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IN THE PRIVY COUNCIL

No. 2 of 1968.

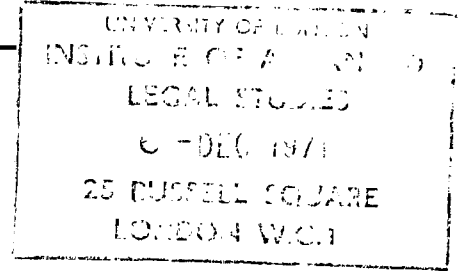
ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF
CEYLON.

B E T W E E N :

DR. NATARAJAN SITHAMPARANATHAN Appellant

- and -

RAMANATHAN MATHURANAYAGAM Respondent



C A S E F O R T H E A P P E L L A N T

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1. The Appellant appeals from the judgment and decree of the Supreme Court dated 8th May 1966 dismissing with costs the appeal of the Appellant from the judgment of the District Court of Colombo dated 6th December 1962 which vacated the Order Absolute dated 20th April 1961 admitting to probate Last Will No. 1285 dated 3rd March 1961 propounded by the Appellant and admitted to probate Last Will No. 1283 dated 2nd February, 1961 propounded by the Respondent.

Record

p.171

p.165 L.37

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2. On the 3rd March 1961 Velautham Natarajan (hereinafter referred to as "the testator") executed his Last Will and Testament No. 1285 in the following terms:

"I, Velautham Natarajan of 292, Deans Road, Maradana, Colombo, being of a sound and disposing mind memory and understanding, hereby revoke and annul all wills codicils and other testamentary acts heretofore made by me and declare this my Last Will and Testament.

p. 18

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I bequeath and devise all my properties movable and immovable and of what nature or kind soever and wheresoever situate or whether the same be in possession reversion remainder or expectancy nothing

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excepted to my three children,
Dr. Natarajan Sithamparanathan and
Manonmani Jatarajan wife of S.Ponnusamy
and Rajeswari Natarajan wife of
D. Shanmugarajah, in equal shares
absolutely.

I hereby appoint my said son,
Dr. Natarajan Sithamparanathan to be the
executor of this my Last Will and
Testament.

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In Witness Whereof I, the said Velautham
Natarajan have set my hand to this and
another of the same tenor and date as
these presents at Colombo on this third
day of March One thousand Nine hundred and
Sixty-one.

Signed by the testator as and)
for this Last Will and) Sgd.
Testament in the presence) V.Natarajan.
of us present at the same) V.Natarajan. 20
time who at his request in)
his presence and in the)
presence of each other have)
hereunto subscribed our)
named as witnesses.)

Sgd. V. Ketharanathan.
Sgd. C.K. Koruthu.

(Sgd) J.M. Caderamanpulle
N.P.

I, JOSEPH MARIAN CADERAMANPULLE of Colombo 30
Notary Public, do hereby certify and
attest that the foregoing Last Will
having been duly read over and explained
by me to Velautham Natarajan the testator
who signed as "V.Natarajan" and who is
known to me in the presence of
Dr. Vettivelpillai Ketharanathan of Uduvil,
Chunnakam, presently of Lady Ridgeway
Hospital and Chempothrail Koruthu Koruthu
of 57/8, Flower Road, Colombo 7, the 40
subscribing witnesses who are not known to
me the same was signed by the said testator
and also by the said witnesses and by me

the said Notary in my presence and in the presence of one another all being present at the same time at 292, Deans Road, Maradana, on this third day of March One thousand nine hundred and sixty-one.

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(Sgd) J.M. Caderamanpulle

Notary Public.

Date of Attestation.

3rd March, 1961.

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(Seal)

3. (a) The Testator died on the 5th March 1961 and on the 12th April 1961 the Appellant applied to the District Court of Colombo for probate of the said Last Will and Testament by petition to which was annexed the said Last Will and Testament, the affidavit of the Appellant, an affidavit as to execution and capacity from one of the attesting witnesses (C.K. Koruthu - Chartered Accountant) and a joint affidavit as to execution and capacity sworn to by the other attesting witness (Dr. V. Ketharanathan) and the Notary who drew up and attested the Will (J.M.Caderamanpulle). The gross estate was shown as 355,067 Rupees and the net 323,183 Rupees.

p.19 L.13

pp.15-22

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(b) On the 20th April 1961 the District Court of Colombo entered an Order Absolute in the first instance declaring the Appellant entitled to probate as the executor named in the said Last Will and Testament.

p.1 L.25

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(c) On the 24th May 1961 the Respondent, by Petition to which was annexed an alleged Last Will and Testament of the testator No. 1283 dated 2nd February 1961 and attested by J.M.Caderamanpulle, Notary Public, an affidavit of the Respondent and an affidavit from the witnesses to the said Last Will which petition alleged that the Last Will and Testament of the testator No. 1285 dated 3rd March 1961 was not the act and deed of the said testator, moved that the aforesaid Order Absolute entered on the 20th April 1961 be set

pp.22-30

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aside; that the petition of the Appellant that the Last Will and Testament No. 1285 dated 3rd March 1961 attested by J.M.Caderamanpulle, Notary Public, be admitted to probate be dismissed; that an Order be made declaring the Last Will No. 1283 dated 2nd February 1961 attested by J.M.Caderamanpulle, Notary Public, proved and the Respondent and the Appellant be declared the executors thereof and that probate thereof be issued to the Respondent and the Appellant. 10

4. The Last Will and Testament of the testator No. 1283 dated 2nd February 1961 is in the following terms:

pp.25-26

"This is the Last Will and Testament of me Velautham Natarajan of 292, Deans Road, Maradana, Colombo.

