *1 Macnaghten and Gordon's Reports (1849), 518.*
[3] *6 Hurlstone and Norman's Reports, 583 (592).*
[4] *L. R. (1920) 2 Ch. 1.*
[5] *(1907) 1 Ch. 665.*
[6] *6 New Reports (April-August, 1865), 246.*
[7] *2 Cox's Equity Cases, 180.*
[8] *9 Ves. Jr.'s R. (1803-04), 360.*
[9] *3 Moore (P. C.), 344.*
[10] *(1910) 2 Ch. 322.*

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The testator has taken special care to direct where after-acquired property is to go.

The codicil could not revive things that ceased to exist (*Moxon v. Crassley*,[1] *Pouys v. Mansfield*,[2] *Hopwood v. Hopwood* [3]). District Judge applied *In re Reeves*,[4] but that could be distinguished. Section 24 of the Wills Act was applied in that case. Section 24 is not law in Ceylon.

H. V. Perera (with *N. E. Weerasooria*), for respondent.—In dealing with money in a will it is usual to use the words " at the time of my demise " to describe this money, but this expression must not be taken to mean that the testator meant to draw a distinction with regard to point of time between money and some other class of property mentioned elsewhere in the will without such words of qualification.

Section 24 of Wills Act is not a new rule at all. The object of this provision was to extend the rule applying to personal property—that will speaks from time of death—to real property (*In re Chapman*[5]).

In Ceylon there is not the same distinction between movable and immovable property as there is between personal and real property in England. Property movable and immovable pass immediately to heirs (*Silva v. Silva*[6]).

" For the purpose of this Ordinance " in section 5 is for the purpose of dealing with all his property (*vide* section 1 of Ordinance). Meaning of republication and revival (*Theobold on Wills, p. 70*).

To find out the extent of devise both instruments must be looked at. English law is correctly set out in *In re Reeves* (*supra*). No reason why this should not be applied in Ceylon. There is no substance in any of the appellant's contentions owing to section 5 of the Ordinance. *Brooks v. Kent* (*supra*) supports view taken by Russel J. in *In re Reeves* (*supra*).

[AKBAR J.—You are relying on section 5 and the codicil; suppose there was no codicil?]

Then under English law section 24 would apply. Sections 1 and 5 of our Ordinance should be read together. Even if there was no codicil it is submitted that after-acquired property passed. There being a codicil my case is stronger (*In re Pope*[7]).

One must read the will as if dated the same as the codicil.

Soertsz, in reply.—It is wrong to impute an intention to the testator and then to see whether the language expresses that intention. We must not assume that the testator was dealing with his property in classes. We must ascertain the intention as expressed.

[1] *(1927) 1 Ch. 364.*
[2] *3 Mylne and Craig's R., 359.*
[3] *7 H. of L. Cases, 728.*
[4] *(1928) 1 Ch. 351.*
[5] *(1904) 1 Ch. 431 (435).*
[6] *10 N. L. R. 234.*
[7] *(1858) 4 Jurist 651; (1901) 1 Ch. 64.*

With regard to section 5, " for the purpose of the Ordinance " means for the purpose of applying to wills made before 1844. Its object was to enable the testator to take advantage of any old will.

Mortgages on immovable property are movables.[1]

With regard to word " now " (*vide Harrison v. Jackson*,[2] *McClelean v. Clark*,[3] *In re Robe*[4]).

July 30, 1929. DALTON J.—

This case raises some interesting and difficult questions in connection with the construction of a will and codicil. The difficulties arise in part from the fact that some of the questions do not seem to have come before our Courts before. The testator, who was Crown Proctor at Galle, died on August 22, 1927, leaving a will dated August 7, 1913, and a codicil dated August 9, 1927. The material parts of the will are as follows:—

" I give and devise to my beloved wife Margaret my residing house ' The Mound ' together with the land about four acres in extent whereon the said house is built . . . . provided, however, that my wife shall not have the right to sell, gift, mortgage, or otherwise alienate the same but shall possess the same up to the time of her death or remarriage, whichever happens first. After her death or remarriage the said properties shall vest absolutely in my three nieces . . . ., all of Kurunegala.

" I give and bequeath to my said wife all the moneys now invested by me on mortgage bonds or promissory notes and all cash in deposit to my credit in No. 2 account in the Mercantile Bank of India, Ltd., Galle, subject to the direction that she is to have the interest derived therefrom up to the time of her death or remarriage as aforesaid. Thereafter the same shall vest absolutely in my three nieces."

