Present : Lascelles C.J. and Middleton J.

Oct. 6, 1911

APPUHAMY *v.* PERERA *et al.*

128—*D. C. Kurunegala,* 1,017.

Codicil—Revocation of will by destroying it—Is codicil also revoked?—Ordinance No. 7 of 1840, s. 5.

A testator intended to revoke both his will and codicil, but by mistake or ignorance destroyed only the will.

Held, that the codicil was not revoked.

LASCELLES C.J.—Testamentary instruments can be revoked only in the ways prescribed in section 5 of Ordinance No. 7 of 1840; it is not open to us to hold that testamentary instruments can be revoked by implication.

THE facts are stated fully in the judgment of Lascelles C.J., as follows :—

"This is an appeal from a decree of the District Judge of Kurunegala admitting to probate a codicil to the will of Mellowa Arachchige Carolis Perera Appuhamy of Katuwellagama.

"The deceased executed a will on November 20, 1906, and on November 22 of the same year a codicil, in which he varied the terms of the will by increasing the share of the sons. Both the will and the codicil were prepared and attested by the Dunagaha Notary (Seneviratne), whose warrant to practise as a notary has since been cancelled. The testator died on September 8, 1910, but neither will nor codicil was found amongst his papers. On October 10 Julis, the executor of the will, applied for probate, stating in his petition that the testator had left the will and codicil with Dunagaha Notary, who refused to deliver them to him. The notary, when examined on November 13, stated that after executing the will and codicil, the testator had left them in his office for about a month, and that the testator had consulted him about revoking the will, and that he had advised the testator either to tear up the will or to write another one.

"On February 28, 1911, when the case came on for inquiry, the applicant produced the original codicil, stating that he had received it from the notary on payment of Rs. 250. The learned District Judge disbelieves this, but I must confess that I regard the conduct of the notary with the greatest suspicion.

"The respondents produced evidence that the testator formally tore up the will in the presence of his daughters and others. But the learned District Judge rejects this evidence, which is almost certainly false."

Oct. 6, 1911

Appuhamy v. Perera

On the evidence the learned District Judge (Bertram Hill, Esq.) held :—

I find on the evidence that the will was in the possession of the testator, and that it was not forthcoming at his death. The presumption is that he destroyed it. I think it is very probable that the deceased did wish to revoke both the will and the codicil, but by mistake or ignorance only destroyed one of these documents. If the will had been in existence, it seems to me very probable that it would have ben found as the codicil was found.

I find them on the issue that the last will was revoked, but the codicil was not revoked.

I see no reason why the codicil should not be admitted to probate. It is an independent document, and its provisions can be carried out apart from those of the will. I make order accordingly, and order letters of administration with the codicil annexed to issue to the applicant, the eldest son of the deceased.

The second respondent appealed.

Elliott, for the appellant.—The District Judge holds that the will was destroyed *animo revocandi*. The codicil must, therefore, be held to have been revoked ; it is a necessary consequence of the revocation of the will. Counsel cited *Grimwood v. Cozens*,[1] *In the Goods of Bleckley*.[2]

H. A. Jayewardene (with him *A. St. V. Jayewardene* and *Molamure*) for the respondent.—A revocation of the will does not amount to revocation of the codicil. A codicil can only be revoked in the manner set out in section 5 of Ordinance No. 7 of 1840. *Black v. Jobling*,[3] *In the Goods of Savage*,[4] *Gardiner v. Courthope*.[5]

Elliott, in reply.

Cur. adv. vult.

October 6, 1911. LASCELLES C.J.—

His Lordship set out the facts, and continued :—

The findings of the learned District Judge on the evidence are (1) that the will was in the possession of the testator ; (2) that it was not forthcoming at this death ; (3) that the presumption is that the testator destroyed the will ; (4) that is is probable, that the testator wished to revoke both the will and the codicil, but by mistake or ignorance he destroyed only the will.

I am not prepared to hold the findings are erroneous, though the finding as regards the intention of the testator, resting as it does on the almost uncorroborated evidence of the notary, is far from convincing.

