1937

Present : **Maartensz and Hearne JJ.**

RAJASURIAR *v.* RAJASURIAR *et al.*

119—D. C. Jaffna, 256.

Will—Onus of proof in case of suspicion—Statements made by the testatrix regarding the disposition of property—Admissibility—Evidence Ordinance, ss. 14 and 32.

Where, on an application for probate, suspicion attaches to a will a Court should not pronounce in favour of it unless the suspicion is removed and the Court is judicially satisfied that the paper propounded does express the true will of the deceased.

Statements made by a testatrix shortly after the execution of her will to the effect that she had given all her property to her child are admissible under section 14 of the Evidence Ordinance.

APPEAL from an order of the District Judge of Jaffna

F. A. Hayley, K.C. (with him *P. Navaratnaraja*), for appellant.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam* and *T. K. Curtis*), for second and third respondents.

Cur. adv. vult.

October 27, 1937. HEARNE J.—

The petitioner propounded the document marked P 2 as the last will of his deceased daughter, and probate was refused on the finding of the Judge that the deceased was not aware of the contents and nature of the will when she set her signature to it. He held that it was the intention of the testatrix to bequeath her property to her minor son with a life interest to her parents and by implication that the disposition of her

property, according to the tenor of P 2, "to her son *and* father and mother" was contrary to the instruction she gave the Notary who drafted P 2.

The onus of proving a will lies upon the party who propounds it. The canons of proof vary according as the will is a reasonable and natural one or the reverse. "Where a suspicion attaches to a will, a Court must be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." In these circumstances the person propounding a will must, as it is said, "satisfy the conscience of the Court" not only that a testator was in such a state of mind as to be able to authorize, and to know that he was authorizing, the execution of a document as his will, but also that he knew and approved of the contents of the document.

In regard to the first point I agree with the Judge that the will was the reverse of reasonable and natural. I endorse the reasons he gives in support of his view and it is unnecessary to reiterate them here. Clearly the petitioner appreciated the unreasonableness of the bequest to him and his wife of two-thirds of the testatrix's estate and it was undoubtedly for this reason that he stressed, if it is true, the unhappy relations existing between the testatrix and her husband. But as the Judge correctly pointed out this part of his evidence was irrelevant. Even assuming the testatrix was on bad terms with her husband this is no reason for diverting from her only child who, according to the evidence, was very dear to her, two-thirds of her disposable estate to her aged parents.

In regard to the second point the circumstances were such as most properly awakened the vigilance of the Court. Two-thirds of the property according to P 2, would become the property of the testatrix's father and mother and their heir was a young man who was married to the daughter of the Notary who prepared P 2. P 2 is alleged to have been read and approved by the testatrix before the witnesses to her signature came into her sick room. The persons who gave evidence to this effect were the petitioner and the Notary both of whom are interested parties and the sister-in-law of the petitioner who may have been prevailed upon to give false testamony. After the witnesses to the execution of the "will" had been brought in one copy is alleged to have been read by the Notary while the other is stated to have been in the hands of Dr. Mills, but Dr. Mills, who was one of the witnesses, and Mr. Swaminathan, who was the other, deny this. Much has been said to cast doubt on the veracity of Dr. Mills and Mr. Swaminathan but on a review of the whole case, and taking Mr. Hayley's objections into consideration, I think that the Judge was entitled to believe them in regard to the circumstances preceding the execution of P 2. A point was made of the fact that it was not suggested to the Notary in cross-examination that he had failed to carry out the testatrix's instructions. This is true but it must not be given an exaggerated importance. The Notary had deposed to the reading of the will in the presence of the testatrix. The object of this evidence was to show that he had carried out her instructions, for had he not done so he would not have dared read P 2 in the presence of the testatrix with

Dr. Mills in a position to verify what he was reading. On this most important point he was strongly attacked in cross-examination, and the evidence of Dr. Mills and Mr. Swaminathan which the Judge believed negatived his evidence.

Although no comment is made by the Judge on this aspect of the case I do not understand why the will was not executed on February 7. According to the Notary when he was at the hospital on the 7th the testatrix "pressed me to get her signature that day" and he adds, "if the witnesses were there I should have attested the will that day itself". Surely two witnesses could have been found in a large private hospital? The doctor in charge and the nurses were available. But he did not have the will executed. He came back three days later. This was a long time for the engrossment of a simple will and although he is a Notary it was not till he went to the hospital on February 10, that "he thought of witnesses". The petitioner, however, had seen to the matter. He had spoken to Mr. Swaminathan the previous day and the Notary brought in Dr. Mills. The activity of the petitioner of which one is conscious throughout the evidence is not one of the least suspicious elements in the case. He knew of the dispositions beforehand, he was present at the execution, he had read P 2 before it was "shown to and read by" the testatrix, he was present when the Notary received his instructions, he had "volunteered to ask Mr. Swaminathan to sign as a witness", he kept the will and finally he was in some unexplained way responsible, to use his own word, for the "commotion" on February 7 which frustrated the testatrix's desire to complete the execution of her will on that day. It is unfortunate that the Rev. Mr. Selvaratnam was not a witness. His evidence might have rendered less obscure the happenings on the 7th.