" I make the following bequests:—

(*a*) My brilliant ring . . . . to my nephew . . . .;
(*b*) My fitted suit case to our nephew and godson . . . .;
(*c*) My small dressing case . . . . to my nephew . . . .;
(*d*) My gold watch and chain . . . . to my nephew . . . .;
(*e*) My brilliant ring . . . . to my brother-in-law . . . .;
(*f*) My set of Encyclopædia Brittanica . . . . to my niece . . . .; and

[1] *2 Maasdorp 2.*
[2] *7 Ch. D. 339.*
[3] *50 L. T. 616.*
[4] *61 L. T. 497.*

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(*g*) The rest and residue of my cash found in my possession at the time of my demise and also the money in deposit to my credit in my No. 1 account in the Mercantile Bank of India, Ltd., Galle, in the Bank of Madras, Colombo, in the Government Savings Bank, and in the Post Office Savings Bank, and the amount of my policy of insurance together with the profit thereof and all other movable property absolutely to my said wife Margaret."

The codicil was as follows:—

"I, David George Goonewardene of Galle, do hereby declare this to be a codicil to the last will and testament made by me and dated the seventh day of August, 1913.

"Save as hereby altered or modified I hereby confirm the said will.

"I give to my servant James in the event of his being in my service at the time of my death the sum of Rupees Four hundred.

"I give, devise and bequeath to Hector Pieris and his sister Florence Ida Pieris in equal shares the house and premises called and known as 'The Bower,' situate in Richmond Hill road, Galle, in which they now reside subject to the condition that they shall not sell, mortgage, or otherwise alienate or encumber the said premises or share thereof and that the said premises or any share thereof shall not be liable to be sold under execution against them or either of them and that on the death of either of them the share hereby devised and bequeathed to him, or her shall devolve on his or her lawful issue and failing such issue on the survivor of them subject to the same conditions and restrictions. In the event of both of them dying without issue the said property shall devolve on the three daughters of my deceased brother Edward Gregory Goonewardene in equal shares.

"In witness whereof . . . . ."

The dispute here is between the widow on the one side and the three nieces on the other. At the time the will was made in August, 1913, the deceased had the sum of Rs. 39,000 invested on mortgage and on promissory notes. None of those bonds or notes in existence on August 7, 1913, were in existence at the time the codicil was made on August 9, 1927. At that latter date however, there was the large sum of Rs. 214,200 so invested, of which Rs. 16,050 was on mortgage bonds and Rs. 53,150 on promissory notes. Further, on August 7, 1913, the sum of Rs. 1,250 stood to the credit of No. 2 account in the bank, whilst at the date of the testator's death on August 22, 1927, the amount was Rs. 6,920.

Shortly stated, it is urged for the widow that the three nieces have no interest in the money left by deceased invested on mortgage or on promissory notes, or standing to his credit in No. 2 account; that what he left to them on the death of the wife was only what he had so invested at the date of the will, and that the large sum of Rs. 214,200 invested subsequent to the date of his will was part of the residue which he bequeathed absolutely to his wife.

The trial Judge has held that the effect of the provisions of section 5 of Ordinance No. 21 of 1844 is to bring the date of the will down to the date of the codicil. He accordingly held that the testator's nieces are entitled to a reversion of the moneys invested on bonds and notes as at the date of the codicil, and also to the cash deposit in No. 2 account in the bank. The widow is now appealing from that decision.

The law applicable is the common (Roman-Dutch) law, as varied or amended by Ordinance. Certain provisions of the Wills Act, 1837 (*1 Vict. c. 26*) have been incorporated in Ordinances Nos. 7 of 1840 and 21 of 1844, whilst some sections of the Ordinances have been adapted from that act. The difficulty arising here, so it seems to me, is the application of the common law, with the emendations copied or adapted from an act in England, that is, as to the extent of the change made by statute in the common law, and the extent of the application that is permissible of English authorities which apply English law and interpret statutes not wholly imported into Ceylon.