The suggestion of Mr. Jayewardene that the notary sold the will to the daughters and the codicil to the applicant, as the applicant

[1] *1 Sw. & Tr. 364.*
[2] *8 P. & D. 169.*
[3] *1 P. & D. 685.*
[4] *2 P. & D. 78, 403.*
[5] *12 P. & D. 14.*

has sworn that he did, is far from improbable. Accepting the verdict of the District Judge, the question for decision is whether on these findings the codicil was effectually revoked.

Mr. H. Jayewardene, for the respondents, rested his case on section 5 of Ordinance No. 7 of 1840, which does not differ materially from section 20 of the Wills Act.[1] The section of our Ordinance is as follows : " No will, testament, or codicil, or any part thereof, shall be revoked otherwise than by the marriage of the testator or testatrix, or by another will, testament, or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will, testament, or codicil is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or testatrix, or by some person in his or her presence, and by his or her direction, with the intention of revoking the same."

Mr. Jayewardene contends that whatever may have been the intention of the testator as regards revoking the codicil, that instrument was not revoked in law, inasmuch as it was not revoked in any of the ways enumerated in section 5 of Ordinance No. 7 of 1840, as the only means which the law allows for the revocation of testamentary instruments.

Mr. Elliott, on the other hand, contended that the codicil was dependent on, and subordinate to, the will ; that the will has been found to have been destroyed *animo revocandi* ; that an intention to revoke the codicil as well as the will may be inferred from the notary's evidence ; and that the revocation of the will carried with it as a necessary consequence the revocation of the codicil.

The case is thus in its essential particulars the same as that discussed by Lord Penzance in *Black v. Jobling*.[2]

The question is in substance whether the distinct and positive enactment of section 5 of Ordinance No. 7 of 1840 is to be given effect to, or whether the revocation of codicils is governed by the law which prevailed in England before the passing of the Wills Act, and has been acted on in one or two cases after the passing of that Act.

Lord Penzance, in *Black v. Jobling*,[2] had no hesitation in holding that the intention of section 20 of the Wills Act (corresponding to section 5 of Ordinance No. 7 of 1840) was " to do away with implied revocation, and relieve the subject from the doubt and indistinctness in which the cases had involved it." He also discussed the cases of *Clogstown v. Walcott and others*[3] and *Grimwood v. Cozens and others*,[4] both decided after the Wills Act, and came to the conclusion that in these cases the effect of the Statute of Wills had not been fully discussed.

[1] *Vict. c. 26.*
[2] *1 P. & D. 685.*
[3] *5 N. C. 623.*
[4] *2 Sw. & Tr. 364.*

In *In the Goods of Savage*,[1] Lord Penzance followed his previous decision in *Black v. Jobling*.[2]

The decision of Butt J. in *Gardiner v. Courthope*[3] appears to be the last reported case on the subject. It is important, because subsequently to the decision of *Black v. Jobling*[2] there had been two cases which were cited as having undermined the authority of that decision, namely, *In the Goods of Bleckley*[4] and *Sugden v. Lord St. Leonards*.[5] Mr. Justice Butt, in *Gardiner v. Courthope*,[3] doubted whether Sir James Hannen in that case had thrown any doubt on the law as laid down by Lord Penzance, and regarded the case (which was one where the codicil was written at the foot of the will on the same sheet of paper) as a finding of fact that the deceased had destroyed the document with the intention of destroying the codicil as well as the will.

With regard to *Sugden v. Lord St. Leonards*,[5] Butt J. commented on that decision in the following terms : " It is perfectly true that in dealing with a demurrer to a plea, which he had already found to be not true in fact, and as to which, therefore, it did not matter one straw for the purposes of the case whether it was good or bad in law, the learned Judge (Sir James Hannen) did intimate that he thought that plea a good plea, although that view seems inconsistent with the decision of Lord Penzance in the cases which have been cited."

Butt J. in the result considered himself bound by *Black v. Jobling*,[2] and admitted the codicil to probate, though it was dependent on the will to which it belonged, and could not be construed without it.