I hereby revoke and cancel all Last Wills and Codicils heretofore made by me and declare this my Last Will and Testament. 20

I appoint my son Dr. Natarajan Sithamparanathan and my nephew Ramanathan Mathuranayagam of 96, Vauxhall Street to be the Executors and Trustees of this my Last Will and Testament.

I give and bequeath unto my grand-daughter Manjula Sugumari daughter of Manonmany Ponnusamy Rupees Ten Thousand (Rs 10,000/-) which amount shall be paid to her at the time of her marriage. 30

I give to my said son Dr. N.Sithamparanathan a sum of Rupees Thirty Thousand (Rs. 30,000/-) for furthering his studies abroad. This sum of Rupees Thirty Thousand (Rs. 30,000/-) shall be paid by monthly instalments of Rupees Five Hundred (Rs. 500/-) by the Trustees from the Trust Fund.

I give and devise all my properties movable and immovable to wit my pawn brokers business my personal jewels my motor cars and household furniture articles and effects Premises Nos. 88,94,96,98,90/5 to 90/16, Vauxhall Street, Slave Island, Premises No. 29, Church Street, Slave Island, 40

10 Premises No. 292, and 288/1, Deans Road,
Maradana and my house at South Street,
Rannad, South India (which property in
India I inherited from my father) to my
said Trustees upon trust that the said
trustees shall out of the income of the
said properties and business pay the
bequests hereinbefore mentioned and shall
stand possessed of the said properties and
business in trust for the following
charitable purposes:-

- (1) To erect a Madam at Kataragama
Crylon and feed the pilgrims and the
poor.
- (2) To open a Madam in Palani South India
or in any other part of India if the
Trustees desire.
- (3) To repair any Hindu temples they
desire.
- 20 (4) To give free medical aid to the poor.

If the said Trustees think these charitable
works mentioned by me cannot be executed
owing to any circumstances beyond their
control I give power to them to do any
other charitable works as they think good.

30 The said Trustees shall have the power to
sell my properties or any part thereof
and invest the said proceeds in any other
investment or investments. They shall
also have power to sell my said business and
do any other business out of the proceeds
of such sale or continue my business of
Pawn Broker.

40 The said Trustees shall appoint new
trustee or trustees in place of the deceased
or retiring trustee or in place of trustee
or trustees failing or refusing to act.
Such new trustee or trustees shall be
selected by the surviving trustee from the
children of the said Trustees, Dr.
Sithamparanathan and R. Mathuranayagam or
their descendants generation to generation.
If there are no children or grand-children

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or further descendants of the said Trustees the surviving trustee is at liberty to choose as trustee or trustees any third party except my daughters or their descendants or any relation of mine.

it is my desire that the said Trust be named Velautham Natarajan Trust.

I also declare that only the income of my said properties and my said business or any investment representing the same shall be utilised for the purpose of executing the trust hereby created. 10

It is my desire that the trust be always carried on jointly by only two trustees or their successors as aforesaid at a time.

As I have given my two daughters Manonmany Natarajan wife of S.Ponnusamy and Rajeswari Natarajan wife of D. Shanmugarajah adequate dowries at their marriage and even afterwards my said daughters will not be entitled to any claim or share out of my estate after my death. 20

I also direct that premises Nos. 292 and 288/1, Deans Road, shall not be rented out to anybody but shall be used for the occupation of my Trustee or Trustees or their successor or successors in office at that time or for the use of the charities intended. 30

In Witness whereof I the said Velautham Natarajan have set my hand to this and another of the same tenor and date as these presents at Colombo on this Second day of February One thousand nine hundred and sixty-one.

Witnesses who signed this Last) Sgd.
Will at the request of the) V.Natarajan.
Testator who is known to us)

Sgd. A. Kanekaratnam. 40
Sgd. M.Kandasamy.

Sgd. J.M.CADERAMANPULLE.
N.P.

10 I, JOSEPH MARIAN CADERMANPULLE of Colombo, Notary Public, do hereby certify and attest that the foregoing Last Will having been duly read over by Velautham Natarajan the testator who has signed as "V.Natarajan" and who is known to me in the presence of Dr. Arumugam Kanakaratanam of 117, Galle Road, Bambalapitiya and Dr. Murugesupillai Kandasamy of 40, Moor Road, Wellampitiya the subscribing witnesses who are also known to me the same was signed by the said testator and also by the said witnesses in my presence and in the presence of one another all being present at the same time at 292, Deans Road, Maradana, Colombo, on this Second day of February, One thousand Nine hundred and Sixty-one.

20 I further certify and attest that in the original on page 2 line 3 the word "charitable" was interpolated before the said Last Will was read and signed as aforesaid.

(Sgd) J.M.CADERAMANPULLE,

Notary Public.

Date of Attestation.

2nd February 1961.

(SEAL)

30 5. (a) In consequence of a technical flaw, the Petition of the present Respondent dated the 24th May 1961 was upon his application dismissed on the 28th July 1961 reserving his right to file another Petition.

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40 (b) On the 1st August 1961 the present Respondent presented a Petition in similar items to the terms of the dismissed Petition with the addition of a prayer for an Order under section 377 of the Civil Procedure Code requiring the Appellant to show cause why the present Respondent's prayer be not granted which Petition was supported by his similar affidavit.

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p.36

(c) On the 28th August 1961 the District Court made its Order nisi upon the last mentioned Petition and affidavit in the terms of the last mentioned Petition unless sufficient cause to the contrary were to be shown on a date there named.