It is not necessary to deal with any difference between wills and codicils. Owing to statutory enactments here, as in South Africa, such differences as formerly existed have now for all practical purposes disappeared (*cf.* Lord de Villiers in *Ebden v. Ebden and another* [1] As pointed out in *Kleyn v. Kleyn*,[2] the codicil must be read with the will, and the will and codicil must be construed as forming as far as they can one testamentary disposition. In considering the effects of a codicil upon a will, so far as the time of the making of the will is concerned, one has to turn to section 5 of Ordinance No. 21 of 1844. That section enacts that—

> " Every will re-executed or republished or revived by any codicil shall for the purpose of this Ordinance be deemed to have been made at the time at which the same shall be so re-executed or republished or revived. "

If that section applies in this case, then for the reasons I state below, the testator's will of August 7, 1913, is to be deemed to have been made on August 9, 1927, but only " for the purpose of this Ordinance". This section is clearly an adaptation of section 34 of the Wills Act, 1837. That section provided that the act should not apply to any will made before January 1, 1838, or to any estate

[1] *(1910) A. D. at p. 332.*

[2] *(1915) A. D. 527.*

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per autre vie of any person dying before that date. That provision is not carried into section 5. That may have been due to the fact that some of the provisions of the Wills Act in respect of the execution of wills and codicils had already in 1844 been enacted in Ceylon, in Ordinance No. 7 of 1840. It will be noted however that section 34 contains the words " for the purposes of this act ", which have been imported into section 5 in the words "for the purpose of this Ordinance." I do not think there is any special import in the use here of the singular for the plural. The words however have given me some little difficulty as they do imply a limitation upon the application of section 5. As I state below, however, that limitation, if my view of the law is correct, is not a matter of importance in this case. Mr. Soertsz, for the appellant, has argued that the section can only in practice apply to wills made before the date of the Ordinance, but I am quite unable to so read it. The words "for the purposes of this act" have been considered in the case of *Brooke v. Kent* [1]. The principal object of the Wills Act, 1837, was to provide for one uniform mode of executing wills. That is not the purpose for which Ordinance No. 21 of 1844 was enacted, since the Ordinance dealing with the execution of wills was enacted four years earlier, in No. 7 of 1840. Dr. Lushington points in his judgment to the need of a provision like section 34 in the act, since if it were not there all wills made prior to the passing of the act would immediately become subject to its operation and so become null and void. There was not the same need here in view of the existence of the earlier act, and therefore probably the time limit was dropped when the section was adopted. The provisions in respect of re-execution and republication however were adopted, and with them the words " for the purpose of this Ordinance " were also taken over. All wills therefore became subject to the Ordinance, and it is in my opinion quite impossible to give it the narrow construction for which Mr. Soertsz contended. The words " for the purpose of this Ordinance " however still require to be considered, and they have given me considerable difficulty. I can obtain no assistance, as the section stands, from the above-mentioned case, the provisions dealing with the requirements of execution having no place in this Ordinance. One must turn to the Ordinance and seek the true construction of the section from its provisions, since presumably the words were put there for some purpose. Even if the object of the Ordinance be not one to provide for one uniform mode of executing wills, it is set out in the preamble that it is expedient to provide a " uniform provision . . . . with respect to testamentary dispositions ". The words " for the purpose of this Ordinance " may well be taken to apply to this purpose, although it is not the sole purpose of the Ordinance.

[1] *3 Moore (Privy Council) 344.*

This seems to me to be a reasonable interpretation of the words, and I have heard nothing that leads me to think that such an interpretation is wrong. It is not an easy question to decide, but that is the construction that I would put upon the words. The provisions of section 5 therefore apply in this case.

The absence of any provision in the Ordinance similar to section 24 does not to my mind present any difficulty. That section provides that every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Mr. Soertsz argued that because we had no such provision in Ceylon, the will must be construed to speak from the date it was made. Section 24 however merely gives a rule of construction (*Price v. Parker* [1]) which had been in force before 1837, and was extended by the Wills Act to other property mentioned. The effect of the section is to limit in one respect the work of those who have to construe wills by laying down a definite rule of construction, unless a contrary intention appears in the will. We have no such rule here limiting an inquiry as to what is the real intention of the testator as expressed in his will. Wills do not take effect from the day they are made, for they may be changed at any time. "Testaments when made do not take effect until they are confirmed by the death of the testator, for the will of a man is changeable so long as he continues to live." (Van Leeuwen's Commentaries, *Kotze, vol. I., p. 325.*) It is quite possible in certain cases that the date of the making of the will may have an important bearing upon the question of arriving at the intention of the testator in respect of matters dealt with by him in his will, but it does not go beyond that. So far as it assists the Court in ascertaining the intention of the testator as expressed in his will, the Court will look at the date of the will, but otherwise that date of itself does not give the will any special virtue or effect.

