1919.

Present: Ennis A.C.J. and Loos A.J.

CROOS *v.* CROOS *et al.*

46—D. C. Negombo, 1,701.

Last will—Unsound mind—Undue influence.

To impeach a will on the ground of undue influence, it must be proved that the influence exercised amounted to coercion, i.e., compelled the testator to do something he did not want to do.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Muttunayagam*, *Weerasinghe*, and *Hayley*), for appellant.

Bawa, K.C. (with him *Drieberg* and *Zoysa*), for respondents.

Cur. adv. vult.

October 23, 1919. ENNIS A.C.J.—

This appeal is from a refusal of the learned District Judge, Negombo, to grant probate of a will dated September 27, 1913, of the late Gabriel Stephen Rodrigo of Negombo, which was propounded by the appellant; and allowance of a grant of probate of a will dated June 2, 1913.

At the hearing the third respondent opposed the grant to the appellant on the ground that the September will was a forgery, and the eighth to the sixteenth respondents contended that the testator had destroyed the September will *animo revocandi;* they further contended that both wills were made by the testator while of unsound mind, and that the June will was made under the undue influence of Mr. G. M. de Croos, the September will under the undue influence of Mr. N. E. de Croos, the present appellant.

The learned Judge found that both wills were executed by the testator; that the testator made the June will while " of sound disposing mind, memory, and understanding," and that the September will was made while he was not of sound disposing mind, memory, and understanding; that Mr. G. M. de Croos did not exercise any undue influence, and that Mr. N. E. de Croos did; and that the September will was not destroyed by the testator, but was probably stolen.

On the appeal appearance was entered for the third respondent; there was no appearance for the other respondents.

For the appellant it was contended that the testator was " of sound disposing mind " at the time of executing the September will, and that the appellant had not exercised undue influence to cause the testator to execute it.

These are purely questions of fact, and the learned Judge has given reasons at length for his findings. I do not, however, find myself in accord with the reasons upon which the findings on these points are based. It is agreed that the testator was a lunatic at the time of his death. The point of time when he became of unsound mind is the question in the case, and the learned Judge appears to have been greatly influenced in coming to a decision on this point by the terms of the September will. Mr. Arthur de Silva, who drew up the June will, and of whom the learned Judge says, " there is no doubt whatever that what he says he honestly believes to be true, " has given evidence that he used to see the testator practically five days in the week from about 1910; that he, the witness, went to Kandy in April, 1914, and that before he went, the testator, although not quite well in health, was all right in mind, and that he saw the testator to ask him to ask his servants to look after his place. This is definite evidence from a trustworthy source that the testator was of sound mind in April, 1914. Not a single witness speaks of the testator as of unsound mind prior to that. He had had epileptic fits, but that was all.

The case is very different from that of *Harwood v. Baker*,[1] where within two hours of the will being made it was found that the testator was not in full possession of his faculties, and he died a few hours later. Between June and September, 1913 (viz., in July), Mr. G. M. de Croos, who has been the friend and confidant of the testator, died, and Mr. N. E. de Croos (the appellant) appears to have taken his place as the confidant of the testator. This however, is not proof of undue influence. There may have been influence, but unless that influence amounted to coercion, *i.e.*, compelled the testator to do something he did not want to do, it was not illegal. See *Vandrain v. Richardson*.[2] There is no evidence of any such coercion.

It would seem that after the execution of the September will the testator executed a promissory note, viz., on October 20, 1913; Mr. Kurera gives evidence of this transaction. He also appears to have had a case in court, and to have executed a power of attorney.

The fact that the notary before whom the September will was executed was subsequently convicted and sentenced for forgery is hardly a factor in the case, as it has been proved that the testator employed the same notary as far back as May 6, 1913 (P 2), *i.e.*, before the June will, when the testator was of sound mind according to the Judge's finding.

Finally, there is a significant fact in the case which has not been mentioned by the learned Judge. The thirteenth respondent was living with the testator from 1911 to 1914 (see Mr. Arthur de Silva's evidence), and he has not given evidence in the case, although he appears to be the person who charged Mr. N. E. de Croos with exercising undue influence.

In the circumstances, I would set aside the order appealed from, and direct probate of the September will. The costs of both parties in the Court below and on appeal to be paid out of the estate.

Loos A.J.—

[His Lordship set out the facts, and continued]:—

There is no witness who establishes the exercise of any undue influence by the petitioner-appellant over the testator which induced him to execute the will of September, 1913, but the learned Judge appears to have thought that there is sufficient internal evidence furnished by the will itself to justify its validity being challenged.

The circumstances on which he relied in forming that opinion may indicate that the petitioner-appellant did exercise some influence over the testator, but there is nothing to show that it was an undue influence, that the testator was forced thereby to do what he did not wish to do.

I agree with my Lord that the order appealed against must be set aside, and that the petitioner-appellant is entitled to obtain probate of the will propounded by him.

[1] *3 Moore P. C. Cases 282.*

[2] *(1906) A. C. 169, at 84.*