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(d) By Objections duly made dated the 26th October 1961 cause was shown by which the present Appellant denied generally the averments in the present Respondent's said Petition and affidavit, and by a double negative alleged that the said Will of the 3rd March 1961 was the act and deed of the deceased, and further that the present Appellant and the Notary and witnesses were present at its execution and that the Testator was then of sound mind, memory and understanding and knew it was his last Will that he was executing and also the contents thereof and it was prayed that the entered Order Absolute do stand, that the present Respondent's application to have the Will dated 2nd February 1961 admitted to probate he dismissed with costs and for such other and further relief as to the Court should seem meet.

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p.39

These objections were verified by the joint affirmation of the present Appellant and affidavit of the Notary and the attesting witness Koruthu.

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6. The case went to inquiry on two issues raised on the 26th October 1962 by Counsel for the Appellant, following the wordings of the Petition of the 1st August 1961 as to the first issue, namely,

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(i) was the Last Will No. 1285 dated 3.3.61 the act and deed of the deceased, V.Natarajan?

(ii) was the deceased competent to execute the Last Will?

p.40 L.18

7. (a) The Testator had amassed a considerable fortune as a pawnbroker in Colombo and was at the time of his death on the 5th March 1961 about 61 years of age. He died from cancer of the liver and, according to evidence which was

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p.89 L.34
to

not disputed, he had been ailing for about a year before his death.. He had been in Durden's Hospital twice, the first time in October 1960 and then for about 10 or 12 days about two months before his death, thence going to the Central Hospital (Colombo) for 5 or 6 days, after which he appears to have gone home and to have remained there under medical care, including that of his son, the Appellant, until he died.

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to
p.141 L.24
p.60 L.19

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(b) His family consisted only of the son, the Appellant, and the two daughters named in his Wills before set out. His wife predeceased him. The Respondent, who is described in the Will of the 2nd February 1961 as his Nephew and as living at an address which was one of the Testator's houses, assisted in the pawnbroking business. His relationship as Nephew of the Testator is not admitted.

p.36 L.26

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(c) Besides the two Wills of the 2nd February 1961 ("the February Will") (Exhibit "P 3") and 3rd March 1961 ("the March Will") (Exhibit P. 4) in contest in these proceedings the Testator had executed an earlier Will on the 28th December 1960 ("the December Will") (Exhibit P.2) which is, in many respects, similar to the Will of the 2nd February 1961. All these Wills were attested by Mr.

p.162

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J.M. Caderampulle, Notary Public, of Colombo, who was aged at the hearing 69 and had been in practice 39 years. His evidence is hereinafter referred to in some detail. The Testator had been the client of this Notary for 30 years, which was about the length of time they had known one another.

p.61 L.36

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(d) The December Will (as do the February and March Wills) contains the usual clause of revocation of previous Wills but there was no evidence given as to whether there had or had not been any.

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Written instructions for the December Will were given by the deceased to the Notary upon which Will the deceased never asked the advice of the Notary, the deceased having drafted it to the dictation of someone else but wanted the Notary's service as Notary Public, who "touched it up". The draft was much longer than

p.63 L.1
p.79 L.12
p.64 L.16
p.68 LL.19-21
p.67 LL.6-19

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the completed December Will and was discussed with the deceased, who did not accept the Notary's suggestion as to giving some estates separately for charity and some for his son.

p.63 L.20
to p.64 L.30

(e) The terms of the February Will were similar to those of the December Will with some differences which were pointed out in the Notary's evidence.

p.191
p.64 L.34
to p.65 L.10

It was however not the intention of the Testator, at the time of this Will, that his pawnbrokers business should wholly, if at all, pass under this Will for he had the intention that the Appellant and Respondent should become partners with him in it and had applied to Government by letter in his own handwriting dated the 27th January 1961 for the necessary licences for this.

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p.20 L.1
p.28 L.32
p.40 LL.15-23
p.65 L.15 to
p.66 L.37

This business constituted certainly considerably more than half and perhaps nearly three quarters of his assets. A week or two after this Will, the Appellant and Respondent had a conference on the project with Counsel the Notary being in attendance. There was no evidence of any action by the Government Agent on the Testator's application which would have enabled the parties either to proceed with the partnership or would have prevented them doing so.

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p.40 LL.15-18

(f) The Testator's eldest brother (aged 72) was the witness Velauthan Shanmugam Pillai. He gave evidence of the following facts among others. He lived at Ramnad in South India.

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p.42 LL.1-14

The 3 children of the Testator wrote to him that their father was seriously ill, without mentioning that he had made a Will, and asked Shanmugam to come. He arrived on the 24th February 1961 and took up residence with the Testator. On the 26th February, about 9 p.m.

p.40 L.35
p.48 L.11

the Respondent told him about the February Will, that he was one of the Trustees, that "all the properties" were given to the trust, of which he was the Manager, the Appellant being also a Trustee. Shanmugam asked Respondent for the Will and was told (correctly) that it was in the Bank. He decided first to enquire of the Appellant to discover whether what the

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p.40 L.43

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p.50
L.34 & L.39
p.43 L.8
p.50 L.10
p.51 L.5
p.52 LL.12-19

p.41 L.30

p.55 L.12
to p.56 L.5

p.56 L.21

Respondent had told him was correct before speaking to the Testator. On enquiring next morning of the Appellant, the Appellant said his father had told him that he (his father) had made a Will but that he did not know of the contents. He did not mention that he, with the Respondent, had been admitted as partners in the pawnbroker's business. (There was no evidence of the necessary Government consent).

