1946 *Present :* **Jayetileke and Canekeratne JJ.**

FERNANDO, Appellant, *and* PEIRIS, Respondent.

88—D. C. (Inty.) Chilaw, 2,324.

Will—Undue influence.

Where a testator, when he was seriously ill, executed a will devising and bequeathing to his wife all his property and the validity of the will was challenged on the ground of undue influence the only evidence in support of the plea being that at the time of the execution of the will the wife was present and was weeping—

Held, that the Court was not entitled to presume that the wife exercised undue influence on the testator.

APPEAL from a judgment of the District Judge of Chilaw.

L. A. Rajapakse, K.C. (with him *C. S. Barr Kumarakulasinghe* and *T. B. Dissanayaka*), for the petitioner, appellant.—

The doctrine of undue influence is taken over from the English Law. We have adopted it. It is a doctrine applicable to transactions *inter vivos, e.g.,* conveyances, deed of gifts, &c.

This is a case of a Last Will.

No such doctrine is applicable in the case of Last Wills. The existence of a fiduciary relationship or active confidence does not create any presumption of undue influence. It is on the ground of fraud or coercion only that a last will can be avoided—*Peiris v. Peiris*[1]; *Gray v. Kretser*[2]; *Perera v. Tissera*[3]; *Boyse v. Rossborough*[4]; *14 Hailsham pp. 230–231.* Ordinary influence, importunity or persuasion is not undue influence in the case of Last Wills—*Croos v. Croos*[5]; Spencer Bower on Actionable Non-Disclosure—p. 414, sec. 447.

The burden is on the party alleging the coercion—*Brampy Nona v. Vitanage*[6]; *Gunasekera v. Gunasekera*[7]. There is no doctrine of undue influence in the Roman-Dutch Law; it deals with only unsoundness of mind—*Soysa v. Soysa.*[8]

N. Nadarajah, K.C. (with him *S. W. Jayasuriya*), for the first respondent.—

There are circumstances in this case which arouse suspicion as in the case of *Andrado v. Silva*[9].

The devisee has not given evidence to clear these suspicions. She has not discharged the *onus.* The testator was in a physically helpless condition and may have agreed to execute the Last Will or otherwise he may have been left to die. His mental condition may have been impaired too.

Cur. adv. vult.

[1] *(1906) 9 N. L. R. 14.*
[2] *(1916) 2 C. W. R. 190.*
[3] *(1933) 35 N. L. R. 257.*
[4] *(1856) 6 H. L. C. 2.*
[5] *(1919) 21 N. L. R. 208.*
[6] *(1942) 23 C. L. W. 110.*
[7] *(1939) 41 N. L. R. 351.*
[8] *(1916) 19 N. L. R. 314.*
[9] *(1920) 22 N. L. R. 5.*

April 11, 1946. JAYETILEKE J.—

By his will dated June 28, 1944, the testator, Simon Peiris, devised and bequeathed to his wife, the appellant, all his immovable and movable property of the value of Rs. 8,000 to do as she pleased with it. At the time of the execution of the will the testator was seriously ill having been gored by a bull but was in full possession of his mental faculties. He was removed from the Chilaw hospital as the doctor pronounced his case to be hopeless and, on the way, he was taken to the house of his proctor, who took instructions from him, prepared the will, and obtained his thumb impression to it. The validity of the will was challenged by the respondents, who are the brother and sister of the testator, on the ground of undue influence. The trial Judge upheld the plea and declared the will to be invalid. The appeal is against that order. The only evidence in support of the plea was that at the time of the execution of the will the appellant was present and was weeping. The question we have to decide is whether on the materials before him the trial Judge was right in holding that he was entitled to presume that the appellant exercised undue influence on the testator. It is well-settled law that the will of a person who was not acting of free will but under undue influence is invalid. In *Pieris v. Pieris*[1] it was held that in order to be " undue " the influence must amount to coercion or fraud and that the burden of proving undue influence lies upon the person challenging the validity of the will. In *Gray v. Kretser*[2] Shaw J. said :—

> " In order to establish undue influence there must be something in the nature of coercion or fraud. It must in fact be shown that the document impeached is not really that of the maker, in the sense that he had not a consenting mind to its terms . . . . It must, as I said before, be shown that the document was such the terms of which the testator would not have executed unless he had been influenced by coercion or fraud ".

The evidence in the case shows that the testator wanted to execute a *donatio mortis causa*, and that, on the advice of his proctor, he agreed to execute a will. He gave instructions himself for the preparation of the will, and he signed it of his own free will without in any way being urged to do so by the appellant. He had lived happily with the appellant for over twenty years and had every reason to leave his property to her. The trial Judge seems to have thought that the appellant was in a position to dominate the will of the testator owing to the helpless physical condition in which he was, and to have fallen into the error that, in these circumstances, he could presume that the appellant had exercised undue influence. In *Pieris v. Pieris* (*supra*) Wood-Renton J. held that in the case of wills, unlike that of gifts, the existence of even a fiduciary relationship does not create any presumption of undue influence, and that an attorney or a child may legitimately importune a client or a parent for a legacy so long as the importunity does not amount to coercion or fraud. The evidence does not disclose that the appellant even importuned her husband to devise or bequeath his property to her. She probably wept through grief.

[1] *9 N. L. R. 14.* [2] *2 C. W. R. 190.*

I think it is only fair to the trial Judge to say that many of the cases cited to us were not before him. Had they been cited to him I have no doubt that he would have come to a different conclusion.

I would set aside the judgment of the trial Judge and allow the appeal with costs here and in the Court below.

CANEKERATNE J.—I agree.

Appeal allowed.