1968 *Present :* **Alles, J., and Wijayatilake, J.**

D. M. ABEYSEKERA, Appellant, *and* VERNON DE LIVERA and another, Respondents

S. C. 1/67 (Inty.)—D. C. Colombo, 22712/T

Administration of estates—Testamentary action—Application for probate—Order nisi—Objections as to authenticity of the Will—Burden of proof—Averment of Undue Influence—Duty of objector to give sufficient particulars—Civil Procedure Code, ss. 146, 181, 386, 533.

Where, before order *nisi* is made absolute in an application for probate of a Will, the genuineness of the Will is challenged on the ground that the testator had no testamentary capacity in that he did not have a sound and disposing mind at the time of execution of the alleged Will, the burden of proving testamentary capacity is on the propounder of the Will. It would be the task of the objector to rebut this fact by leading satisfactory evidence that it was otherwise.

But if the authenticity of the Will is challenged on the ground that the deceased was induced to sign the Will by the exercise of undue influence by a legatee, the objector must furnish sufficient particulars concerning the nature of the acts of undue influence, so as to enable the other side to meet the case even after fresh issues are framed by the Court in terms of section 146 of the Civil Procedure Code. The objections should not be " loose and vague " and must be " clear and specific and calculated to raise a reasonable doubt as to the genuineness or validity of the alleged Will ".

APPEAL from an order of the District Court, Colombo.

C. Ranganathan, Q.C., with *H. D. Tambiah*, for the Intervenient-Appellant.

Walter Jayawardena, Q.C., with *Lakshman Kadirgamar* and *Ananda Paranavitane*, for the Objector-Respondent.

H. W. Jayewardene Q.C. with *S. S. Basnayake* for the Petitioner-Respondent.

Cur. adv. vult.

August 18, 1968. ALLES, J.—

One Ellen de Livera died on 16th January 1966 leaving a last will and testament dated 3rd January 1965. The petitioner for probate, Ernest Cecil de Alwis, who is the second respondent to this appeal, was appointed executor of the said will and Dulcie Mendis Abeysekera, the appellant, was one of the principal beneficiaries. Under the terms of the will the testatrix, who was a spinster, made certain devises to some of her nieces and certain charitable institutions, but the most valuable property, which consisted of a house at Wellawatte, was bequeathed by her to her niece, the appellant and her children. The second respondent to this appeal sought to prove the said will and to obtain probate from the District Court. Order *nisi* declaring the will proved was made on 17th March 1966. Vernon de Livera the first respondent, a nephew of a deceased brother of the testatrix, intervened and on the returnable date—8th May 1966—moved for a date to file objections. The objections were filed on 26th August 1966, in the nature of an affidavit which stated in paragraph 4 that ' the deceased did not have testamentary capacity and did not have a sound and disposing mind at the time of execution of the alleged will '. The same paragraph further stated that the ' deceased had been induced to sign the document (said to be the last will) by undue influence ' and that the affirmant was unaware that the deceased had in fact signed the document. The matters referred to in the affidavit were fixed for inquiry ; the proctor for the objector filed his list of witnesses and documents, notice of which was given to the second respondent and on 9th November 1966, the case was set down for inquiry before the

Additional District Judge of Colombo. On this date, the appellant was added as a respondent to the application. The petitioner objector and the present appellant were all represented by Counsel and the record reads as follows :—

" Mr. Nadaraser (for the petitioner) frames the following issues :—

1. Is the document marked ' A ' and filed of record, the last will and testament of the deceased Ellen de Livera ?

Mr. Navaratnarajah (for the objector) frames the following issues :—

2. Was the deceased induced to sign the said last will by the exercise of undue influence ?
3. Did the deceased have at the time of the execution of the said will, testamentary capacity and a sound disposing mind ?