10 Two or three hours later Shanmugam spoke to his brother (the Testator), about the Will. He told his brother that the Respondent had told him about a Will and asked his brother the contents, when he was told that everything was given to charity. He told his brother that he was sorry to hear this and that the Respondent was a Trustee, for as far as he knew, the Respondent was no relation but an outsider. Shanmugam advised him "to give the property to

20 the children and they may do charity" "according to the income they get, they can spend on charity" Testator heard him patiently but did not give Shanmugam any indication that he was going to alter the Will. Shanmugam asked him to think it over but he did not thereafter enquire if the Testator was doing so. The next day however, (the 23th February 1961) he was witness of the Testator telling the Respondent that he had come to make mischief

30 among his children and asking him not to come and on the following day (1st March 1961) of his brother summoning the Appellant, telling him something (not stated) about the intended Will and to bring the Proctor who had written his previous Will. Shanmugam stated emphatically that at no time had the Appellant or his sisters asked him to persuade their father to alter the February Will. Shanmugam further stated that he also was a very good Hindu, that he was

40 interested in religious activities, was himself the Secretary of a religious trust at his home, performed annually his religious rites, and volunteered his opinion that, if he were to leave all his property to an outsider as an administrator of his will, his children would not have any interest in giving alms and performing annual ceremonies on his behalf.

It is respectfully submitted that the evidence of this witness affords a completely

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satisfactory explanation of the testator's action in revoking the February Will and making the March Will in that, after considering his eldest brother's advice as to what it was right for him to do, he had freely accepted and acted upon it.

8. The case for the Appellant was that the Testator had cancer of the liver of which he was dying but, though he was physically weak, he was not in extremis and his mental power had not been reduced below an ordinary standard, that he fully understood the testamentary act of making his will of the 3rd March 1961, that this Will was the Will of a free and capable Testator and that there was no evidence of coercion or dominance by any beneficiary or any other person or any other circumstances which could properly arouse the suspicion of the Court that this Will was otherwise, the due execution of the Will being clearly proved and the Will itself being of a nature to be expected to be made by a father in favour of his children, and having been made by the Testator after receiving the advice of his elder brother, (who also was a devout Hindu) who, after being informed by the Respondent of the contents of the Will of the 2nd February 1961 and after having verified this information from the Testator himself, had advised the Testator to give his property to his children so that they might do charity according to the income they would receive, upon which advice the Testator acted.

p.56 LL.14-18

p.174 LL.1-6

9. The case for the Respondent was that the testator had cancer of the liver caused by cirrhosis and that by virtue of his grave illness he was, for many days prior to 3rd March 1961 (and on that day itself), mentally and physically incapable of executing a valid Will.

p.40 L.15
p.57

p.61

10. (a) At the inquiry which began on the said 26th October 1962, four witnesses were called by the Appellant. They were Shanmugam Pillai (the eldest brother of the testator), C.K.Koruthu (a Chartered Accountant, who was one of the attesting witnesses to Last Will No. 1235), J.M.Caderamanpulle (the Notary who had drawn up

and attested both the Wills in question and who had been the testator's legal adviser for thirty years), Dr. L.D.C. Austin F.R.C.S. (Resident Surgeon of the General Hospital, Colombo who examined the testator on the day prior to the execution of the impugned Last Will).

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p.84

10 (b) The witnesses for the Respondent were H.A. Wilbert Perera, E.V. Jayasekera and Dr. R.S. Thanabalasunderam, M.D. (Ceylon), M.R.C.P. (London).

p.86
p.103
p.105

11. Shortly summarised, the evidence for the Appellant was as follows :-

20 (a) Shanmugam, besides his evidence as to the advice he gave to the Testator summarised in paragraph 7 (f) above, also gave evidence that the deceased gave instructions to the Appellant to send for the Proctor who had written his previous Will, as to the reading of the March Will by the Testator himself on the 3rd March, 1961, of its execution and its subsequent reading aloud by the Proctor at the Testator's request. He also gave evidence that the Testator had been able to talk on the 3rd and 4th and that it was not until Sunday the 5th that his voice was sinking and he collapsed and became unable to talk, up to that morning having retained his safe key and been giving instructions as to his affairs. He was 30 strongly cross-examined but, it is submitted, without material effect upon his credit, though many points were elicited which amplified and elucidated his examination in chief.

p.41

p.55 L.9
p.43 L.25

40 (b) C.K. Koruthu, the Chartered Accountant, deposed as to the due execution of the Will on the 3rd March, 1961. Before this he had a conversation with the deceased, immediately after the Respondent had told him the Testator was mad, when Testator said he was better, but complained that it was difficult to take food and drink for reasons which he gave. The witness was satisfied of the Testator's capacity.

pp.57. 58
p.59 L.20

(c) J.M. Caderamanpulle, Proctor and Notary proved the instructions he had received from the

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Testator for the Will and its due execution by a capable testator. His evidence is referred to in paragraphs 19 and 20 of this Case and has been already referred to in paragraph 7 (c)(d)(e) above.

pp.84-86

(d) Dr. Austin, F.R.C.S., England, Resident Surgeon of the General Hospital, Colombo. He had been called on the 2nd March, 1961 to deal with the mouth and throat trouble of which the Testator complained next day to Korathu and also he made a general examination. He stated the Testator had primary carcinoma of the liver (cancer). He found the Testator walking with wet feet (evidently without assistance) to where his bed was. In reply to the doctor he said he had been in the bathroom. He talked quite rationally (the conversation was for about 15 minutes) and was in full control of his senses, this disease not bringing mental deterioration and there being nothing wrong with his general mental condition. 10

