Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Perera and Others v. *Perera and Another, from the Supreme Court of Ceylon; delivered* 23*rd March* 1901.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR FORD NORTH.

[*Delivered by Lord Macnaghten.*]

This Appeal is *ex parte*. There are two questions in the case one of law and one of fact:—(1.) Was the document propounded as the will of Abraham Perera duly executed according to the law of Ceylon? (2) Was the alleged testator of sound and disposing mind when he set his hand to that document?

Ordinance 7 of 1840 Section 3 enacts that no will shall be valid unless the signature of the testator "shall be made or acknowledged by the "testator in the presence of a licensed notary "public and two or more witnesses who shall be "present at the same time and duly attest such "execution or if no notary shall be present then "such signature shall be made or acknowledged "by the testator in the presence of five or more "witnesses present at the same time and such "witnesses shall subscribe the will in the "presence of the testator but no form of "attestation shall be necessary."

Perera's will was signed with a cross by the testator in the presence of five witnesses

present at the same time who duly subscribed the will in the presence of the testator. But there were other persons present in the room when the will was signed. Among them was a licensed notary public one Gooneratne a near neighbour and intimate friend of the testator who had prepared the will but who declined to attest it for fear of displeasing a wealthy client of his one Simon Fernando. Fernando it seems had learnt that the will would contain a devise of some land in Colombo to which he laid claim and had requested Gooneratne not to attest it saying that he would "spend hundreds of pounds" in impeaching it. In consequence of this threat the notary went to the testator and explained his position and advised that the will should be executed as a non-notarial will in the presence of five witnesses. To this the testator consented on the notary's assurance that a will so executed would be valid.

No objection was taken in the Court of First Instance on the ground of Gooneratne's presence but in the Court of Appeal both the learned Judges who heard the Appeal Laurie J. and Browne Acting J. held that the will was invalid on that ground.

The case was then brought before the Supreme Court in its collective capacity on review preparatory to an appeal to Her late Majesty. The Supreme Court reversed the judgment under appeal and then proceeded to determine the case upon the merits. The Court consisting of Bonser CJ. Withers and Laurie JJ. Laurie J. dissenting held that the testator was of sound and disposing mind and restored the order of the primary Judge.

Their Lordships entirely agree with the Chief Justice and Withers J. in holding that the words of the Ordinance "if no notary shall be present" mean if no notary shall be present acting in his

notarial capacity. Mr. Mayne in his able argument did not contend that the mere bodily presence of a notary would vitiate the execution of a will attested by five witnesses. He admitted that if the notary were drunk or asleep or mentally incapacitated he would not be present within the meaning of the Ordinance. But he contended that in this case the notary was not only present but acting in a notarial capacity up to the very last moment when as he argued it was too late for him to stand aside or retire from his position. Their Lordships have some difficulty in following this argument. When the view of Laurie J. and Browne A.J. that the mere bodily presence of a notary who does not attest the will vitiates the attestation of the five witnesses required by law is abandoned it is difficult to see any sound distinction between the case of a notary who is present but incapable of performing his notarial duties and the case of a Notary who is present and refuses for some reason or other to perform those duties. Nor is it easy to see what difference it makes whether the notary who is present refuses to perform his notarial duties at the last moment or has refused at some earlier time to act on the occasion in his notarial capacity.

Then comes the question Was the testator of sound and disposing mind when he signed the instrument now in question?

The alleged will was executed in the early morning of the 5th of June 1896 between 1 and 2 o'clock a.m. Of the persons present on that occasion no less than five gave evidence at the trial in support of the will. They heard what the testator said. They saw what he did. If their evidence stood alone there could be no doubt that the testator was then perfectly competent. They were Gooneratne the notary Rodrigo his

clerk and three of the attesting witnesses. The other two attesting witnesses had deposed to the like effect on the application for probate but they were not called at the trial. There is however no suggestion that they were improperly kept back. Three other persons were called in support of the will—William D'Abrew Dr. Fernando M.D. of London University Assistant Colonial Surgeon and de Silva a native doctor. The evidence of the native doctor is of little or no value. D'Abrew who was a broker to an European firm of merchants apparently a man of property and a great friend of the testator as well as of Simon Fernando saw the testator on business on the 5th of June. He says that the testator then conversed with him "very freely for about "10 minutes" and "talked very sensibly." Dr. Fernando was not called in until the 8th of June. Perera was then in a state of coma which the doctor was told had set in that morning. However "after a bit" Dr. Fernando was able to rouse him and obtain answers to a few simple questions. "He answered in a few words" says Dr. Fernando. "He seemed to understand my "questions."

In opposition to the will three witnesses were called—the testator's widow Dr. Fonseka a young medical practitioner who was in attendance on the testator from the 25th of May and saw him latterly twice a day and Dr. Rockwood general physician of the Colombo Hospital and a gentleman of acknowledged eminence in his profession. The evidence of the widow may be disregarded. She was not believed by the Judge at the trial or by the majority of the Court of Appeal on review. Her story is obviously unworthy of credit. It is inconsistent with her own conduct when the application for probate was made and it is contradicted on all material

points by a body of evidence which it is impossible to reject. Dr. Fonseka and Dr. Rockwood however whose evidence is beyond suspicion give it as their opinion that from and after the 2nd of June Perera was not in a fit condition to execute a will. Dr. Fonseka undoubtedly had ample opportunity of observing the testator's condition during his last illness but naturally he would be much influenced by Dr. Rockwood's opinion. Dr. Rockwood only saw Perera once and that was on the 2nd of June. He saw him then under great disadvantages. It was the day after Perera had had a long and exhausting interview with Gooneratne sitting up in his bed for two or three hours and giving minute instructions for the disposition of his property. Perera was also suffering on that day from suppression of urine which was the immediate cause of Dr. Rockwood being sent for. It is not by any means improbable that these two circumstances combined may have led Dr. Rockwood to take a more unfavourable view of his patient's condition than the event seems to have justified. Certainly Perera had more vitality left in him than Dr. Rockwood gave him credit for and at least on two occasions after the will was signed he showed more intelligence than Dr. Rockwood thought possible from his appearance on the 2nd of June.