Issue 2 is now amended by the addition of the words ' exercised on her by Mrs. Dulcie Mendis Abeysekera. ' "

Counsel for the appellant and Counsel for the petitioner objected to Issues 2 and 3. In regard to Issue 2 it was submitted by Counsel that the precise nature of the acts of undue influence should be given and also the dates and places of such acts and in regard to Issue No. 3, Counsel submitted that it does not state why or how the testatrix did not have testamentary capacity and why the objector says she did not have a sound and disposing mind. The learned trial Judge, in spite of these objections, accepted the issues in the form in which they were raised. He has not set down any reasons. The appellant has appealed from this order and prayed that the issues be rejected and that fresh issues be framed so as to give due notice of the alleged acts of undue influence, the manner in which the undue influence was exercised and the times, dates and places of the said acts and as to why or in what way the deceased lacked testamentary capacity or a sound disposing mind.

In my view, subject to the observations I have to make in regard to the procedure adopted by the learned Judge, Issue No. 3 might be accepted. The burden of proving this fact is on the propounder of the will and the notary who executed the last will has filed an affidavit on 17th March 1966 that to all appearances he verily believed the deceased to be " of sound mind, memory and understanding " at the time of the execution of the will. It would be the task of the objector to rebut this fact by leading satisfactory evidence that it was otherwise. The real complaint of the appellant is that she has been kept completely in the dark as to the precise nature of the acts of undue influence alleged against her and even of the approximate times and places when and where this undue influence was exercised so that she may be able to get ready to meet the allegations. She further maintained that the first time that she became aware that it was alleged that she was the person who exercised undue influence on the testatrix was at the inquiry on 9th November 1966 .

Section 533 of the Civil Procedure Code requires, *inter alia*, that if " any person upon whom the order *nisi* has been directed to be served, or any person then appearing to be interested in the administration of the deceased's property, *satisfies the court that there are grounds of objection to the application, such as ought to be tried on viva voce evidence*, then the court shall frame the issues which appear to arise between the parties, and shall direct them to be tried on a day to be then appointed, for the purpose under section 386. "

What was the material on which the court could have been satisfied before the framing of issues, that there were grounds of objection to the application which required them to be tried by *viva voce* evidence ? There was evidence that the testatrix was 82 years of age at the time of her death ; that she was a spinster and that she had made certain devises to her nieces and that the intervenient-appellant benefited most by her death. It was submitted by Counsel for the objector that this being a family matter the objector by alleging undue influence had stated all that was necessary. Mr. Ranganathan for the intervenient-appellant and Mr. Jayewardene for the petitioner (the present 2nd respondent) submitted that the material was inadequate to satisfy the Court that the will was executed under the exercise of undue influence. They relied on the observations of Bonser, C.J. and Withers, J. in *In the Matter of the Estate of the late Sinnetamby Poothepillai* [1] where at p. 216 the Chief Justice said—

> " . . . that (section 533) does not mean . . . . that it is sufficient if the Court is satisfied that somebody objects. It means that the Court must be satisfied that there is a prima facie case made against granting the application. It is not enough that somebody gets up and says that the will is a forgery ; something more is necessary from which the Court can infer that a substantial case against the application has been made out. "

And Withers, J. at p. 217 said if an issue of forgery had been raised the Judge would have no power to determine it because that issue had no proper foundation.

> " The Court has not been satisfied by evidence that there was a *prima facie* case for suspicion against the genuineness of the document. Without such evidence the Court could not frame the issue much more determine it. "

Although these observations were made in a case in which the will was attacked on the ground of forgery, the question arises whether they are not equally applicable to a case of undue influence.

[1] *(1896) 2 N. L. R. 214 at 216.*

Counsel supporting the appeal also submitted that in Ceylon the doctrine of Undue Influence has been taken from the English Law and that in order to establish Undue Influence there must be either evidence of coercion or fraud—vide *Pieris v. Pieris* [1], *Gray v. Kretser*,[2] *Perera v. Tissera*, [3] and *Fernando v. Peiris*. [4] They therefore contend that it was insufficient for the objector to allege undue influence without stating in what manner that influence was exercised. Finally Counsel for the petitioner-respondent brought to our notice the provisions of section 181 of the Civil Procedure Code which states that in interlocutory applications an affidavit may admit the statement of an affirmant's belief provided that reasonable grounds for such belief are set forth in the affidavit—vide *Samarakoon v. Ponniah* [5]. It was open to the objector to allege that the will was executed as a result of undue influence. But if so, the reasonable grounds for such belief should have been set down. I am unable to agree with Counsel for the objector that the mere allegation of undue influence is a 'fact'. Whether there was influence and if so whether such influence was undue are inferences that have to be drawn from the facts averred in the affidavit. The present appeal however is not based on a non-compliance or wrong compliance of section 533 by the trial Judge but is only confined to a prayer for a rejection of the present issues and framing of fresh issues to enable a fuller exposition of the matters affecting undue influence. It was submitted however by Counsel for the appellant that if the material could not have reasonably satisfied the Judge that the objection on the grounds of undue influence was sufficient, *a fortiori* for the same reason, the present issues are insufficient to arrive at a right decision in the case.