It was urged for the appellant that the moneys by clause 2 invested at the date of the will upon mortgage bonds or promissory notes had entirely disappeared by the time the codicil was made and that any sums so invested after the earlier date came under the residuary clause to the widow absolutely. If, however, in view of the provisions of section 5, the date of the will is to be taken to be August 9, 1927, then the moneys referred to in the second clause must be those invested at the later date, unless the codicil shows any intention to the contrary. Even if the testator in April, 1913, is differentiating between property "now" in existence, and property in existence "at the time of my demise," having regard to the rule in respect of republication, "now," by force of the codicil becomes August, 1927, subject to what is said about intention.

[1] *(1848) 16 Simon, 198.*

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A large part of the argument advanced for appellant might have much greater force had there been no codicil, but even in such a case the question of construction would not have been an easy one to answer.

With respect to the argument that the moneys invested on mortgages and promissory notes on August 7, 1913, are of the nature of a special legacy and have been adeemed, we were referred to several authorities. It seems to me that these authorities have no bearing upon the law as it obtains here. We have no such precise classification of legacies as there is in English law, but, as pointed out in *Mohamed Cassim v. Mohamed Hassen*,[1] it is rather a question of the testator's wish than a matter of law. Voet however does deal (*XXX., s. 17*) with a legacy of *species* (particular things) and also of a *genus* (class of things), as where a testator wishes a legatee to acquire all the particular things comprised in a class. The moneys due on mortgage bonds and promissory notes here it seems to me fall within two classes and in no case can be said to be a *species*. One or more of the sums due on the bonds, or on the notes, might have been particularized from the class dealt with, but as a matter of fact both classes have been dealt with as a whole. If these classes be regarded as debts due to the testator with which he has dealt, then the same conditions apply (*Voet XXX., s. 20*), and he goes on to point out what is the effect upon such a legacy of a change in the person of the debtors—

> " It is moreover a sign of no change of intention if he (the legatee) shows that the testator has exacted payment of the debt left by legacy in order to have the money in his hands . . . . So also if the money has been gathered in, but again lent to other debtors, that change of debtors as it were does neither nullify the legacy nor lessen it."

It is the same also when such a collection of debts as a book of debts is left as a legacy. He says (*XXX., s. 25*)—

> " This class of debts is, in case of doubt, neither extinguished nor lessened by payment of debts being enforced, but one debt is substituted for another just as if there had been a changing of debtors' names. So that the very money which was exacted is included in the legacy if it be again lent out and be included in the book of debts, just as also is that which is afterwards for the first time included in the book of debts."

The moneys lent out on mortgage and promissory notes would fall in from time to time and be lent out again, and, as the amounts here show, greatly increased as time went on. The change resulting merely from payment, followed by a fresh loan even to another debtor, or the creation of fresh loans of the same kind do not of

[1] *29 N. L. R. 89.*

themselves show any change of intention on the part of the testator in making such a bequest as we have here. If, however, that intention can be safely gathered from other materials in the will, then of course it must be given effect to. I can find nothing on the facts here to support satisfactorily any conclusion that the bequest contained in clause 2 of the will has been either adeemed or tacitly revoked. I might add here that it has been argued that, in view of section 5 of Ordinance No. 7 of 1840, tacit revocation has no longer any place in our law, but if that is so the same must be said of the doctrine of ademption, since one kind of ademption at any rate is based upon an amplied revocation of the specific gift (*Jarman on Wills II., p. 1157*). It cannot be said that the bequest has in any way been annihilated, or that nothing remains upon which the terms of the bequest could operate. From what I state below as the result of republication, inasmuch as the will must be deemed to have been made on August 9, 1927, a large part of the argument addressed to the question of the testator's intention in August, 1913, can be put on one side. It is not necessary to consider what the position would be had there been no codicil.

Taking the will and codicil as forming as far as they can one testamentary disposition which has been made on August 9, 1927, the testator has given to his wife " all the moneys now invested " by him on mortgage bonds or promissory notes and " all cash in deposit " to his credit in his No. 2 account in the Mercantile Bank up to the time of her death or remarriage, and thereafter to her three nieces absolutely. I can find nothing in the codicil expressing any intention or whence any intention can be inferred, that " now invested " meant invested in 1913. One would not of course expect to find anything of the kind, for it would be meaningless, since the testator must have been aware that the moneys invested on mortgage and notes at the time he made the will had all been reinvested with additions on fresh bonds and notes,; nor can I find that he was ignoring in his codicil the bequest in clause 2 of the will on the footing that he was aware these moneys had become part of the residue. The republication of the will and the terms of the codicil lead one, having regard also to the provisions of section 5, to the conclusion that the testator was amongst other things affirming the provisions of clause 2 of the will and dealing with the moneys therein referred to as they then existed.

