Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Louisa Maria Botegoe Jayatilleke Karunaratne v. *Elizabeth Ferdinandus and Others, from the Supreme Court of Ceylon; delivered the* 19*th March* 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Lindley.*]

The will in question in this case is set out on page 7 of the Record. It is dated the 10th November 1894. The testator died on the 8th January 1895. The will was propounded for probate by his widow as an uncontested will and on the 1st March 1895 an order was made for the grant of probate to her. Shortly afterwards the heirs of the testator entered a caveat to prevent the issue of probate to her and proceedings were taken to impeach the will. Some difficulty arose and some mistakes were made in the procedure; but on the 21st December 1895 probate was granted to the widow and on the 12th February 1896 the heirs presented a petition for its revocation and three issues were directed to be tried. They were as follows:—

1. Had the applicant for probate any reason to suppose that her application would not be opposed by the present Petitioners?

2. Was the deceased John Aron Ferdinandus, at the time he made his will of sound mind, memory, and understanding?

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3. Was the will of the deceased obtained and procured by the undue influence or fraud of the Respondent, her mother, brother, and cousin ?

The first of these issues was tried before the Acting District Judge (Mr. F. R. Dias), in December 1897, who decided it in favour of the widow. Nothing turns upon it now.

The second and third issues were tried by the Permanent District Judge (Mr. Browne), and the evidence upon them was heard by him, with the exception of the evidence of Mr. F. J. de Saram. His testimony was taken by Mr. Dias but was received by Mr. Browne with the consent of both parties.

The District Judge (Mr. Browne) on 18th January 1899, delivered a long and careful judgment, and decreed that the probate granted on 21st December 1895, to the widow should be revoked with costs.

It is material to observe that there was no issue raising the question whether the will was valid as to the testator's moveable property but invalid as to his immoveable property. The will was attacked and defended as a whole and it was adjudged invalid.

From this decision of the District Judge the widow appealed to the Supreme Court ; and that Court then made the following order :

" It is considered and adjudged that the decree " made in this action by the District Court of " Colombo, and dated the 18th day of January " 1899, be and the same is hereby varied by " declaring that the late John Aron Ferdinandus " died intestate as to his immoveable property, " and for the purpose of giving effect to this " declaration expunging from the residuary " clause in the will propounded as the will of " the said John Aron Ferdinandus the reference " made therein to immoveable and real pro-

" perties. And it is further ordered and decreed " that all costs be paid out of the estate."

This order is dated the 22nd March 1899; it was affirmed on a petition for review by an order dated the 6th December 1899. From these two orders of the Supreme Court the widow has appealed to His Majesty in Council. The Appellant by her Petition of Appeal asks not only that these orders of the Supreme Court may be discharged but that the validity of the will as originally propounded by her may be upheld and that probate thereof may be granted to her. The Respondents have presented no cross appeal; they do not object to the orders as they stand but they do object to probate of the will as executed being granted without modification.

Under these circumstances their Lordships have felt considerable difficulty in arriving at a conclusion of what ought to be done. They cannot think that the course taken by the Supreme Court was correct unless the Court was prepared to pronounce against the will and only forbore to do so because the testator's heirs were content with less. But the Court did not say that they were prepared to dismiss the widow's appeal and it would rather seem that they were not. If so the order appealed from ought not to have been made unless indeed it was the result of a compromise come to between the parties which apparently it was not. On this part of the case their Lordships adhere to the sound principle acted upon by the House of Lords in the case of " *The Tasmania* " L.R. 15 App. Ca. 223.

There negligence on the part of the captain of a ship was relied upon before the Court of Appeal although not investigated at the trial. Lord Herschell said " I think that a point such as " this not taken at the trial and presented for the " first time in Court of Appeal ought to be most

" jealously scrutinised. The conduct of a cause " at the trial is governed by and the questions " asked of the witnesses are directed to the points " then suggested and it is obvious that no care is " exercised in the elucidation of facts not material " to them.

" It appears to me that under these circum- " stances a court of appeal ought only to decide " in favour of an Appellant on a ground then " put forward for the first time if it be satisfied " beyond doubt first that it has before it all the " facts bearing upon the new contention as com- " pletely as would have been the case if the " controversy had arisen at the trial and next " that no satisfactory explanation could have " been offered by those whose conduct is " impugned if an opportunity for explanation " had been afforded them when in the witness " box."

The second and third issues rendered it necessary to investigate the capacity of the testator and his freedom from undue influence but practically such a general investigation is very different from an investigation of a more limited range and pointed to the specific question whether the testator when he made his will was able to understand and understood that he was disposing of his tea and cocoa estates. This question was never raised at the trial and not having been so raised their Lordships are of opinion that the will should have been upheld or set aside; and not have been upheld as to the moveable property and set aside as to the immoveable property. In *Fulton* v. *Andrew* L. R. 7 H. L. 448, *Marck* v. *Turrell* 7 Pr. D. 68 and other cases of that sort where words or clauses have been omitted from the probate the Court has always acted on evidence pointedly addressed to the words or clauses said to have been improperly inserted in the will

and it is obviously most important that this practice should not be departed from. Their Lordships however have the satisfaction of feeling that no injustice has been done in this case for they have come to the conclusion that the decision of the District Judge was correct and that the widow's appeal from it ought to have been dismissed. They have however thought it right to point out the objection in principle to the order appealed from in order to prevent a repetition of the mistake which has been made.