Counsel for the objector sought to support the present issues on what may be termed the historical approach. When the Charter of 1833 gave power to the Judges of the Supreme Court to 'frame, constitute and establish' Rules and Orders for the procedure, practice and pleadings upon all actions or suits in Court, no special Rules were drafted in regard to testamentary proceedings. Therefore when section 533 of the Civil Procedure Code was drafted in 1889, the framers of the Code must have been guided by the practice of the Probate Division in England in regard to testamentary matters. This procedure did not provide that particulars of Undue Influence should be given to the other side. In support Counsel relied strongly on two decisions of the Probate Division decided in 1883—*Lord Salisbury v. Nugent* [6] and *Hankinson v. Barningham* [7]. In the former case the President had ordered the defendant to give the names of the persons charged with undue influence, but declined to go further and order particulars of the acts of undue influence and the time and places where each of the said acts were alleged to have been committed to be given. Cotton, L.J. said that if he had to decide the case according to what he thought reasonable, he would say that where there is a long period involved, "it would be better for the purposes of justice, and

[1] *(1904) 8 N. L. R. 179 at 209 and (1906) 9 N. L. R. 14 at 24.*
[2] *(1918) 2 C. W. R. 190.*
[3] *(1933) 35 N. L. R. 257.*
[4] *(1946) 47 N. L. R. 169.*
[5] *(1931) 32 N. L. R. 257 at 258, 259.*
[6] *9 P. D. 23.*
[7] *9 P. D. 62.*

a saving of expense, for the party alleging undue influence to be obliged to show with reasonable particularity the nature of the case he intends to make " but in view of the prevailing practice of the Court followed by eminent Judges of the Court, he refrained from ordering that particulars should be furnished. Lindley and Fry, L. JJ. also refused to interfere in view of the long-standing and prevailing practice of the Court. In the latter case, Sir James Hannen declined to order particulars to be given of an allegation that a person was of unsound mind. Both cases were considered by Lord Esher in 1886 in *Cave v. Torre* [1] which was a case, not of Probate but one in which the defendant stated that he had reasonable and probable cause that his brother-in-law, the plaintiff was of unsound mind and ordered his removal to the lunatic asylum. Lord Esher following the two Probate cases held that the defendant could not be ordered to give particulars of the unsoundness of mind. In support of his view, the learned Judge said that such particulars would first of all, be " evidence only and not facts ; and, secondly, if it were facts, why it is only increasing the expense to order particulars of circumstances which might extend over years. "

In 1901, by a Rule made under the Judicature Act, a specific amendment was made in the practice with regard to probate. Order XIX, Rule 25A, required *inter alia*, it to be stated with regard to *every defence* which is pleaded what is the substance of the case on which it is intended to rely . . . ' The decisions in *Lord Salisbury v. Nugent* and *Hankinson v. Burningham* came up for consideration in *The Earl of Shrewsbury's case* [2] in 1922. In this case reference was made to Rule 40 of the Rules of Contentious Practice in Probate made in 1865 under statutory powers. This Rule authorised the pleading of several defences by defendants in probate actions, and as to one of such defences only, that of want of knowledge and approval of the contents of a will, directed that the party pleading the same should deliver with such a plea sufficient particulars. This rule did not require particulars to be given in cases of Insanity and Undue Influence and sanctioned the practice followed in *Lord Salisbury v. Nugent* and *Hankinson v. Burningham*. However, in the *Earl of Shrewsbury's case*, Rule 40 and the practice hitherto existing were fully discussed and it was held in spite of an argument to the contrary, that the decisions in *Lord Salisbury v. Nugent* and *Hankinson v. Burningham* must be considered as being overruled and that in view of Order XIX, Rule 25A, the requisite particulars must be given where either undue influence or unsoundness of mind is alleged. Sir Henry Duke, President of the Probate Division who delivered the judgment remarked at p. 120 that " it is satisfactory to reflect that the practice actually in use here as I have detailed it is that which Cotton, L.J. in the Court of Appeal in *Lord Salisbury v. Nugent* . . . . thought to be most conducive to just administration of the Law. "

