1945 *Present:* **Keuneman and Rose JJ.**

DHAMMANANDA THERO, Appellant, *and* PEMANANDA THERO, Respondent.

12—D. C. (Inty.) Colombo, 10,590.

Last Will—Appointment by incumbent of successor—Testamentary instrument affecting property—Civil Procedure Code, s. 518.

An instrument in writing by which the incumbent of a Temple appoints his successor is a will provided it is drawn up in proper form.

Such an instrument is one by which property is affected within the meaning of section 518 of the Civil Procedure Code.

The fact that the construction of a will may give rise to difficulty is not a good ground for refusing to grant probate.

[1] *(1942) 43 N. L. R. 394.*

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *Dodwell Gunawardana*), for petitioner, appellant.

L. A. Rajapakse, K.C. (with him *Kingsley Herat* and *T. B. Dissanaike*), for objector, respondent.

Cur. adv. vult.

March 22, 1945. ROSE J.—

In this matter the appellant asks for probate of a will. It appears that the testator, a Buddhist priest, was the incumbent of a certain temple and that there was consequently vested in him a power to appoint his successor from among his pupils. He purported to exercise this power by the instrument of which probate is requested. No point has been raised as to the form of the instrument, which in that respect would seem to comply with the requirements of the law as to a will.

The appellant was appointed executor of the will and it is therefore contended on his behalf that on that ground alone the will is entitled to be admitted to proof, provided that " property is in any way affected " within the meaning of section 518 of the Civil Procedure Code. I would add that it is common ground that an incumbent may amongst other methods be appointed by will—indeed, as was pointed out in *Piyatissa Terunnanse v. Somanapala Terunnanse*[1], while the more solemn the form of nomination the easier will be the proof, there is no particular form required—and that the right to such an incumbency is a legal right and not purely an ecclesiastical matter, as was held in *Devarakkita v. Dharmaratne*[2].

Section 518 reads as follows:—" (1) When any person shall die leaving a will under or by virtue of which any property in Ceylon is in any way affected, any person appointed executor therein may apply to the District Court . . . . to have the will proved and to have probate thereto issued to him . . . . "

Counsel for the respondent contends, in the first place, that there is a distinction between the conception of a will in England and according to the Roman-Dutch Law and that according to the latter, which he suggests is operative in Ceylon, the instrument in question is not a will at all, in that it does not purport to dispose of any property; and secondly, in the alternative, that by the mere appointment of an incumbent no property in Ceylon is " affected " within the meaning of the section.

For the first proposition he relies on a definition contained on page 1 of Steyn on *The Law of Wills in South Africa* where it is said that " a will or testament is the declaration in proper form by the person making it, the testator, with regard to the disposal of his property after his death "; also on a somewhat similar definition contained in Maasdorp's *Institutes of South African Law* at page 146 where it is stated that " a will is a declaration made by any person during his life-time as to what he wishes should become of his property after his death ". This definition appears to be based on a passage in Voet. Counsel further

[1] *40 N. L. R. 262.* [2] *21 N. L. R. 265.*

suggests that the terms of the Wills Ordinance (Cap. 49 of the Legislative Enactments of Ceylon) are consistent with his submission in that they relate exclusively to wills which dispose of property.

Even assuming that Counsel is correct in his contention that the Roman-Dutch conception of a will is the one to be considered, it seems to me that it would be incorrect to assume that the definitions contained in Steyn and Maasdorp are intended to be exhaustive. The same observation would seem to apply to the Wills Ordinance, and I consider that the better view is that a wider meaning should be given to the term " Will " and that a will should be regarded as including any testamentary document drawn up in proper form.

As to the respondent's second proposition, I would point out that the phrase " in any way affected " is not a term of art and, that being so, the legislature have made use of a very wide expression. It seems to me that according to the ordinary usage of language it cannot reasonably be held that property is not affected by the appointment of a person to administer it, as it is unlikely that any two persons would administer property exactly in the same manner.

Counsel for the respondent referred to an old case, *Re Elizabeth Tomlinson* [1] to show that even in England the mere appointment of an executor is insufficient to entitle a will to probate. That case, however, refers to the will of a married woman, who at that date was subject to certain disabilities, and in so far as wills in general are concerned it would seem to be against his contention. The learned President in the course of his judgment said as follows:—" Where the will is of a man or a femme-sole the appointment of an executor has been held sufficient to entitle the will to proof; but where it is the case of a married woman executing a power by will different considerations arise . . . . In the case of a femme-sole making her will the rule applicable to wills in general would, of course, be put in force, namely, that the appointment of an executor *prima facie* entitles the will to be admitted to proof ".

I would add that the fact that the construction of this will may well give rise to difficulty is not in my opinion a good ground for refusing to grant probate.

For these reasons the appeal must be allowed, the judgment of the District Court set aside and the Order Nisi dated September 9, 1943, made absolute. The appellant will have the costs of the proceedings here and below.

KEUNEMAN J.—I agree.

Appeal allowed.

1 *(1881) 6 P. D. 209.*