It was put to him in cross-examination that cancer of the liver sometimes can result in the condition known as cholaemia, when he stated that this was usual in cirrhosis but never with cancer. He described the symptoms of patients with cholaemia, as that they feel drowsy, get unconscious and die in a coma and he gave other medical details in reply to the Court and the Counsel for the parties as to cirrhosis, cholaemia and cancer, explaining that cirrhosis is destruction of the liver, hence the liver cannot eliminate toxins and cholaemia supervenes, whereas the cancer was an additional growth, not preventing detoxification, so the patient does not go into cholaemia. The Testator had not cholaemia, but he might die at any moment. 30

12. Also shortly summarised the evidence for the Respondent other than that of the medical witness dealt with in paragraphs 15 & 16 was as follows :- 40

pp.86-103

(a) H.A. Wilbert Perera (Wilbert) a trader, who for three or four years before the Testator's death had pledged goods to him and had, in 1958, during riots, helped him by

10 putting out a fire in a shed in front of his house and who stated that thereafter the deceased had liked him very much and frequently saw him. He stated that 8 or 9 days before his death (which was on the 5th March) the Testator was talking at random like a man not in his proper senses, about which time a Doctor saw the Testator for about an hour and prescribed, that in the morning of 2nd March Testator vomited blood, that at 8 of 8.30 a.m. on the 3rd March the Appellant was giving Testator a blood transfusion, he being inarticulate; thereafter he purported to describe the circumstances of the execution of the Will, including an allegation that the Appellant induced the Testator's signature by twice appealing to the Testator to sign in order to give to charity and an allegation that the Will was not read out and would not have 20 been understood if it had been, that that evening the Testator had great difficulty in speaking, that on Saturday evening the 4th the Testator's condition was worse and that on Sunday morning the Testator died.

30 During cross-examination he was questioned as to the 2nd March 1961, when he admitted that he had not seen the Testator vomit blood but only (he alleged) a basin by him full of blood. However, he was in a state of complete exhaustion, waving his arms about and shaking his head and obviously not in his proper senses; that on that day, so far from being capable of walking, he was incapable of lifting anything to his mouth and anyone who said that he was able to walk about in the bathroom and talk would be saying something utterly and deliberately false. In cross-examination Wilbert also gave evidence 40 indicating that the Will was not signed in the presence of the attesting witnesses, that it was obvious to anybody (including the Doctor, attesting witness and the Proctor) that the man could not understand anything, that the Proctor must have heard the Appellant tell the Testator to sign in order to give to charity and that a deliberate fraud was being practised on a man who was completely senseless but at that time he did nothing to prevent it.

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p.97

pp.86-103

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- p.103 (b) E.V.Jayasekera. Ex Storekeeper, who stated he had known the Testator 10 or 12 years. In his short evidence he stated that he had seen the Testator on Friday the 3rd March between 12 and 1 o'clock. He said in chief that the deceased was on a bed lying down, that he waited half an hour, neither he spoke to the Testator nor the Testator to him but almost immediately in cross-examination he said that he did talk to the deceased, then that he did not talk to him but to the doctor. 10
- pp.152-165 13. The learned Additional District Judge of the District Court of Colombo delivered his judgment on the 6th day of December 1962 answering both issues in the negative and admitting Last Will No. 1283 dated 2nd February 1961 to probate.
- p.166 14. The Appellant by Petition of Appeal dated the 13th December 1962 appealed from this judgment to the Supreme Court. His appeal was argued on the 8th of May 1966 before H.N.G. Fernando, S.P.J. and Abeysundere, J. and dismissed on that date. The learned Judges of the Supreme Court delivered their reasons for dismissing the appeal almost one year later - on 19th April 1967. 20
- p.172 LL 34-36
15. Dr. Thanabalasunderam, giving evidence for the Respondent stated, inter alia -
- p.106 L.33 (i) that the testator suffered from cancer of the liver caused by cirrhosis; 30
- p.112 L.28 (ii) that when he last examined him on 13th February 1961 (almost three weeks before he died) cholaemia had set in;
- p.106.LL 20-30 (iii) that cholaemia produces drowsiness, mental deterioration and incoherence of speech;
- p.115 LL 10-
p.108 L.12 to
p.109 L.1 (iv) that he did not think it possible that on 2nd March 1961 the deceased could have walked unaided or talked rationally;
- p.109 LL.25-30
cf.p.127 L.30 (v) that he did not think it possible that at about 7.30 a.m. on 3rd March 1961 the testator could have talked rationally to the Notary. 40
- p.109 LL.38-43

Under cross-examination Dr. Thanabalasuneram stated, inter alia -

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- (vi) that he had maintained no case record or notes with regard to the illness of the testator; pp.110-111
- (vii) that when the Appellant has asked him whether he could give evidence in this case (before he was summoned as a witness for the Respondent) he said that he could not give helpful evidence because he could not recollect the details of the testator's case; p.111
- 10 (viii) that any drug which induces drowsiness is contra - indicated in a case where cholaemia had set in; p.116 L.25
- (ix) that, therefore, he would not have prescribed pethidine which is a drug to induce drowsiness; p.116 L.30
- 20 (x) when confronted with his prescription (marked R.1) dated 13th February 1961 however, that none of the prescriptions given by him were for cholaemia or for cirrhosis; p.193 pp.116-119
- (xi) that between the last day on which he saw the testator (13th February 1961) and the date of his death (5th March 1961) it was not possible for the testator to have staged a dramatic recovery; pp.126-127 p.136 LL.13-16
- 30 (xii) that the testator could not have been on his feet and could not have spoken rationally during the period referred to in (vi) above. p.136 LL.17-19
16. Dr. Thanabalasunderam also admitted that his evidence was in direct conflict with the evidence of Dr. Austin. p.134 LL.6-7

