1956 *Present :* Gratiaen, J., and Pulle, J.

JOHN PIERIS *et al.*, Appellants, *and* W. M. WILBERT, Respondent

S. C. 166—D. C. (Inty.) Colombo, 13,653

Will—Probate—Objections to grant—Burden of proof.

An application for probate of a will was resisted on the ground that the testator was not in a fit state of mind at the time the will was executed. The petitioner was nominated in the will as executor and also as "sole and universal heir of all the estate and effects" of the deceased. It was not disputed that the petitioner took an active part in getting the will executed.

Held, that in cases of this nature two rules ought to be observed. The first, that the burden lies in every case upon the party propounding the will to satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if the will is prepared by or on the instructions of a party who takes a benefit under it, that is a circumstance that ought generally to excite the suspicion of the Court and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed. The second rule extends to all cases in which circumstances exist which excite the suspicion of the Court.

APPEAL from an order of the District Court, Colombo.

S. J. V. Chelvanayakam, Q.C., with *E. R. S. R. Coomaraswamy*, for the respondents-appellants.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke* and *P. Ranasinghe*, for the petitioner-respondent.

Cur. adv. vult.

April 30, 1956. PULLE, J.—

This is an appeal from an order admitting to probate an instrument purporting to be the last will of one George Theobald Pieris who died on the 7th May, 1948. The will (Exhibit P6) was executed on 4th May, 1948, and was attested by a notary and two witnesses.

By this will the testator specifically bequeathed three lands to one W. M. Wilbert and nominated him as the executor. He was further nominated as " the sole and universal heir of all the estate and effects which shall be left by me after my death whether movable or immovable . . . . "

The testator was 80 years old. He was the father of three children named Benjamin, John and Alice by a lady to whom he was not married and who predeceased him. The application for probate was made by the executor (referred to hereafter as the " petitioner ") and it was resisted by the three appellants, namely Benjamin and John and also by one Mrs. Emily Mendis who claimed, as a sister of the testator, a 1/7th share of the estate on the basis of an intestacy. The petitioner was the son of an old servant of the testator. He had been living several years with the testator and was trusted by him. As many as 42 lands were inventorised as part of the estate. These were valued at Rs. 16,360. The movables were comparatively of little worth.

The testator was admitted to the surgical ward No. 3 of the General Hospital on the 27th April, 1948, with a history of abdominal pain which which had lasted two weeks. The visiting surgeon of this ward was Dr. V. Gabriel and the house surgeon Dr. A. Rajiyah. The testator was in this ward until he died on the night of 7th May. Mr. L. L. P. de S. Sonaratne, Proctor and Notary, on receiving instructions from one Lionel de Silva, the first witness to the will, went to ward No. 3 apparently accompanied by the petitioner to take instructions from the testator for drawing up a will. This was on the evening of 3rd May. The testator was found sleeping and arrangements were made that night both by Lionel de Silva and the petitioner for the notary to visit the hospital the next day at about 10.30 a.m. He spoke to the testator on 4th May in the presence of the petitioner and Lionel de Silva and obtained instructions which he (the notary) recorded in Exhibit P5 and to which he obtained the signature of the testator. He went back immediately to his office in Hultsdorp, had two copies of the will typed, and went again to the hospital and obtained the signature of the testator, after reading out the draft, to the original and the duplicate. The second attesting witness was one

H. A. Gunasekere whose brother was married to a sister of the petitioner. It is not disputed that the petitioner took an active part in getting the will executed.

In regard to the inquiry to the objections to the grant of probate it is sufficient to refer to only two of the issues. They are :

"2. Had the deceased testamentary capacity at the time of making the said will ?

"4. Was the deceased in a fit state of mind to execute the said last will at the time it was said to be executed ? "

The appellants sought in addition to impugn the will as a forgery. The learned trial Judge held on this issue as well in favour of the petitioner. His finding as to forgery was not contested at the argument in appeal.

The petitioner did not himelf give evidence at the inquiry. To support the will he called Dr. Gabriel, Dr. R. Rajiyah, the notary and the two witnesses. If their evidence could have been acted upon at its face value the appeal is bound to fail. The argument on behalf of the appellants, however, is that having regard to the evidence, taken as a whole, and the findings thereon there was proof of circumstances of suspicion attaching to the execution of the will and that the petitioner has failed to discharge the burden resting on him affirmatively to satisfy the court that the testator knew and approved of the contents of the document. Reliance was placed on the judgment of Lindley, L.J., in *Tyrell v. Painton* [1] in which the learned Lord Justice cited with approval the following passage from the judgment of Parke, B., in the Privy Council case of *Barry v. Butlin* [2].

