1944 *Present:* **Soertsz and Hearne JJ.**

ARULAMPIKAI, Appellant, *and* THAMBU, Respondent.

59—D. C. (Testy.) Jaffna, 1036.

Last will—Incapacity of person writing a will from taking under it—Subsequent confirmation——Burden of proof on propounder of will—Point raised for the first time in appeal—Roman-Dutch law.

The principle of the Roman-Dutch law—that a person who writes out a will for the testator cannot take any benefit under it, unless the testator either adds a clause in his own handwriting to the effect that he dictated the will and acknowledges its correctness or in some other manner confirms the disposition—is in force in Ceylon. Such confirmation may take place, apart from the will itself, as for instance in a subsequent and independent codicil or by some other satisfactory proof of confirmation.

Where a strong suspicion arises in consequence of the will being wholly in the handwriting of the beneficiary who is the father of the testatrix, a young woman living under his roof in a state of estrangement from her husband, it is incumbent on the propounder to dissipate the suspicion by leading evidence of the confirmation of the will.

The Supreme Court may decide a case upon a point raised for the first time in appeal where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material upon which the question could be decided.

APPEAL from a judgment of the District Judge of Jaffna. The facts appear from the argument.

N. Nadarajah, K.C. (with him *V. K. Kandaswamy*), for the respondents, appellants.—The petitioner, to whom probate has been issued in this case, is the father of the testatrix, and the 1st and 2nd respondents, who are the appellants, are her child and husband. The will in question was written in the handwriting of the petitioner and makes him the sole beneficiary. It was executed on March 1, 1941.

The rule of the Roman-Dutch law is that a person who writes a will for another cannot take any benefit under it—*Benischowitz v. The Master* [1]; *Mellish v. The Master* [2]; Steyn's *Law of Wills in S. Africa (1935 ed.) p. 16; Nathan's Common Law of S. Africa, Vol. 3, p. 1811;* Van Der Keesel's *Select Theses, Art. 292 (Lorenz's Translation);* Walter Pereira's *Laws of Ceylon (1938 ed.) p. 407.* In English law, if a party writes or prepares a will under which he takes a benefit, the burden is on him of proving that the document really expresses the mind and intention of the testator—*Fulton v. Andrew* [3]; *Tyrrel v. Painton* [4]; *Finny v. Govet* [5]. In Ceylon it has been held that where a suspicion attaches to a will, the Court must be particularly vigilant in examining the evidence—*The Alim Will Case* [6] ; *Andrado v. Silva et al.* [7].

[1] *S. A. L. R. (1921) A. D. 589.*
[2] *S. A. L. R. (1940) T. P. D. 271 at 277.*
[3] *L. R. 7 H. L 448 at 461.*
[4] *L. R. (1894) P. D. 151.*
[5] *(1908) 25 T. L. R. 186.*
[6] *(1919) 20 N. L. R. 481.*
[7] *(1920) 22 N. L. R. 4.*

Section 11 of the Prevention of Frauds Ordinance (Cap. 57) declares that gifts to attesting witnesses and to their wives or husbands are void. That section, however, only adds to, and would not limit, the list of persons who are excluded by the Roman-Dutch law from taking under a will. It is the Roman-Dutch law which will be applicable on such a question as the one involved in this case—*Nagamma v. Sathappa Chetty et al.*[1] ; *Rabot et al. v. de Silva et al.*[2] ; *de Silva et al. v. de Silva et al.*[3]; *Pearl Assurance Co. v. Government of the Union of S. Africa* [4]; *Samed v. Seguthamby* [5]; *Thurburn v. Steward* [6]; *Weerasekere v. Peiris* [7]; Lee's *Introduction to Roman-Dutch Law (3rd. ed.) pp. 2, 26.*

A pure point of law can be raised for the first time in appeal.—*Appuhamy v. Nona* [8]; *Fernando v. Abeyegoonesekera* [9]; *Raymond v. Wijewardene* [10].

E. F. N. Gratiaen (with him *D. W. Fernando* and *C. Chellappah*), for the petitioner, respondent.—As regards the list of persons mentioned at page 15 *et seq.* of *Steyn on Wills* as incompetent to benefit under a will, the whole of the Roman-Dutch law is not applicable in Ceylon. It is impliedly repealed by sections 4 and 11 of the Prevention of Frauds Ordinance (Cap. 57)—*Ahamat et al. v. Sariffa Umma* [11]. We have in Ceylon special formalities provided for, and as long as they have been complied with, the Roman-Dutch rules of exclusion will not apply. The petitioner in this case was merely performing some clerical duties for the notary. The incapacity of a person who writes the will would apply. to nuneupative will only and not to a will formally executed in the manner required by law—*Benischowitz v. The Master* [12].