17. In the course of his judgment the learned Additional District Judge came to the following findings of fact with regard to the evidence of Dr. Thanabalasunderam:-

- | | | | |
|----------------|-------|---|----|
| <u>Record</u> | (i) | that Dr. Thanabalasunderam had no clear recollection of the treatment he had prescribed for the testator during the period he attended on him; that he had kept no records and he was merely testifying to the impression he had formed or whatever impressions remained in his mind as to the testator's condition when he saw the testator on his several visits; | 10 |
| p.159 LL.13-18 | | | |
| p.159 LL.19-21 | (ii) | that Dr. Thanabalasunderam last saw the testator on 13th February 1961, about fifteen days before the execution of Last Will No. 1285 on 3rd March 1961; | |
| p.159 LL.24-42 | (iii) | that he had in his evidence in chief given his opinion that the testator was suffering from cancer due to cirrhosis and that he "chanced the opinion that cholaemia was setting in" but (having stated in cross-examination that drowsiness was the first sign of Cholaemia so that he would not have prescribed pethidine, a drug to induce drowsiness, which was therefore dangerous to give to a man already drowsy with cholaemia), yet on his prescription being put to him he had admitted that he had prescribed pethedrine and that it was for relief of pain; that in none of the prescriptions given by Dr. Thanabalasunderam did he prescribe for cholaemia or cirrhosis, what he had prescribed for was diarrhoea and relief of pain; | 20 |
| p.193 | | | |
| p.160 L.23 | | | |
| p.160 LL.33-35 | | | 30 |
| p.161 LL.1-3 | (iv) | that Dr. Thanabalasunderam had treated the testator's case with indifference; | |
| p.161 L.18 | (v) | that it may well be that cirrhosis of the liver was present; | |
| p.161 L.28 | (vi) | that there is certainly an apparent conflict in the medical testimony of Dr. Austin and Dr. Thanabalasunderam. | |

18. On the other hand, dealing with the evidence of Dr. Austin, the learned Additional District Judge held:

19.

- (i) that he saw no reason to doubt Dr. Austin's evidence that on 2nd March 1961 (the day before the execution of Last Will No.1285) the testator was in full control of his mental faculties; Record
p.158 LL.22-23
- (ii) that "there was no question of the testator being in a state of cholaemia on 2nd March 1961"; p.158 LL.16-18
- 10 (iii) that, as for the testator's physical condition on 2nd March 1961, he was walking about. p.158 LL.24-25
19. The Notary (Mr.Caderamanpulle), who gave evidence which has a vital bearing on this case, said, inter alia -
- (i) that he had been in practice for 36 years and that the testator was his client for 30 years; p.61 LL.36-37
- (ii) that in response to a telephone message from the Appellant he went to the testator's residence "on the morning of 3rd March 1961 at about 8 o'clock"; p.61 L. 1 to
P.62 L.2
p.74 L.39
- 20 (iii) that the following conversation took place between the testator and himself:
- "I asked him what his instructions were. He told me he wanted to give all his properties to his three children. I asked him 'Are you giving all your properties to them', and he said 'Yes, nothing excepted'. He wanted to give all his properties to his three children. I then asked him in what proportion; he said equally. I asked him who was to be the executor, and he said 'Dr.Sithamparanathan' his son. He told me 'I do not want that Mathuranayagam'; with a flash of his hand, in Tamil he said 'cut that Will off'". p.62 LL.3-10
- 30
- 40 (iv) that later the same morning the Will was signed in the bedroom of the testator in the presence of the two attesting witnesses, the testator's p.62 LL.30-32

Record

brother Shanmugampillai, the Appellant, his two sisters and one of the testator's sons-in-law;

p.62 LL.35-37

(v) that the testator having called for his spectacles which were given to him, read the Will and then gave it back to him (the Notary) to read it again.

(vi) that then the following conversation took place between the testator and himself:

p.62 LL.37-42

"I said 'Do you want to read the Will for the contents to be known by all?' He said 'Yes'. Then I asked 'do you want it read aloud?' He said 'Yes'. I read it. It was about three paragraphs. I read the Will aloud and then kept it aside and said 'In other words you are giving all your property to your children, and you appoint your son-in-law as Executor'". 10

The testator then executed the Will, both the copy for the Notary's protocol and the retained copy. 20

It is submitted that the word "son-in-law" in the above quotation from the printed record is a mistake for "son".

pp.63-68

p.68 L.16

to

p.71 L.36

p.75 L.35

to

p.78 L.20

20. The Notary was cross-examined in detail with regard to the circumstances in which the testator's other two Wills were executed and the sequence of events which occurred in the testator's bed room before the impugned Will was signed and the details of its execution, but no cross-examination was directed to the conversation which took place between the testator and the Notary at about 8.00 a.m. on the morning of 3rd March 1961 when instructions were given by the testator for the preparation of the impugned Will. It was not suggested to the Notary at any stage of his cross-examination that he was a partial or dishonest witness or that he had any motive whatsoever for conspiring with the Appellant to give false evidence, nor was it suggested to the Notary that his memory was unreliable or that he had been grossly deceived when he assumed that the testator had a disposing 30 40

mind on the morning of 3rd March 1961. On the contrary, the Notary was emphatic that the testator read understood and approved the contents of the impugned Will before he signed it.