Unlike in England and in India our law has remained static since 1889 and there has been no amendment of the Civil Procedure Code providing for particulars to be stated in the pleadings of any misrepresentation,

[1] *(1886) 54 Law Times 515 at 519.* [2] *(1922) P. D. 112, 126 Law Times 415 at 416.*

fraud, breach of trust, wilful deceit or undue influence. It is the absence of such an amendment that has made it possible for Counsel for the objector to contend that in the interpretation of our law we should be guided by the practice that prevailed in England prior to the passing of the Judicature Act in 1901. In England the alteration has been effected by the issue of Order 19, Rules 6 and 25A, and in India by Order 6, Rule 4, of the Code of Civil Procedure in India.

I am however unable to agree with learned Counsel for the objector that in the absence of any amendment of our Civil Procedure Code on lines similar to those referred to above, we in Ceylon in the year 1968 should still be guided by the English practice as it existed prior to 1901. It is a practice that has been abrogated in England by the issue of the Orders referred to earlier and the decision of the Probate Division in the *Earl of Shrewsbury's case*. Indeed the authorities cited by Counsel for the appellant and second respondent seem to suggest that we in Ceylon had veered to a more liberal view even before the passing of the Judicature Act in 1901. In 1895, Withers, J. in *In the matter of the Last Will and Testament of L. Carolis Dias* [1] at p. 68 indicated that a party respondent must satisfy the Court by evidence either by affidavit or oral testimony that he has good *cause to show against the order being made absolute* and that a Judge can and should discharge an order *nisi* if the party respondent to the order *nisi* satisfied the Court which granted the order that on the material before it, it was not competent to make the order. The same Judge in the subsequent year in *In the Matter of the Last Will and Testament of the late Venasi Ellupalayar* [2] reiterated the same view when he said that an objection to the authenticity of a will should be supported by *oral evidence on oath*. In the same year, Bonser, C.J. in *In the Matter of the Estate of Sinnetamby Poothepillai* (supra) made the observations to which reference has already been made earlier in this judgment. The issue in the case was whether the will was a forgery. This issue was not raised at the trial and Withers, J. who agreed with Bonser, C.J. stated that unless there was a *prima facie* case of suspicion, no occasion arose for the framing of issues. Finally in 1897 we have the decision of the Supreme Court (Lawrie and Withers, J.) in *Perera v. Perera*.[3] In this case the objector led some evidence that although the will was signed by a mark, the testator could write his name; that he was very ill for days prior to his death and that it was dated only five days before his death. Lawrie, J. was of the view, in spite of these facts that the objector had not made out a *prima facie* case and that the District Judge was not wrong in refusing to be satisfied that there were grounds of objection. With regard to the grounds of objection under section 533, Lawrie, J. made the following observations :—

> " It was urged by the appellants that the 533rd section of the Code required only a *prima facie* case to be submitted to the judge, that did not require an objector to set forth every fact and to give the name of every material witness whom he intended to call at the trial, for that

[1] *(1895) 2 N. L. R. 66.* [2] *(1896) 2 N. L. R. 126.*
[3] *(1897) 7 Tambyah's Reports 105.*

would materially prejudice the objection by enabling the propounder of the will to concoct rebutting evidence. I agree but on the other hand it is not sufficient for an objector to say I allege and offer to prove that the will was not signed by the deceased.

After the applicant has supported the application for probate by the oaths of the attesting witnesses no issue should be allowed unless the respondents satisfy the Court that *they have at command evidence which if believed will ensure the rejection of the application.*"

In the same case Withers, J. although he agreed that the case should be remitted to the District Judge for trial on certain issues, said :

"The objections referred to in that section should in my opinion be clear and specific and calculated to raise a reasonable doubt as to the genuineness or validity of the alleged will. I cannot help thinking that the legislature intended that an opponent should bring forward objections such as will be found in forms of defence in the probate division of the High Court in England to an action by an executor who claims a decree of probate of a will in solemn form of law and which *should be supported by satisfactory evidence.* I refer to such defence as non-conformity with the provisions of the statute regarding the execution of wills, unsoundness of mind at the time of execution, undue influence and fraud, etc."