The point of law raised now by the appellants was not taken at the trial. It is not even mentioned in the petition of appeal. A point of law cannot be raised for the first time in appeal when it depends on an issue of fact on which evidence could have been led and which ought to have been investigated at the trial Court—*Manian v. Sanmugam* [13]. In the present case evidence that the testatrix confirmed the disposition would have removed any disability imposed by law on the petitioner—*Steyn on Wills p. 16; Melish v. The Master* [14]. Parol evidence may be received regarding such confirmation—*Exparte Searle* [15].

N. Nadarajah K.C., in reply.—The confirmation necessary to enable the petitioner to succeed is something in the nature of an endorsement in the will itself or by way of a codicil—*Smith and another v. Clarkson and others* [16]; *Benischowitz v. The Master* (*supra*); *Van Leeuwen's Commentaries, Vol. I., p. 318* (Kotze's Translation).

Cur. adv. vult.

[1] *(1903) 9 N. L. R. 246.*
[2] *(1909) 12 N. L. R. 81.*
[3] *(1938) 40 N. L. R. 228.*
[4] *L.R. (1934) A.C. 570 at 578.*
[5] *(1924) 25 N. L. R. 481 at 496.*
[6] *L. R. (1869–71) 3 P. C. 478 at 511.*
[7] *(1932) 34 N. L. R. 281 at 285.*
[8] *(1912) 15 N. L. R. 311.*
[9] *(1931) 34 N. L. R. 161.*
[10] *(1937) 10 C. L. W. 1.*
[11] *(1931) 33 N. L. R. 8 at 13.*
[12] *S. A. L. R. (1921) A. D. 589 at 599.*
[13] *(1920) 22 N. L. R. 249.*
[14] *S.A.L.R. (1949) T.P.D. 271 at 277.*
[15] *(1942) Bisset & Smith's Digest 266.*
[16] *S. A. L. R. (1925) A. D. 501 at 507.*

August 1, 1944. SOERTSZ J.—

The last will which was admitted to probate by the order of the District Judge, dated April 15, 1943, had been attacked mainly on the grounds that—

(*a*) it was not the act and deed of the deceased;
(*b*) that it was procured by undue influence;
(*c*) that it was procured by fraud.

The learned trial Judge, in a full and well-considered judgment, found against the appellants on all three questions, and, in my opinion, on the evidence before him, he reached the only possible conclusions in regard to the questions (*a*) and (*c*). The evidence he accepted, established quite clearly that the testatrix signed the will in the presence of the Notary and of the two attesting witnesses, all of them being present together, and there was no evidence whatever of fraud. In regard to the other question, that of undue influence, two views were possible, but the trial Judge having found that there was no undue influence, I do not think we ought to reverse that finding although possibly, we ourselves might have reached a different conclusion. But, on appeal Counsel for the appellants raised a question which had not been expressly put in issue in the Court below, and contended that the will failed to take effect inasmuch as it was, in its entirety, in the handwriting of the petitioner, who is the sole beneficiary under it. Now, it is a well-established rule of the Roman-Dutch common law that "the person who writes out a will for the testator cannot insert therein any benefit for himself and, should he do so, cannot take such benefit unless the testator either adds a clause in his own handwriting to the effect that he dictated the will and acknowledges its correctness, or in some other manner clearly confirms the disposition. Such confirmation can take place *dehors*, or apart from the will itself, as for instance in a subsequent and independent codicil, or by some other satisfactory proof of confirmation. Such confirmation cannot, however, be gathered merely from the fact that the testator knew the contents of the will either because he had read or dictated it, or prepared a draft which the writer merely copied". *See Steyn on Wills p. 16.* This statement is based on the several cases to which reference is made by the writer—*Smith v. Clarkson and others* [1]; *Gunn v. Gunn* [2]; *Smith v. Mathey* [3]. The case of *Smith v. Clarkson*, in particular, deals very fully with this question in the judgment of Kotze J.A. which considers the opinions of nearly all the well-known Roman-Dutch Jurists.