Record
p.71 LL.30-31

21. With regard to the events of the crucial day i.e. 3rd March 1961, the learned Additional District Judge held, inter alia -

- 10 (i) that the evidence of the Notary (Mr. Caderamanpulle) that the testator was of sound mind and understanding at the time he gave instructions and at the time of signing the Will on 3rd March 1961 cannot be lightly dismissed; p.164 L.9
- (ii) that Mr. Caderamanpulle is a Proctor and Notary Public who had practised his profession for about 39 years; p.164 L.12
- (iii) that no charge of dishonesty has been levelled at him; p.164 L.13
- 20 (iv) that his evidence is certainly entitled to respect and due weight must be attached to it; p.164 L.14
- (v) that Mr. Caderamanpulle appeared to be a somewhat overconfident witness; p.164 L.15
- (vi) that he has reason to think that Mr. Caderamanpulle was mistaken in regard to the mental soundness of the testator on the crucial day; p.164 L.26
- 30 (vii) that although he does not accept the position that the testator spoke to Mr. Caderamanpulle in the clear manner as he (Mr. Caderamanpulle) testifies, it is likely that on the morning of 3rd March 1961 the testator did tell him to prepare a new Will; p.164 LL.33-35
- (viii) that, bearing in mind the evidence of Shanmugampillai, the idea the testator would have conveyed to Mr. Caderamanpulle was that the Respondent should be "cut off"; p.164 LL.35-37
- 40 (ix) that this idea when conveyed to Mr. Caderamanpulle, who was perhaps quick p.164 LL.37-40

Record

to come to conclusions, caused Mr. Caderamanpulle to infer that the charitable trust bequests should be abandoned and the property left to the children;

p.165 LL.6-9

- (x) that Mr. Caderamanpulle although honest has been grossly deceived when he assumed that the testator had a disposing mind on the morning of 3rd March 1961.

22. (a) In rejecting the evidence of Dr. Thanabalasunderam and Wilbert Perera that the testator's mental and physical condition over a long period prior to the execution of Last Will No. 1285 on 3rd March 1961 rendered him incapable of performing a valid testamentary act, the learned Additional District Judge in effect rejected the grounds and reasons and the main evidence upon which the Respondent sought to set aside the impugned Will and he ought, therefore, to have upheld that Will. 10 20

(b) Having accepted Dr. Austin's evidence that the testator was in full control of his mental faculties on 2nd March 1961, the learned Additional District Judge had only to address his mind to the question whether the testator's mental condition on 3rd March 1961 was such as to render him incapable of performing a valid testamentary act on that day.

(c) The only evidence led by the Respondent with regard to the testator's mental condition on the crucial day was that of Wilbert Perera according to whom the testator was on that day incoherent, unable to move about physically, unable to hear and senseless from at least 8.00 or 8.30 a.m. 30

(d) The evidence of Wilbert Perera as to the testator's physical and mental condition on, and prior to, 2nd March 1961, being in direct conflict with that of Dr. Austin on such an important aspect of the case, was properly rejected by the learned Additional District Judge as being untrustworthy, but in that event his evidence as to the testator's physical and mental condition on the crucial 40

p.162 L.40

day (3rd March 1961), especially when opposed to the evidence of the Notary, should also have been rejected as being unreliable.

10 (e) It was not the case for the Respondent (nor the evidence of Wilbert Perera) that the testator was able to give instructions for the execution of a valid Will at 8.00 or 8.30 a.m. on the morning of 3rd March 1961, but had no disposing mind later the same morning when the impugned Will was actually signed.

20 (f) The learned Additional District Judge has accepted the position that the testator gave instructions to the Notary on the morning of 3rd March 1961 to prepare a new Will and that he had conveyed the idea that the Respondent should be cut out of the new Will - and has thereby found that the testator was capable of performing a valid testamentary act at or about 8.00 or 8.30 a.m. on the crucial day which necessarily involves the rejection of Wilbert Perera's evidence to the contrary on this point.

(g) This was, therefore, a fit and proper case for the application of the maxim Falsus in uno, falsus in omnibus to the evidence of Wilbert Perera.

30 (h) The clear and positive evidence of the Notary to the effect that the testator was "perfectly sound" both at the time he gave instructions for the preparation of the impugned Will and at the time of its execution a few hours later is consistent with the evidence of Dr. Austin (which was accepted in its entirety) as to the testator's physical and mental condition on the day (2nd March 1961) immediately preceding the execution of the impugned Will.

40 (i) In the light of the findings referred to above there was no evidence at all on the basis of which the learned Additional District Judge could have come to the conclusion that, although the testator was capable of performing a valid testamentary act at or about 8.00 or 8.30 a.m. on the crucial day, he was incapable of performing a valid testamentary act a few hours later the same morning.

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(j) Moreover, the learned Additional District Judge's conclusion that the Notary although honest "has been grossly deceived when he assumed that the testator had a disposing mind on the morning of 3rd March 1961" is not founded on the evidence placed before him and is based on erroneous inferences drawn from the established facts and being inconsistent with other findings of fact is insupportable in law.

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(k) The Appellant further submits that the ultimate conclusion reached by the learned Additional District Judge can be supported, if at all, only on the basis that the Notary was guilty of perpetrating or participating in a fraud of the utmost gravity, but in view of his finding (the benefit of which the Appellant is entitled to) that the Notary was a honest witness, his ultimate conclusion is perverse in law.