The meaning and effect of " republication " has been dealt with in various English authorities, all of which, so it seems to me, are in entire agreement with the principles of the common law that govern the subject.

In the case before us the codicil in express terms refers to the will which the testator confirms. He says " Save as hereby altered or modified I hereby confirm the said will." What is necessary

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to constitute a republication is dealt with by Stirling J. in the case of *In re Smith, Bilke v. Roper*.[1] It will be borne in mind of course that Ordinance No. 7 of 1840 deals with the requirement for the valid execution of wills and codicils. He states that in his opinion the best statement of the principle is to be found in *Barnes v. Crowe* [2]:—

> "If we disentangle ourselves from the rule that there shall be no republication without re-execution the principle that a codicil attested by three witnesses shall be a republication seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself . . . ."

In the case of *In re Champion, Dudley v. Champion*, [3] North J. considers the effect of such words as the testator has used here—

> "What is the effect of these words of confirmation? It is settled by authority that the effect of such a phrase as 'I confirm my will in other respects' is a republication of the will, and when under the old law a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date."

The old law referred to was no part of the Roman-Dutch law, and these authorities are cited of course to show the effect of republication as now provided for in section 5 of Ordinance No. 21 of 1844. *In re Champion* (*supra*) was cited with approval by the Court of Appeal in *In re Fraser, Lowther v. Fraser*. [4] It is there stated that the effect of a codicil confirming a will is to bring the will down to the date of the condicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will containing the same dispositions as the original will but with the alterations introduced by the codicil.

There is however a limit on the application of this principle of republication, for, as Parker J. points out in *In re Park, Bott v. Chester*,[5] if the will be treated for all purposes as having been made at the date of the codicil, it may have the effect in some cases

[1] *45 Ch. D. 632.*
[2] *1 Ves. Jr. 486.*
[3] *(1893) 1 Ch. 101.*
[4] *(1904) 1 Ch. 726.*
[5] *(1910) 2 Ch. 322.*

of revoking the will instead of confirming it. The rule is clearly stated by Romer J. in the case of *In re Hardyman, Teesdale v. McClintock* [1]:—

> " It is not right therefore to say that the effect of republication of a will is that you must necessarily and for all purposes construe the will as though it had been made at the date of the codicil. Barton J. in the case of *In re Moore*[2] in my opinion accurately sums up the law on the subject when he says ' The authorities which have been cited '— mostly English authorities—' lead me to the conclusion that the Courts have always treated the principle that republication makes the will speak as if it had been re-executed at the date of the codicil, not as a rigid formula or technical rule, but as a useful and flexible instrument for effectuating a testator's intentions, by ascertaining them down to the latest date at which they have been expressed.' "

I venture to suggest that the principles of the Roman-Dutch law governing the construction of wills and codicils would lead one to the same end as that to which this rule leads one as is so succinctly set out in the last few lines of the above remarks of Barton J., without the assistance of any such artificial rule as is laid down in either section 24 or section 34 of the Wills Act or as is contained in section 5 of our Ordinance.. If I am correct in that opinion, then any limitation (contained in section 5) upon the application of the rule enacted in section 5 is immaterial so far as this case is concerned, for if that section does not apply here one falls back upon the provisions of our common law.

The above authorities, or most of them, are referred to by Russell J. in the case of *In re Reeves, Reeves v. Pawson*,[3] which case the trial Judge follows. The effect of them is that one must apply the rules as to republication " with good sense and discrimination," taking the will and codicil together as forming one document and seeking to give effect to the intentions of the testator as expressed therein and not to frustrate them.

For these reasons the codicil here has the effect of making the devise in clause 2 of the will operate in the same way as it would have operated if the words of the will had been contained in the codicil, and the appellant is only entitled to the moneys invested at the date of the codicil on mortgage bonds and promissory notes and to the cash in deposit to No. 2 account in the bank during her lifetime or until she remarry, and thereafter they vest absolutely in the respondents.