On the other hand what has been stressed by Mr. Hayley is the activity of Dr. Chelliah, the brother of the testatrix's husband. His interest, however, has this to commend it. It is disinterested. Nothing is claimed by him or his brother. Their case is that the testatrix's intention were that her parents were to receive a life-interest only and her son the entire property. There can be no doubt that his suspicions regarding the integrity of the Notary were roused and according to the findings of the Judge he was justified in his suspicions.

A point of law arose but it was not pressed. The testatrix is alleged to have referred to the will she had executed after its execution. According to the evidence of her night nurse whose impartiality has not been seriously impugned the testatrix told her she had "given all her property to her child". Dr. Chelliah's evidence is that she told him "she had written everything in favour of the child", while A. R. Paul and the husband say she said she had bequeathed her property to her child subject to a life interest in favour of her parents. It is possible that she did not give full details of her "will" to the nurse and Dr. Chelliah for reasons which it would be futile to conjecture. The question is whether her declarations, according to these witnesses, that she had bequeathed all her property to her child are admissible in evidence. In *Doe v. Hardy* [1], Littledale J. thought the declaration of the testator were admissible to show his intentions where the defence was either fraud, circumvention or

[1] *M. & Rob. 525.*

forgery. In the present case fraud is alleged. In Ceylon we are governed by our own Evidence Ordinance. Are these declarations admissible under this Ordinance? It has been argued that statements of deceased persons can only be proved under section 32 of the Ordinance the provisions of which are inapplicable in the present case. Illustration (*m*) to section 14 appears to me to be an answer to this. "The question is, what was the state of A's health at the time when an insurance on his life was effected. Statements made by A as to the state of his health at or near the time in question are relevant facts". This illustration follows English Law. The case of *Aveson v. Lord Kinnaird and others*[1] was an action by the husband upon a policy of insurance on the life of his wife. It was held "that declarations made by the wife when lying in bed apparently ill, stating the bad state of her health at the period of her going to M (whither she went a few days before in order to be examined by a surgeon, and to get a certificate from him of good health preparatory to making the insurance) . . . . are admissible in evidence to show her own opinion, who best knew the fact, of the ill state of her health at the time of effecting the policy . . . .". It is in accordance with English law that whenever the mental feeling of an individual is material the expression of such feeling made at the time in question may be proved. "If it is the natural language of the affection it furnishes satisfactory evidence and often the only evidence of its existence. The question whether it was feigned or real is for the Jury to determine." So under section 14 of our Ordinance the declarations of the testatrix are, in my opinion, admissible as statements from which it could be inferred that a particular state of mind which gave validity to a particular physical act (the signing of P 2) did or did not accompany the doing of that act.

I now turn to R 1 and P 9. Shortly after the "will" was executed the husband paid a visit to the deceased "when there appears" as the Judge remarks "to have been an incident between the husband and the petitioner". After the husband had returned to Point Pedro where he was stationed the deceased wrote to him. In the letter occur these words "Do not take seriously the behaviour of the foolish old man . . . . I did not write anything in such a foolish way. Will I do anything to harm my child? Everything can be done when I come there". The husband's letter to his wife contains these sentences. "I warned you to be careful. You have done good to the daughter of Sinnathamper (he is the Notary) by signing away happily (?) to do harm afterwards to the child. You did not understand what you did . . . . You wrote and gave to your father to please him". These quotations are translations from Tamil and it is possible that they may have lost some of the meaning intended or have gained some unintended force in the process of translation. The Judge who is himself a Tamil gentleman and who would therefore be able to read the originals does not appear to have attached much significance to them. It has, however, been pressed upon us that they indicate that the testatrix had told her husband that she had given her property to her child and her parents, and that his letter and the visit of Dr. Chelliah show a determination on the part of the husband and Dr. Chelliah to induce her to make another will.

[1] *6 East. 188.*

I do not think that the testatrix's letter to her husband necessarily bears this construction. If she had told him, as he says she told him, that she had left her property to her child with a life-interest to her parents she would be quite capable of saying that she had not done anything to harm the child and that, if this had been done by giving a life-interest to her parents, the will could be altered after she had recovered and returned to him. The husband's reply was undoubtedly one he had written in resentment. Away from his influence his wife had made a will the effect of which would be to exclude him even from the management of the property during the minority of his son. In this frame of mind it is quite possible that he would have suggested that the child might be harmed and the petitioner's son and the latter's wife benefited by the petitioner having a life-interest. It is true the husband's answers at page 107 of the typescript are unhappily worded. They may have suffered in translation. I do not, however, think his letter can be regarded as conclusive of knowledge on his part that his wife had left her property to her child and her parents.

In my opinion the Judge was right in refusing probate. The application for probate of P 2 in its entirety was the only application before him, and I would dismiss the appeal with costs. It would, I think, be in the interest of the child if the Public Trustee intervened in this matter and I understand from Mr. Perera that such a course would commend itself to the father of the child. On intestacy the entire property of the testatrix would devolve on the child and this, I think, would be in accordance with her wishes.

MAARTENSZ J.—I agree.

Appeal dismissed.