A consideration of the language used by the learned Judges in the above decisions such as 'testimony that he has good cause to show against the order being made absolute,' '*prima facie* case made against the granting of the application,' 'evidence which if believed will ensure the rejection of the application,' and 'objections which should be supported by satisfactory evidence' seem to suggest that a bare statement of the grounds of objection—be it want of understanding or fraud or forgery or undue influence—is not sufficient. The only manner in which the tests mentioned above could be satisfied would be by furnishing particulars of the fraud or misrepresentation or undue influence or other grounds as the case may be. I am therefore inclined to agree with the submission of Mr. Ranganathan and Mr. H. W. Jayewardene that the material supplied by the objector in this case was inadequate and should be particularised further. Learned Counsel for the objector was constrained to argue that it never was his case that particulars of the undue influence should not be made available to the appellant and the petitioner at the appropriate state. In his view this could be disclosed at the stage the case is opened and a postponement granted to enable the other side, if they so desire, to meet the case. But this is most unsatisfactory procedure. Undue influence may take many forms—fraud, coercion, threats and the like—and it is most unsatisfactory that a case should be heard piecemeal. There is the further disadvantage, quite apart from the element of surprise, that a person in the position of the appellant may be deprived of the opportunity of obtaining evidence in his defence if he is not made aware in time of the nature of the case he has to meet. It is a principle of elementary justice that when an allegation is made the party

making the allegation must give sufficient particulars to enable the other side to meet the case. In the instant case, quite apart from the absence of particulars, the first time the name of the person exercising the undue influence was disclosed was on the date the issues were framed. It is the burden of the Court to frame issues on which the right decision of the case appears to proceed (section 146 of the Code) and I would with respect agree with the observations of Bonser, C.J. in *In the Matter of the Last Will and Testament of L. Carolis Dias* (supra) that the procedure that should be followed under section 386 is the ordinary procedure in a regular action. In the words of Withers, J. in *Perera v. Perera* (supra) the objections should not be 'loose and vague' and must be 'clear and specific and calculated to raise a reasonable doubt as to the genuineness or validity of the alleged will'.

I am unable to agree with Counsel for the objector that section 146 of the Civil Procedure Code has no application to testamentary proceedings. The framing of issues is a matter for the Court and as Gratiaen, J. remarked in *Mariya Umma v. The Oriental Government Security Life Assurance Co. Ltd.*[1], "Section 146 imposes a special duty on the Judge himself to eliminate the element of surprise which could arise when the precise nature of the dispute is not clarified before the evidence is recorded.... He should have ordered the defence to furnish full particulars of its grounds for avoiding liability (this was a case where an insurance company sought to avoid liability), and the issues for adjudication should only have been framed after the Judge had ascertained for himself 'the propositions of fact or of law' upon which the parties were at variance." Said Lord Halsbury in *Sayad Muhammad v. Fattah Muhammad*[2] "Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues..." (See also *Natesan Chettiar v. Mariyayee Ammal*[3].)

We think the second issue framed in this case is too vague to enable a Court to satisfactorily arrive at a just decision in the case. Acting in revision, we therefore direct the objector-respondent to furnish the necessary particulars to enable Court to frame fresh issues as contemplated in this judgment to give the intervenient-appellant and the petitioner sufficient notice of the nature of the acts of undue influence said to have been exercised by the appellant on the deceased. If the objector fails to do so the ground of undue influence shall not be entertained by Court. The appeal of the intervenient-appellant is allowed with costs of appeal payable jointly to the appellant and the petitioner-respondent. The costs of inquiry will abide the final determination of the present inquiry.

WIJAYATILAKE, J.—I agree.

Appeal allowed.

[1] *(1955) 57 N. L. R. 145, 149.* [2] *Indian Appeals (1894) P. C. 4.*
[3] *A. I. R. (1936) Madras 526.*