[1] *(1925) 1 Ch. 287.* [2] *(1907) 1 I. R. 315.*
[3] *(1928) 1 Ch. 351.*

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This case appeared to us, after we had heard the facts stated by Counsel, to be one in which in all the circumstances a settlement might well have been come to by the parties, seeing their close relationship, and we accordingly gave every opportunity for that being done, but unfortunately without result. The appeal therefore had to be heard to a conclusion. I refer to this as it might have some bearing upon the Court's order as to costs. After careful consideration on this point, and further as one cannot say that one side rather than the other unreasonably opposed a settlement, I think this Court should direct that the costs of the parties be paid out of the estate.

The judgment of the lower Court is affirmed and the appeal is dismissed with costs, payable as denoted.

AKBAR J.—

This appeal relates to the true construction of a will and codicil made by one D. G. Goonewardene, Crown Proctor of Galle. The will was made on August 7, 1913, and the codicil on August 9, 1927. The testator died on August 22, 1927, without revoking the will or the codicil and probate issued on the will on September 22, 1927.

The material parts of the will and codicil are as follows:—

No. 208.

I, David George Goonewardene of Galle, hereby revoke all former wills, codicils, and other testamentary dispositions made by me and declare this to be my last will and testament.

I give and devise to my beloved wife Margaret, my residing house called the " Mound " together with the land about 4 acres in extent whereon the said house is built and now enclosed by a wall as also the house and premises standing opposite my said residing house and purchased by me from the heirs of the late Albert Bastiansz. Provided however that my said wife shall not have the right to sell, gift, mortgage, or otherwise alienate the same but shall possess the same up to the time of her death or remarriage, whichever happens first. After her death or remarriage the said properties shall vest absolutely in my three nieces. Eva Moonamale Goonewardene, Ida Moonamale Goonawardene, and Esme Moonamale Goonawardene, all of Kurunegala.

I give and bequeath to my said wife all the moneys now invested by me on mortgage bonds or promissory notes, and all cash in deposit to my credit in my No. 2 account in the Mercantile Bank of India, Ltd., Galle, subject to the direction that she is to have the interest derived therefrom up to the time of her death or remarriage as aforesaid. Thereafter the same shall vest absolutely in my said three nieces.

I make the following bequests:—

(*a*) My brilliant ring set with one stone (star pattern) to my nephew K. G. M. Goonewardene, Proctor, Kurunegala;

(*b*) My fitted suit case to our nephew and godson George Moonamale Goonewardene of Kurunegala;

. . . . . .

(*g*) The rest and residue of my cash found in my possession at the time of my demise and also the money in deposit to my credit in my No. 1 account in the Mercantile Bank of India, Ltd., Galle, in the Bank of Madras, Colombo, in the Government Savings Bank, and in the Post Office Savings Bank and the amount of my policy of insurance together with the profit thereof and all other movable property absolutely to my said wife Margaret.

It is my wish and desire that my wife should out of her income regularly pay to her sister Ida Peries as much as she can spare the amount of such sum being left by me to her discretion.

It is also my wish and desire that the executors of this my will shall after my demise sell by public auction my houses and carriages, my library and all other movable property save and except such as my wife should like to retain, and shall pay the proceeds thereof to my said wife.

It is my wish and desire that my wife shall invest on mortgage of immovable property in Galle all moneys which she gets absolutely under this will and that she shall keep the same in the bank until she finds such safe and good investments.

I hereby nominate and appoint my brother Edward Gregory Goonawardene of Kurunegala and my brother-in-law Hector C. Peries of Galle to be the executors of this my will.

In witness whereof

. . . . . .

Signed, witnessed, and attd.

7th August, 1913.

No. 4,809.

I, David George Goonewardene of Galle, do hereby declare this to be a codicil to the last will and testament made by me and dated 7th day of August, 1913.

Save as hereby altered or modified I hereby confirm the said will.

I give to my servant James in the event of his being in my service at the time of my death the sum of Rs. 400.

I give, devise, and bequeath to Hector Peries and his sister Florence Ida Peries in equal shares the house and premises called and known as "The Bower," situated in Richmond Hill road, Galle, in which they now reside, subject to the condition that they shall not sell,

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mortgage, or otherwise alienate or encumber the said premises or share thereof and that the said premises or any share thereof shall not be liable to be sold under execution against them or either of them and that on the death of either of them the share hereby devised and bequeathed to him or her shall devolve on his or her lawful issue and failing such issue on the survivor of them subject to the same conditions and restrictions.

In the event of both of these dying without issue the said property shall devolve on the three daughters of my dead brother Edward Gregory Goonewardene in equal shares.

In witness whereof

. . . . . .