Passing now to the merits of the case the evidence is as follows:—The will on the face of it and without extrinsic evidence appears free from all objection and the due execution of it is certified by the notary who prepared it. Moreover the will was read to and perhaps by the testator and he made no objection to it. Further although the testator had had a stroke of paralysis some time before and was weak and ill and often cried he was considered by Mr. Keegel a medical gentleman who attended him to have been capable of making a will when he signed it; and this evidence is corroborated by Mr. Bastiansz.

On the other hand it is proved beyond all question that in the early part of the year 1894 the testator desired to make a very different will giving one-third of his property to his illegitimate daughter, one-third to his sister, and one-third to his wife. His wife's mother remonstrated against this and it is plain that he was prevented by his wife and her relatives from executing this will. So much so that he wanted a friend to help him to get it signed secretly. There is no reliable evidence apart from the will itself of November 1894 that he ever changed his views as expressed in this earlier proposed will. He was fond of his sister and of his daughter and evidently wished to provide liberally for them. During his illness he lived much with his wife's

See the wife's evidence, Rec. p. 117.

relatives and more than once he desired to remove from where he was to another home in another part of the island. This however he was unable to manage and it is plain that his wife and her relatives were unwilling that he should go away even when arrangements had been made by other friends for his removal. The testator had a considerable amount of property. His landed property was worth some Rs. 109,000; he had in cash securities Rs. 23,600 and he had in addition other property making a total of nearly Rs. 134,000. He knew what property he had and took an interest in the management of his tea and cocoa estates. He himself considered that he was worth between 18,000*l.* and 20,000*l.* The proposed abortive will was prepared by a Mr. de Saram from instructions given by the testator himself. The will of November was prepared by Mr. P. Perera from instructions given by Mr. E. Boteju the brother of the widow. Mr. Perera was known to Boteju and at his request went to the testator and saw him in June 1894. The testator said he would send written instructions through Boteju and Boteju brought Perera instructions in writing some three months afterwards. These are produced PP 1. It is quite impossible to believe that those instructions should have been given by the testator; it is impossible to believe that the testator if he knew what he was about would have given instructions for a will based upon the idea that his property was worth Rs. 26,000 or possibly more but providing for its being worth between Rs. 26,000 and Rs. 20,000 and again providing for its being worth even less than that. By these instructions Rs. 5,000 were to be left to his sister and a like sum to his daughter.

Rec. PP 1, p. 124.

About a week after these instructions had been given to Perera Boteju again saw him and gave him verbal instructions to make

some alterations in the names of some of the legatees and in the amounts of some of the legacies. Perera made these alterations accordingly and the will of November embodied them. By this will the amounts of the legacies to the sister and daughter were reduced from Rs. 5,000 to Rs. 3,000 each. Perera knew nothing about the earlier proposed will nor did he know that the testator had any landed property; nor did he ever receive any instructions from the testator himself although according to the evidence he was quite competent to give instructions and to understand what he was doing. When his will was read to him he seemed to be sorry and cried but he said he had no objection and so his signature was taken. As regards the reading of the will the evidence stands thus, the will was read over to him by the notary. Keegel the surgeon who was present said the testator also read it but no other witness said this. The District Judge refers to Keegel's evidence but apparently thought that the will had only been read over to the testator by the notary and the Chief Justice expressed his opinion to be that if the testator read it his reading must have been of a very cursory nature. Their Lordships take the same view of the evidence on this point.

Boteju was called as a witness but only before the Acting District Judge Mr. Dias who tried the first issue. Perera had not then been examined, and important documents produced by him were not then before the Court. But after their production neither party desired to examine Boteju upon them. No explanation therefore has been given by him of those documents. In particular no explanation has been furnished of his remarkable letter to Perera of 23rd June 1894 which runs thus:—"As I have "spoken to you and expressed my views re- "garding the will, so go and speak to my

" brother-in-law to-day. In speaking to him you " should encourage him to make the will as I " suggested." Even the evidence given by Boteju on the trial of the first issue was apparently not read by the District Judge who tried the second and third issues. He however had Perera's evidence and the documents he produced. Boteju says that the testator dictated his instructions to him and he conveyed them to Perera and gave the draft and revised draft prepared by him to the testator who approved them. For the reasons already stated and based on the will alone their Lordships cannot believe this statement. The letter above referred to unexplained strongly confirms the inference that Boteju got the will prepared without instructions and in complete ignorance that the testator had any landed property and that the testator when he read and signed the will did not realise its effect. It is much to be regretted that Boteju was not examined and cross-examined on the trial of the 2nd and 3rd issues. On the question of undue influence he was the most important witness.

The case is not like *Rhodes* v. *Rhodes*, L.R. 7, A.C. 192, and others of that kind where a testator has given instructions which he understood and has left a solicitor to embody them in a will in proper form and a blunder has been made which the testator did not discover and which the Court cannot correct. Their Lordships are satisfied that although the testator may have given Boteju some instructions for a will the testator never gave him instructions for any such will as he told Perera to prepare; and that the testator although he may have read the will was induced to sign it by undue influence of his wife and her relations or some of them and without appreciating its contents.

Their Lordships having carefully reviewed the whole evidence have come to the conclusion that the Supreme Court ought to have dismissed the

widow's appeal and to have affirmed the decision of the District Judge setting aside the will. The order varying it was unfortunate and encouraged the present Appeal. If the Respondents had not been content with the order as it stands their Lordships would have felt bound to advise His Majesty to discharge the orders appealed from and to affirm the order of the District Judge; but as it is they think they may properly and they therefore will humbly advise His Majesty to leave matters as they are and simply dismiss the Appeal. Their Lordships do not think that a new trial ought to be granted but owing to the unsatisfactory state in which the case stood when the Appeal was brought no order will be made as to the costs of the Appeal.