The question therefore comes to this :—Having regard to all the circumstances of the case ought the diagnosis of Dr. Fonseka and Dr. Rockwood who were not present when the will was executed to outweigh and prevail over the testimony of eye-witnesses based upon the evidence of their own senses.

Instructions for the will were given on the 1st of June. Perera sent for Gooneratne on that day. Gooneratne went in the evening. Perera told him he wanted to make his will. He called for all his deeds and with his deeds before him

gave very full directions for the disposal of his property. The notary was between two and three hours taking his instructions. He took them down in English as he says his practice was. The will was to be in Sinhalese. On the 2nd of June Gooneratne received a note purporting to come from Perera though not signed by him containing some further instructions. Gooneratne took the note to the testator who told him to adopt it. Then the will was drafted in Sinhalese and afterwards copied by Gooneratne's clerk for execution.

It is not denied that Perera was in a sufficiently rational state on the 1st of June to make a will. Dr. Fonseka admits that. Gooneratne according to the statement of the Judge of First Instance was " a very respectable man " and had practised as a notary in English and Sinhalese for twenty years. There does not seem to be the slightest reason for doubting the accuracy of his statement as to the instructions given to him. The only reason suggested by Laurie J. for disbelieving Gooneratne's statement seems to be founded on the elaborate character of the testator's instructions as taken down by Gooneratne. They seem to have been taken down in the form of a will and not as notes or memoranda. The original instructions and the letter of the 2nd of June were produced at the trial and the primary Judge and the two Judges who formed the majority of the Supreme Court on review found nothing suspicious in them. On the materials before this Board their Lordships agree with the opinion of those learned Judges. Even if their Lordships had felt any hesitation in accepting their view upon this part of the case they would not be in a position to differ because either by inadvertence or design the original instructions for the will as well as the letter of the 2nd of June have been omitted from the Record.

The will prepared by Gooneratne from the instructions which were given to him seems to be a fair and just disposition of the testator's property. Moreover there was no concealment about the preparation of the will. So little secrecy was observed that Simon Fernando the principal opponent to the will came to hear of its contents so far as he was interested in them on the very day after the instructions were given. One other remark may be made which bears upon the testator's apparent condition. Gooneratne who saw Perera frequently during his last illness does not seem to have thought that there was any immediate necessity for hurrying on the completion of the transaction. The instructions were given on the 1st of June but it was not until late in the evening of the 4th of June that the will was brought to the testator for execution.

It is not necessary to go through the evidence of the witnesses who were present at the execution of the will because it is admitted that if their account of the transaction is to be accepted without qualification there can be no question about the testator's mental capacity.

The will it seems was read over to the testator clause by clause by Rodrigo Gooneratne's clerk. Both Gooneratne and the clerk say that Perera seemed then to be of sound mind. After the will was read over and a clause of attestation had been added, the attesting witnesses were called in and the will was executed. One of the attesting witnesses was a brother of Simon Ferdinando, and on good terms with him. In consequence of his position he declined to join the other attesting witnesses in the affidavit for probate. He was, however, called as a witness at the trial, and seems to have given his evidence very fairly. In cross-examination he says he was told that Perera wanted him. He went up

to Perera's bedside and asked him why he wanted him. Perera said there was a will of himself and his wife and he wanted the witness to sign. He said there was something still to write in the will and he asked the witness to go and sit outside. When the witnesses were called in again the testator was seated at a table near the bed, and he heard the deceased say that he had not signed his name for some time and he felt nervous. The other attesting witnesses gave evidence to the same effect and they added that the notary explained that it was not necessary for the testator to sign his name and that it would be sufficient if he put his mark to the will and so Perera signed every sheet with a cross.

The learned Counsel for the Appellant did not contend that the witnesses in support of the will were acting in conspiracy or saying what they knew to be false. He said that the will may have been and probably was read over to the testator but that there was nothing to show that he followed the reading of the will or understood its meaning. He adopted the argument of Laurie J. to the effect that it was not enough to prove that a testator was of sound mind when he gave instructions for his will and that the instrument drawn in pursuance of those instructions was signed by him as his will if it is not shown that he was capable of understanding its provisions at the time of signature. That however is not the law. In *Parker* v. *Felgate* 8 P. D. 171 Sir James Hannen lays down the law thus "If a "person has given instructions to a solicitor to "make a will and the solicitor prepares it in "accordance with those instructions all that is "necessary to make it a good will if executed by "the testator is that he should be able to think "thus far. 'I gave my solicitor instructions to "prepare a will making a certain disposition of "my property I have no doubt that he has given

" effect to my intention and I accept the document " which is put before me as carrying it out'."

Their Lordships think that the ruling of Sir James Hannen is good law and good sense. They could not therefore hold the will invalid even if they were persuaded that Perera was unable to follow all the provisions of his will when it was read over to him by Gooneratne's clerk. But they desire to add that they see no reason to doubt or qualify the testimony of the witnesses who agreed in saying that the testator was of sound mind when the will was executed.

Their Lordships will therefore humbly advise His Majesty that the Appeal must be dismissed.