Signed, witnessed, and attd.

9th August, 1927.

It is admitted that on August 7, 1913, the sums invested on mortgage bonds and promissory notes totalled about Rs. 39,000 and that the money in deposit in No. 2 account of the Mercantile Bank, Galle, was about Rs. 1,250 on that date. On August 22, 1927, the sums invested on mortgage bonds and promissory notes amounted to about Rs. 214,000 and the deposit in the No. 2 account was Rs. 6,920. It seems clear, and it was so admitted at the argument, that on August 22, 1927, all the bonds and promissory notes which were in existence on August 7, 1913, were extinguished and were replaced by other mortgage bonds and promissory notes. The testator left no children or other descendants. The contest is as to the true interpretation, at the date of the death of the testator, of the words " all the moneys now invested by me " (which occur in the second disposition made by the testator in his will). The appellant's contention was that the bequest of " all the moneys now invested by me on mortgage bonds or promissory notes " referred to the moneys invested at the time of the will, that is 1913, and not to the moneys so invested at the time of the death of the testator in 1927, and that as the bonds and notes which existed in 1913 were all discharged and extinguished in 1927, all such moneys as were found to be invested in 1927 in bonds and notes passed under the residuary clause (*g*) to the appellant, the widow. An elaborate argument was addressed to us by Counsel on both sides as to the meaning of the will as it stood by itself, and as to its meaning when read in conjunction with the codicil.

In the view that I take of this case, it is unnecessary to speculate on the effect of the will if there had been no codicil. The testator did as a matter of fact execute a codicil, and the two documents must be read together to find his true intention on the date that he made the codicil. The manner in which wills are to be executed in Ceylon is dealt with in Ordinance No. 7 of 1840 (see sections 3 to 15).

It will be seen that these sections are based on the corresponding sections of the English Wills Act of 1837. Then came Ordinance No. 21 of 1844, of which sections 1, 5, and 21 are based more or less on the corresponding sections of the Wills Act of 1837. These two Ordinances, Nos. 7 of 1840 and 21 of 1844, are the statutory enactments which deal with wills. The Courts in the Island have usually followed the English decisions in interpreting the sections of the two local Ordinances which are based on the Wills Act. For the rest, notably on questions of the interpretation of wills, resort must be had to the common law of the land, the Roman-Dutch law (see *Mohamed Cassim v. Mohamed Hassen* [1]). The first two things to be noted in the two Ordinances are that there is no section corresponding to section 24 of the Wills Act, and that section 5 of Ordinance No. 21 of 1844 is not word for word the same as section 34 of the Wills Act. It seems to me that section 5 of Ordinance No. 21 of 1844 plays an important part in the interpretation of the will and codicil before me and full effect must be given to it. Section 34 of the Wills Act enacts that that act is not to apply to wills and codicils made before January 1, 1838, and the importance of these words was explained in the case of *Brooke v. Kent.*[2] In Ceylon, on the other hand, there was an interval of time between the passing of Ordinance No. 7 of 1840 and that of Ordinance No. 21 of 1844, and section 14 of Ordinance No. 7 of 1840 made provision to some extent for wills and codicils made prior to February 1, 1840. Section 5 of Ordinance No. 21 of 1844, although it applied to wills and codicils made prior to February 1, 1840, clearly also applies to wills and codicils made after December 23, 1844, the date on which Ordinance No. 21 of 1844 came into force. If that section applies to the will and codicil before me and is given its full effect, the section bids a Court to " deem " the will as having been made at the time at which it was re-executed, republished, or revived " for the purpose of this Ordinance." The only difficulty that the section offers is to be found in the words " for the purpose of this Ordinance. " Similar words occur in section 34 of the Wills Act, and a meaning can be given to these words in the English Act, for many purposes are indicated in the various sections of that act. These sections are however not reproduced in Ordinance No. 21 of 1844, but some are to be found in Ordinance No. 7 of 1840. But a meaning can be given to these words in the local Ordinance if we look at sections 1, 2 and 3, and perhaps 4. Section 1 is based on the English Act (Section III.); section 2 and 3 are peculiar to the Roman-Dutch law. Under section 2, for instance, a will made by any male under the age of 21 years or by a female under the age of 18 years is invalid, but majority can be attained by such a minor by marriage or be conferred by letters of *Venia Aetatis*. A will may