In regard to wills, we are governed by the Roman-Dutch law, except in so far as local Ordinance have modified it, and whatever view we may personally entertain in regard to what we may be disposed to regard as an archaic and in many cases, a purely technical rule of exclusion, we must submit to it if it is in force. The question, then, arises whether the Roman-Dutch common law rule stated above has been abrogated by any local Ordinance. Counsel for the respondent to this appeal submitted that section 11 of the Prevention of Frauds Ordinance (Cap. 57) repealed that rule by implication in that it rendered void only devises, legacies,

[1] *(1925) A. D. 501.* [2] *(1910) and T. P. D. 423.* [3] *(1926) O. P. D .31.*

gifts, &c., to attesting witnesses and to their wives and husbands and persons claiming under such witnesses, wives or husbands. I do not think that argument can be accepted for as Steyn points out (pages 15-18) these were persons incapacitated from benefiting under a will both by the common law and by statute law. In South Africa too, there are statutes incapacitating attesting witnesses, their wives and husbands from taking benefits, and yet, the rule of the common law excluding persons writing out a will from benefits under it is very much alive and is strictly enforced there, as the cases already cited show. The resulting position would appear to be to the common law exclusions, the statutes added others.

In this case, it is admitted that the whole will is in the handwriting of the petitioner who is the respondent to this appeal. It matters not, in the least degree, that evidence was led to show that the petitioner copied the will from a Notary's Manual at the request of the Notary who later attested the will. He cannot take under the will unless there is satisfactory proof of a confirmation by the testatrix of the will in the manner indicated in the passage cited from Steyn's Treatise.

That brings me to the two other questions that arise on this appeal, namely whether, (*a*) this point may be taken on appeal, it not being an issue expressly framed in the Court below; (*b*) if it may, properly, be considered on appeal, whether we should send the case back to the trial Court for further consideration of the question of appropriate confirmation, or deal with it here.

In regard to these questions, the important fact to bear in mind is that they arise in testamentary proceedings in which it is sought to have a will admitted to probate—proceedings *in rem*. In such proceedings, as laid down in the case of *Andrado v. Silva* [1] " it lies upon the propounder of a will to prove (1) the fact of execution; (2) the mental competency of the testator; (3) his knowledge or 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 propounder to remove it ". Applying this principle, we find that in regard to the fact of execution, a strong suspicion arises in this case in consequence of the will being wholly in the handwriting of the beneficiary who is the father of the testatrix, a young woman living under his roof in a state of estrangement from her husband, the father himself having, in great measure, caused the estrangement. It was, therefore, incumbent on the propounder to dissipate that suspicion by leading evidence of the confirmation of the will. From the very beginning of the inquiry, the fact of the will being in the handwriting of the petitioner was pressed in order to show that the will was designed, drawn up, and imposed upon the testatrix by her father, the petitioner, and yet no attempt whatever was made to show that there was any independent confirmation of the will by the testatrix. It may indeed be granted that the parties were not aware of that rule, but granting that only makes it most unlikely that there was any other confirmation of the will by the testatrix. But, even if such a confirmation had come into existence for some other reason, it would have, undoubtedly, been relied upon to repel the attack that was actually delivered against

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

the will. But, if we disregard the fact that these are testamentary proceedings, in which quite apart from issues such as are framed in ordinary suits, an initial burden lies upon the propounder of a will, and treat the case as an ordinary suit purely *inter partes* to be tried and decided upon issues, I still think that the rule laid down in the leading case on the point, *The Tasmania (1890) 15 A. C. at 223*, applies to enable the appellants to raise to this question on appeal (*a*) because the question "might have been put forward in the Court below under some one or other of the issues framed" (*15 N. L. R. at page 312*). In this instance, it could have been put forward under, at least, issues 1 and 2; (*b*) because in the circumstances of this case, we may safely assume that we have before us all the material in support of the will that was at the command of the petitioner. If there had been any further confirmation of the will by the testatrix it would, undoubtedly, have been put forward, when in cross-examination, attention was repeatedly called to the fact that the petitioner himself had written the will. To send the case back now might only serve to expose the parties to stronger temptation than they appear to be able to resist.

In the result, although this will was rightly admitted to probate on the findings of the District Judge and would have been operative in other circumstances, it fails in this instance because the sole beneficiary under it is incapacitated from taking under it.

I would, therefore, set aside the order made and direct that the estate be dealt with on the footing of an intestacy. In regard to costs, the appellant, that is the 2nd respondent to the petition, having failed on the questions he raised in the trial Court, I think he should pay the petitioner-respondent's costs in the Court below personally. In regard to the costs of appeal, the petitioner-respondent will recover half from the estate.

HEARNE J.—I agree.

Appeal allowed.