"The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal and they have been acquiesced in on both sides. These rules are two : The first that the *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." Lindley, L.J., states in respect of the second rule that it is not "confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court." Reference was also

[1] *(1894) P. 151.* [2] *2 Moo. P. C. 480.*

made to the *Alim Will* case [1] and the decision of the Privy Council in *Harmes and another v. Hinkson* [2]. In the last mentioned case Lord Du Parcq delivering the judgment of the Board stated,

> "The concluding words of the rule, as it was stated by Baron Parke, emphasize the necessity of the complete removal of doubt from the judicial mind. 'The conscience of the Court' must be satisfied. Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact."

The evidence adduced in this case may now be examined in some detail in the light of the principles laid down in the cases quoted above.

The opinion of the medical witnesses was based, to a considerable extent, on the entries in the bed-head ticket, Exhibit P1. Shortly after admission on the 27th April an X-ray examination of the testator revealed a calculus at the lower end of the ureter. It was the case for the appellants that from the 30th April there was a steady deterioration in the condition of the testator, that by the 3rd May he was lapsing into a state of semi-consciousness which progressively became worse until he passed off in a state of deep coma. Owing to restlessness and violence of movements due partly at least to pain the testator was placed on a bed with railings.

Against the date 30th April the bed-head ticket reads,

"General condition not very good. Patient slightly restless."

The amount of urea in the blood, according to the Pathologist's report, was 145 milligrams and in the urine 2.4. These figures are admittedly high and in the absence of proof that upon later blood and urine tests there was an improvement the chances were that the patient's condition would gradually become worse because the disease had a fatal ending in the course of a week.

The entry on the 1st May was :

"Patient slightly restless. Urine to be charted. No temperature. Fluids ad lib."

There is no entry for 2nd May which was a Sunday but on the line just before the entry of 3rd May is the note, "Drowsy at times." followed by "Tongue coated. Fluids ad lib."

Against 4th May it is noted,

"Omit all." followed by a reference to a mixture and "Saline and Glucose O. T."

There is nothing to indicate a difference in the treatment on 5th May. The entry states "Same—Cipla 50 c.c." It is not necessary to go through the entries of 6th and 7th May as it is obvious that the testator was then in a very low condition.

Dr. Gabriel, a surgeon of eminence, expressed the opinion at the end of his evidence in chief that the testator was, on the 4th May, of sound mind and in a fit condition to make a will. I have no doubt that up to

[1] *(1919) 20 N. L. R. 481.* [2] *(1946) 62 T. L. R. 445.*

this stage he honestly believed that the patient was visited by him in the course of his normal duties between the 27th April and 7th May. Besides he had given a certificate (Exhibit P3) dated the 11th February, 1950, to the following effect :

"This is to certify that Mr. George Theobald Pieris of 600, Old Road, Nawinna, Nugegoda, was a patient under my care in the General Hospital and was of sound mind to make a will on the 4th May, 1948."

By the 11th February, 1950, the appellants had filed their objections to the grant of probate and the petitioner had apparently requested Dr. Gabriel to express an opinion as to the testator's mental condition on a study of the bed-head ticket. Naturally, Dr. Gabriel who gave evidence in October, 1952, had no independent recollection of the patient. He was a busy practitioner and it is in evidence that Ward No. 3 of which he and his assistant Dr. A. Rajiyah were in charge had as many as 65 patients. In cross-examination Dr. Gabriel was asked whether he was on leave from 15th April to 3rd May, 1948. His answer was,

"I hardly think so because I would not have taken leave for such a long period. It may be, but I do not remember having taken such long leave. I am not denying it but I cannot remember. From 15th April till 3rd May I might have been on leave but I cannot say. I have not brought any of my diaries or any document from which I can verify whether I was on leave or not."

The appellants produced a certified copy (Exhibit D24 A) of Dr. Gabriel's leave register for the years 1946, 1947 and 1948 according to which he was on leave from the 15th April, 1948, to 3rd May, 1948, being 19 days lieu leave. On this point the learned District Judge's comment was that the register was not conclusive evidence that Dr. Gabriel had availed himself of the full period of leave granted, for it sometimes happens that an officer returns to work before the expiration of the leave. With all respect I do not think it was open to the Judge to speculate that Dr. Gabriel might have curtailed his leave, for in that event an entry would have been made in the register, for accounting purposes, of the number of days not availed of. I feel that Dr. Gabriel was hardly in a better position to express an opinion than Dr. J. H. F. Jayasuriya whose opinion was expressed on the material set out in the bed-head ticket and on the facts spoken to by some witnesses called on behalf of the appellants. The Judge's comment on the certificate P 3 of 1950 is

"It is very unlikely that a person of Dr. Gabriel's responsibility would have given a certificate of this nature unless he was satisfied in his mind as to Pieris' testamentary capacity on the 4th of May."