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23. The learned Additional District Judge has mis-directed him self with regard to the evaluation of certain circumstances which he describes as suspicious. None of the so-called suspicious circumstances enumerated by the learned Additional District Judge are related to the execution of the said Last Will or have any relevance to or bearing on the question whether the testator had or had no testamentary capacity to execute the said Last Will.

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24. The learned Additional District Judge has failed to apply the proper presumptions in favour of the validity of a Will or even the general standard of proof on a balance of probabilities (by which presumptions and balance the Will should have been upheld). By requiring the Appellant to discharge the burden of dispelling suspicions he has imposed on the Appellant a heavier burden than that which rests upon a prosecutor in a criminal case and has thus misdirected himself in the way in which he dealt with the issue in the case.

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25. The judgment of the Supreme Court proceeded on the basis that the conclusion of the trial Judge as to the purport of the instructions which the testator gave to the Notary is in line with

his (the trial Judge's) conclusions as to the advice given to the testator by Shanmugampillai (his elder brother) i.e. to name his children as trustees. It is submitted with respect that both the trial Judge and the Supreme Court have misconstrued the evidence of Shanmugampillai with regard to the advice which he gave his brother inasmuch as Shanmugampillai stated, inter alia -

- 10 (a) (in evidence in chief) that he told his brother that he was sorry to hear that he had written everything to a trust and made Mathuranayagam a trustee; and that he explained to his brother that charity should be done by the children on behalf of the parents. p.41 L.10
p.41 L.13
- 20 (b) (in cross-examination) on more than one occasion, that what he said to his brother was to give the property to the children so that they may do charity out of the income received; p.50 LL.34-40
- (c) (in cross-examination) that he asked his brother to think over the matter. p.51 L.5

30 It is abundantly clear when the evidence of Shanmugampillai is considered in its proper context that the idea he sought to convey to the testator was that the full beneficial interest in the property should be given to the children and that he should leave charity to be done by the children as they might think right; that an outsider should have nothing to do with his property or with what charity was done out of it.

40 In any event, since the conversation between Shanmugampillai and the testator took place a few days prior to 2nd March, 1961, at which date, on the trial Judge's finding of fact based on the evidence of Dr. Austin, the testator was in full possession of his mental faculties, both the trial Judge and the Supreme Court erred in failing to consider at all the probability that the testator, having thought about the advice tendered by his brother, ultimately made his own independent decision which was not to create a charitable trust but

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to leave his property to his three children equally

p.41 LL.19-29

The incident which occurred in the presence of the testator on 28th February 1961 (a few days before the execution of the impugned Will) between the present Respondent and one of the Testator's daughters over a money transaction, which led to the Testator telling the present Respondent that night that "he had come to make mischief among his children" and that he should not come again, is also a significant item of evidence which helps to explain the Testator's change of mind. Shanmugampillai, who was a witness to this incident, has expressed the opinion that it would have influenced the Testator. The present Respondent did not give evidence at all nor was it even suggested to Shanmugampillai in cross-examination that such an incident did not occur.

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p.174 L.46

The Supreme Court observes that the fact that the trial Judge rejected the Notary's evidence on the basis that he was careless and not dishonest or untruthful, is not sufficient reason to hold that his evidence should have been accepted. If, however, the Notary in fact drafted a document so radically different from that which (in the trial Judge's opinion) he was actually instructed to prepare such an error cannot be explained on the basis that the Notary was careless but only on the basis that he perpetrated or participated in a grave fraud, especially in view of the Notary's evidence that the Will was read by the testator, then read out aloud and that he understood and approved its contents before he signed it.

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Both the trial Judge and the Supreme Court failed to draw the proper inferences from the established facts and the learned Judges of the Supreme Court, being in as good a position to evaluate the evidence as the trial Judge, ought not to have adopted the attitude, which in effect they did, that it is not within their competence to say that they would have given a different judgment if they had been the judge of first instance, but that because

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he has pronounced a different judgment they will adhere to his decision.

Record

26. The Appellant humbly submits that the said judgment of the Supreme Court of Ceylon dated 19th April 1967 (and its decree dated 8th May 1966) affirming the decree of the District Court of Colombo dated 6th December 1962 should be set aside for the following (among other)

R E A S O N S

- 10 1. BECAUSE the finding that Last Will No. 1285 dated 3rd March, 1961, was not the act and deed of the testator and that the testator was not competent to execute the said Last Will is based on no evidence at all; or
2. BECAUSE the said finding is so completely contrary to the weight of evidence that it is perverse; or
- 20 3. BECAUSE if the proper inferences are drawn from the primary facts (which the trial Judge and the Supreme Court have failed to do) the said Last Will should be upheld;
- 30 4. BECAUSE the trial Judge has failed to apply the proper presumptions in favour of the validity of the Will or even the general standard of proof on a balance of probabilities, by which presumptions and standard the said Last Will should have been upheld and in requiring the Appellant to discharge the burden of dispelling suspicions which, in any event, were irrelevant to the main fact in issue, he imposed on the Appellant a heavier burden than that which rests upon a prosecutor in a criminal case and has thus misdirected himself in the way in which he dealt with the issue in the case.
5. BECAUSE the judgments of the District Court and the Supreme Court are wrong and ought to be reversed.

L. KADIRGAMAR.

No. 2 of 1968.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE
ISLAND OF CEYLON

BETWEEN:

DR. NATARAJAN SITHAMPARANATHAN
Appellant

- and -

RAMANATHAN MATHURANAYAGAM
Respondent

CASE FOR THE APPELLANT

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