On these authorities the law, I think, is clear. Section 5 of Ordinance No. 7 of 1840 must be construed to mean what it says, namely, that testamentary instruments can be revoked only in the ways prescribed in the section, and that it is not open to us to hold that testamentary instruments can be revoked by implication.

If the authorities had compelled me to have come to a different conclusion I should have regretted the result, for when the Legislature, in a matter of this importance, has laid down rules which are at once simple and precise, it is not to the interest of the public that such rules should be obscured or whittled down by judicial decision.

In my opinion the codicil propounded in this case, not having been revoked by any of the means prescribed in section 5 of Ordinance No. 7 of 1840, should be admitted to probate. The appeal therefore, fails and must be dismissed with costs.

[1] *2 P. & D. 78.*
[2] *1 P. & D. 685.*
[3] *12 P. & D. 14.*
[4] *8 P. & D. 169.*
[5] *1 P. & D. 154.*

MIDDLETON J.—

The question in this case is whether a codicil to a will which has been properly held to be revoked has also been revoked according to law. In this case, I am not sure that I should have arrived at the same findings as the learned District Judge as regards the possession of the will, and the probability that it was the intention of the testator to revoke both will and codicil, but by mistake or ignorance he only destroyed the will. From reading the evidence my inferences would rather be that the notary was more concerned in these matters than the learned Judge deemed to be the case. Assuming, however, the correctness of these findings, there does not appear to me any evidence that the testator revoked the codicil according to the terms of section 5 of Ordinance No. 7 of 1840.

As to the cases relied on by Mr. Elliott, I see that in *Grimwood v. Cozens*[1] the papers found with the codicil, of which probate was sought, contained a draft will stating "I have destroyed all other wills or codicils," and the codicil in question then had the names of the attesting witnesses struck through.

In *In the Goods of Bleckley (deceased)*[2] the will and codicil were written on one sheet of paper, and the deceased had directed another will to be prepared, and revoked the will by cutting off his signature, though he did not mutilate the codicil

In both these cases I think, as Sir Charles Butt said as regards Sir James Hanner's ruling in *Gardiner v. Courthope*,[3] that the learned Judges deciding them were of opinion that the evidence showed, not only an intention to revoke, but an actual revocation within the meaning of section 20 of the Wills Act,[4] which is practically the same as section 5 of Ordinance No. 7 of 1840.

In the present case there is no revocation of the codicil within the terms of section 5, and the inference of the learned District Judge as to the intention to revoke is at its weightiest only in his opinion probable. *Black v. Jobling*[5] and *In the Goods of Turner*[6] are, in my opinion, strong authorities applicable to the present case. In the latter case also, as well as in *Gardiner v. Courthope*,[3] the construction of the codicil depended on the destroyed will.

In *In the Goods of Ellice*[7] the codicil was absolutely independent of the will, both physically and in respect of construction.

"This difficulty, as regards the will having been destroyed and so rendering the codicil in great part unintelligible," as Lord Penzance said in *In the Goods of Turner* (*ubi supra, p.* 406), "applies in every case where some other document is mentioned in a will in such manner that the directions of the will cannot be carried out without

[1] *2 Sw. & Tr. 364.*
[2] *8 P. & D. 169.*
[3] *12 P. & D. 14.*
[4] *7 Will IV. and Vict. c. 26.*
[5] *1 P. & D. 685.*
[6] *2 P. & D. 403.*
[7] *33 L. J. P. M. & A. 27.*

Oct. 6, 1911

MIDDLETON J.

Appuhamy v. Perera

a reference to such document, and that document is not forthcoming. It is a question of construction." In the present case there is, I gather from the evidence, a duplicate of the will, which may be in existence. In *In the Goods of Savage*,[1] Lord Penzance said, in referring to his own decision in *Black v. Jobling*,[2] " the words of the statute are imperative."

I would decide this case on the same ground, and dismiss the appeal with costs.

Appeal dismissed.