It appears to me rather unlikely that the certificate P3 would have been granted had it been brought to Dr. Gabriel's notice that it was a matter of record he had been on leave from 19th April to 3rd May.

Before comparing the opinions expressed respectively by Dr. Gabriel and Dr. Jayasuriya it is necessary to deal with the evidence of three witnesses whose testimony was accepted by the Judge and of another witness Sister Mary Andrea whose veracity was not doubted.

The first is Mr. S. Somanathan, a Proctor of 19 years standing, in whon the testator reposed confidence. It is sufficient to state that the monie of the testator used to be paid by him into a bank account in the name o Mr. Somanathan on which the latter operated only at the testator's request. Mr. Somanathan received a message from the testator through the petitioner to see him at the hospital. He went to the hospital twice but the precise dates have not been satisfactorily fixed. The first was about the 29th or 30th April in the evening. He addressed the testator and asked him why he wanted him. The following is the account given by the witness :

> " He nodded to me and he told me in a very low voice that he wanted to make a will and then he touched the pillows and sheets which were spread on the bed and he said he wanted to give those to his children. As far as I am aware they were hospital pillows. I listened to him and I thought he was not talking coherently. "

The impression that the witness formed was that the testator was speaking in " a sort of comatose condition ". He was definitely of the opinion that the patient was not in a fit condition to execute a will and informed the petitioner accordingly. The second visit of Mr. Somanathan was probably on Monday the 3rd May between 11 a.m. and 12 noon. The patient appeared to be worse. When addressed he would not reply and showed no signs of recognizing him.

It is indisputable that the testator's daughter, the wife of one Captain Shanmugam, came by air from India on the afternoon of 3rd May and went to see her father the same evening. He found him, as she describes, unconscious. She called out several times " Papa ". Then he opened his eyes and looked all over rolling his head from side but was unable to recognize her. On the evening of 4th May she found him in the same condition unable to recognize her. She was at the bed side for about an hour. When she tried to feed him with a little orange juice it trickled out of his mouth. She found his condition no better on the 5th evening and on the 7th he was very bad.

Mrs. Florence Senanayake, a Member of Parliament, was a friend of the family of the testator. She paid a visit to the hospital on the evening of the 4th May and was by the bed side in the company of Mrs. Shanmugam. She has fully corroborated the evidence of the latter as to the condition of the patient on the 4th May.

Rev. Sister Mary Andrea was in charge of Ward No. 3 in 1948. Although she gave evidence in July, 1953, she had sworn an affidavit regarding the testator's condition on 20th September, 1952, and was able to recollect his case by associating him with Mrs. Shanmugam who had come from India. She had obviously the most number of opportunities of seeing the testator. She remembered him also as a patient kept on a barred bed with railings all round. She is definite that for about four or five days before his death the testator was semi-conscious. By that she meant a continual state of drowsiness, perhaps broken occasionally for a little time, associated with a person of advanced years suffering from uraemia. She was questioned about the entry in the bed ticket on 4th May. According to her the direction " Omit all."

on 4th May did not connote any improvement in the condition of the patient but only a change in the treatment. Saline and glucose injections were directed to be given that day because he could not take enough fluids by mouth. On this point the witness is strongly supported by the testator's daughter and Mrs. Florence Senanayake.

Coming now to the expert evidence, in the course of his cross-examination Dr. Gabriel admitted that the entry of 1st May showed that the patient's condition was worse than on the previous day. He also admitted that if the testator sought to gift away the hospital sheet and pillows it indicated that his mind was affected and if he could not recognize his own daughter on the 3rd or 4th May he may have been in a near comatose state. Dr. Gabriel did not attach much importance to the note "drowsy at times" and "tongue coated".

Dr. Jayasuriya expressed a view contrary to Dr. Gabriel's as to the inferences that could be drawn from the entries "Drowsy at times" and "tongue coated". According to him they were, having regard to the history of the illness, indications of a progressive deterioration of the patient by the accumulation of toxic matter and he has given reasons which commend themselves to me. Dr. Jayasuriya went so far as to doubt that the patient had any mental understanding from the 1st May.