[1] *(1929) 29 N. L. R. 89.*

[2] *3 Moore's P. C. Appeals, 344.*

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be executed by a man under 21, but such a will would be invalid unless it is re-executed by a codicil when the testator has attained majority by marriage or by letters of *Venia Aetatis* even though he may in fact be under 21 at the time of the execution of the codicil. Further, under section 1 of Ordinance No. 21 of 1844 a testator is authorized to dispose of by will (which includes a codicil, see section 21), not only the property to which he is entitled at the date of the will, but also the property to which he would be entitled at the time of his death. I might mention here that the distinction which once existed in the English law between personalty and realty in so far as a testator's power to dispose of by will after-acquired property is concerned and which distinction was removed by the Wills Act never existed in Ceylon (see *Silva v. Silva et al* [1]). This may perhaps be the reason why section 24 of the Wills Act was not reproduced in Ceylon. In my opinion, one of the purposes of the Ordinance No. 21 of 1844 mentioned in section 5 is the purpose indicated in section 1, that is to say, to enable a testator to dispose of after-acquired property, unless of course such an intention is clearly negatived by the terms of the will and codicil. It is argued for the appellant that the intention of the testator at the date of the codicil was not to bequeath the reversion of the moneys invested at the time of his death in bonds and notes to his nieces but to give them all under the residuary clause (*g*) to his wife. I do not think that such an interpretation is right for the following reasons :—The codicil made only two alterations, by one of which he left a small sum of money to his servant James and by the other he devised a house which he had acquired since 1913 to two persons but with the reversion to these three self-same nieces should the two devisees die without lawful issue. Even in this devise the testator's intention appears to be to benefit his nieces further than what he had done by his will. At the date of the making of the codicil the testator, who was a lawyer, must have known that all the bonds and notes which existed in 1913 had ceased to exist and that the clause dealing with such investments in the will was practically a useless clause. I cannot believe that when by his codicil the testator proceeded to confirm his will, he meant to confirm a clause which he must have known had lost its effect so far as the bequest of the moneys invested in bonds and notes were concerned. What is more likely is that he intended to extend that clause so as to make it applicable as if it were made at the date of the codicil. This same clause also disposed of " all cash in deposit to my credit in my No. 2 account." Clearly the effect of the codicil is not to restrict this bequest to the Rs. 1,250 which was in deposit in 1913, but to make it apply to the Rs. 6,920 in deposit at the time of his death. It

[1] *(1908) 10 N. L. R. 234.*

should also be noted that the life-interest in the moneys invested in bonds and notes is left to the widow, and that it is only the reversion that is to go to the nieces.

Counsel for the appellant then argued that the intention he contended for was manifest by the use of the words " at the time of my demise " in paragraph (*g*). I think these words are nothing more than mere words of description to earmark the money that would be in the immediate possession of the testator at the time of his death. In any event, whatever meaning the word " now " may have in the will, we must construe it by reference to and along with the codicil. A further argument was pressed on us by Counsel for the appellant that there was an ademption of the moneys invested by the testator on bonds and notes when the bonds and notes were discharged and the moneys recovered by the testator. To this contention there are two answers. The effect of section 5 was to make it appear as if the whole will was re-executed in 1927. Further, the intention of the testator in the will was to divide his property into certain classes or categories; and his intention must be construed by the application of the rule in the Roman-Dutch law stated by Voet in Books XXX.-XXXII., section 25 (see Buchanan's translation, page 31). The extract is as follows:—

> " Not only single debts, but also universities (collections) of debts, as for example, a book of debts, can be left as a legacy. This class of debts is, in case of doubt, neither extinguished nor lessened by payment of debts being enforced, but one debt is substituted for another, just as if there had been a changing of debtors' names. So that the very money which was exacted is included in the legacy, if it be again lent out and be included in the book of debts, just as also is that which is afterwards for the first time included in the book of debts; but not those debts which have been transcribed and removed from the book of debts to other accounts ."

The modern English decisions seem to me to be to the same effect. (See *In re Reeves, Reeves v. Pawson*,[1] and the cases quoted by Russell J.) As Russell J. stated, " the will and the codicil are treated as one document bearing the date of the codicil. "

In my opinion, when the testator confirmed his will by his codicil of 1927 his intention was to confirm his bequest of the moneys invested at the date of his death in mortgage bonds and promissory notes to his wife for life and then to his nieces.

I would affirm the decision of the District Judge and dismiss the appeal with costs, the costs to be paid as directed by my brother.

Appeal dismissed.

[1] *(1928) 1 Ch. 351.*