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

KANAGARATNAM, Appellant, *and* ANANTHATHURAI, Respondent.

18—D. C. (Inty.), Jaffna 84.

Will—Codicil—Application for probate—Objections by respondent—Duty of Court to frame issues—Testator's knowledge and approval of contents of will—Nature and degree of proof necessary—Party who prepared will a beneficiary—A circumstance of suspicion Civil Procedure Code, s. 533.

In an application for the issue of probate of a Will or Codicil it is the duty of Court, when the respondent shows grounds of objection to the application, to frame issues as required by section 533 of the Civil Procedure Code.

When considering whether a testator knew and approved of the contents of the Will the Court will take into consideration as a circumstance of suspicion (but in no case amounting to more than a circumstance of suspicion) that the party who wrote or prepared the will takes a benefit under the will. Further, with regard to the nature and degree of proof that is required, the testator's instructions for, or reading over, the instrument are not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased.

APPEAL from a judgment of the District Judge of Jaffna.

H. V. Perera, K.C. (with him *N. Nadarajah, K.C.*, and *H. W. Tambiah*) for the petitioner, appellant.

N. Kumarasingham for the respondent.

June 21, 1945. KEUNEMAN J.—

In this case the appellant produced will P 1 dated May 9, 1942, and asked for probate of that will. The present respondent produced further documents X 1 and X 2 which he alleged had been a later will or codicil duly executed by the deceased. X 1 and X 2 are said to have been executed on October 3, 1942. As regards the will P 1 the present respondent did not dispute the fact that probate should be issued in respect of it and the Judge's finding that probate should be issued in respect of the document P 1 must therefore be affirmed.

The only question is whether the Judge has rightly ordered probate to issue in respect of the documents X 1 and X 2. Now, it has been clearly laid down in our law (see *Andrado v. Silva* [1]) that " it lies upon the propounders to prove (1) the fact of execution, (2) the mental competency of the testator, (3) his knowledge and approval of the contents of the will. If the circumstances are such that a suspicion arises affecting one of these matters it is for the propounders to remove it ".

In this case the learned District Judge has failed to frame issues as he was required to do under section 533 of the Civil Procedure Code,

[1] *22 N. L. R. 4.*

and the case proceeded to trial on certain statements made by counsel. In the course of the proceedings Mr. Advocate Kulasingham, who appeared for the present appellant, said that he insisted upon the documents being proved in solemn form, that is, the proof of the making of the documents by the testator and her mental capacity to make it. Now, undoubtedly the use of the words " in solemn form " appears to catch up all the three elements which are required as proof under our law, but the latter part of his statement may well be interpreted to restrict the elements to two and not three, namely, the making of the documents and the mental capacity of the testatrix and in view of this somewhat ambiguous statement it is possible that there may have been some misunderstanding by the parties. In fact one of the elements which is laid down as requisite under our law has not been sufficiently considered in the Court below or by the Judge himself, namely, whether the testatrix knew and approved of the contents of the will X 1 and X 2. The Judge has not directed his attention to the various pieces of evidence bearing upon the matter, nor has he analysed that evidence and stated his considered conclusions on that matter. In the circumstances it is difficult to uphold the finding of the judge that the documents X 1 and X 2 should be admitted to probate.

There is one further matter which may well have been considered by the judge in connection with the issue of probate. In *Barry v. Butlin* [1] it has been laid down that " if a party writes or prepares a will under which he takes a benefit that is a circumstance which ought generally to excite the suspicion of the Court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument ". Now, in this case the evidence led appears to show that the documents X 1 and X 2 were not drawn up on the instructions of the testatrix and in fact were prepared by the present respondent for his own purposes. Further the documents X 1 and X 2 are in the English language which the testatrix could neither read nor write. Accordingly this was a matter which the Court had to bear in mind in considering whether the documents X 1 and X 2 should be admitted to probate.

Now, in *Barry v. Butlin* there are also laid down certain qualifications which perhaps I may quote. " All that can be truly said is that if a person whether attorney or not prepares a will with a legacy to himself it is at most a suspicious circumstance of more or less weight according to the facts of each particular case in some of no weight at all. . . . . But in no case amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the Court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased ". Further with regard to the nature and degree of proof that is required in these cases *Barry v. Butlin* lays down this principle: " Nor can it be necessary that in all such cases even if the testator's capacity is doubtful the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form no doubt the more satisfactory but

[1] *2 Moore's Privy Council Cases p. 480.*

they are not the only satisfactory description of proof, by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence. In some cases it might be impossible to establish a will without it but it has no right in every case to require it ".

I have given these quotations in full with a view to assisting the Judge in further proceedings which we consider necessary in this case. In view of the fact that these two important matters have not received the consideration which they require, it is necessary that we should set aside the order that probate should issue in respect of the documents X 1 and X 2 but at the same time we affirm the finding of the District Judge that the testatrix executed this document on October 3, 1942, in the presence of five witnesses who also signed the document as such. We further affirm the finding of the District Judge that the testatrix was of sound mental condition and understood the nature of the acts she was doing when she was signing the codicil.

The matter that remains for decision by the Court is whether the testatrix knew and approved of the contents of the documents and further the Court will give consideration to the fact that the documents X 1 and X 2 appear to have been prepared by the party who now claim a benefit under them and the Court will apply the principles laid down in *Barry v. Butlin* or any other English cases which may be cited to the Judge. It is very desirable that even at this stage proper issues should be framed to cover the matters now in dispute. The case will go back for trial on the matters referred back to the District Judge.

The costs of this appeal and the inquiry already had will be in the discretion of the District Judge who hears the matter anew.

JAYETILEKE J.—I agree.

Case sent back.