After reviewing the evidence of Dr. Gabriel and Dr. Jayasuriya the learned Judge said,

> "In this conflict of views I do not feel justified in drawing any inference one way or the other from the entry of the 4th nor is it possible to conclude that the patient was in a semi-comatose condition from the 1st May."

With all respect I should say that on this finding the learned Judge should have held against the petitioner as the burden rested on him to satisfy the conscience of the court in regard to the circumstances of suspicion.

The learned Judge seems to think that the testator's reference to the sheet and pillows might have been an angry rejoinder to a possible query by Proctor Somanathan whether the will was to be made in favour of the children. Then in regard to the first visit of the daughter on the 3rd May he appears to be impressed by the suggestion that the testator deliberately refused to recognize the daughter as she might have heard a discussion between her and her two brothers to remove him from the ward. In my view there was no reason why the learned Judge should not have held that the testator was irrational in his conversation with Proctor Somanathan and was incapable of recognizing or holding a conversation with the daughter.

As to Mrs. Florence Senanayake he accepts her evidence that the testator was on the evening of the 4th May in a low condition and unconscious but in his opinion that was not an indication he was in that condition on the morning of that date. It is somewhat remarkable that Lionel de Silva, whom the Judge thought was a truthful witness, was positive that when he saw the testator on the 5th May evening he found him quite normal and smiling and conversed with him for 10 or 15 minutes.

The Judge thinks that although Sister Mary Andrea said that for some days the testator was in a semi-comatose condition her evidence did not exclude periods of consciousness. Her evidence read as a whole is clear that the testator was throughout those days in a drowsy condition with an occasional break. There is nothing to suggest from what she said that he was of such a sound memory and understanding as to be able to make a will.

Before concluding the judgment there are one or two matters of importance which must be adverted to. After the notary returned from the hospital on the 3rd May he asked Lionel de Silva to obtain the services of a doctor to be present at the execution of the will. On the morning of the 4th May the petitioner and Lionel de Silva saw Dr. Gabriel and obtained the document P2 signed by him to "allow bearer and another to see me in ward 3 at 3 p.m.". In point of fact the will which is numbered as the first instrument attested by the notary was executed in the forenoon in the absence of any medical adviser who could pronounce on the patient's capacity to understand the transaction. Lionel de Silva's explanation is that the testator was anxious to have the will executed without any delay on the morning of 4th May because his sons were worrying him, that he attempted to get in touch with Dr. Gabriel to advance the time and failed. However, it is a matter for comment that both the notary and Lionel de Silva did not take the precaution of asking a responsible official attached to ward No. 3 to be present at the signing of the will.

According to the notary the instructions he received (Exhibit P5) on the morning of 4th May were that the testator wanted to bequeath to the petitioner "(1) Katupotha, (2) Kitulpe, (3) Anasiwatte and all other properties not mentioned here". It is surprising that in the long list of lands inventorized not a single one of the properties named above finds a place. There is no proof whatever that the testator ever owned a land known by any one of those names.

After the testator had fallen on evil days and lost his valuable properties he succeeded in retrieving a land called Rikilligama Estate of 220 acres in the year 1939. He induced the mortgagee to transfer that estate to John and Alice. He was in possession of the property up to the time of his death and it was for long the only source of his income. If as the Judge finds the testator did not take the transfer in his own name lest he feared seizure by other creditors and that, inferentially, John and Alice held the estate in trust for the testator, it is singularly strange that while he mentioned to the notary the names of three unknown lands to be bequeathed to the petitioner, he forgot altogether the estate of 220 acres of which he was in possession since 1939.

Looking at the case as a whole, even if it could be said that the testator knew what he was doing up to a point, it is impossible to believe that in the background of the evidence of Mr. Somanathan, Mrs. Senanayake and Sister Mary Andrea he was in sufficient possession of his faculties to appreciate fully the implications of the documents to which his signature was obtained on the morning of 4th May. In these circumstances his purported testamentary disposition ought not to be allowed to stand.

In the result the appellants succeed on the submission that the petitioner has failed to discharge the burden of removing the suspicions attendant on the making of the will. I would, accordingly, set aside the order under appeal and declare that George Theobald Pieris died intestate. The petitioner will pay to the appellants the costs of appeal and the costs in the District Court.

GRATIAEN, J.—I agree.

Appeal allowed.