

1949

Present: Jayetileke S.P.J. and Canekeratne J.

VELMURUGU, Appellant, and ARUMUGAM, Respondent

*S. C. 137—D. C. Batticaloa, 569**Will—Revocation—Act of testator—Modes specified in Statute of Frauds—Chapter 57—Section 6.*

A will can be revoked only in one of the modes specified in section 6 of the Prevention of Frauds Ordinance.

APPEAL from a judgment of the District Judge, Batticaloa.

P. Navaratnarajah, for the second respondent appellant.

C. T. Olegasegarem, for the petitioner respondent.

Cur. adv. vult.

June 29, 1949. JAYETILEKE S.P.J.—

The petitioner-respondent applied in this action to obtain probate of a will dated June 14, 1934, of Arumugam Valliamma who died on March 22, 1947. By this will the testatrix left all her property to her two nephews, the petitioner-respondent and the first respondent. The second respondent, who is a niece of the testatrix, opposed the application on the ground that the will was revoked by the testatrix in the year 1937. The second respondent was adopted by the testatrix from her infancy and she lived with the testatrix till the year 1934, when she got married to one Kasupathy against the will of the testatrix. The testatrix executed the will shortly after the marriage of the second respondent. The evidence shows that in the year 1936 the second respondent made up with the testatrix and returned to her house and lived there up to the death of the testatrix. The evidence as to revocation was that of one Abubacker. He said that on several occasions the testatrix requested the petitioner-respondent to return the will to her so that she may distribute the properties among the heirs, and, finally, in the year 1937 she asked the petitioner-respondent whether he would return the will or not. Thereupon the petitioner-respondent went into the room, opened a drawer and brought a long envelope and set fire to it saying "Here is the will. It won't be of any use either to you or to me."

The learned District Judge has not expressed any opinion about the evidence of Abubacker in his judgment. He says that, assuming his evidence to be true, it is not evidence of revocation within section 6 of the Prevention of Frauds Ordinance (Cap. 57).

The section provides that no will or codicil shall be revoked otherwise than by another will or codicil or by a writing executed like a will or by the burning, tearing or otherwise destroying the same by the testator or testatrix or by some person in his or her presence or by his or her

direction with the intention of revoking the same. The language of the section is identical with that of section 20 of the English Wills Act of 1937. Theobald¹ says that, though a testator may have done everything which he considered necessary to revoke the will, the will is not revoked if he has not adopted one or other of the modes of revocation pointed out in the section.

Mr. Olegasagarem invited our attention to two cases which are very helpful. In *Reed v. Harris*² the testator throw his will on the fire to revoke it, but his niece, Alice Harris, snatched it off without his knowledge and put it away. Hearing that Alice had taken the will away the testator asked her to give it up but she refused. Later she promised to burn the will herself and threw a piece of paper on the fire in the presence of the testator saying "Here it is finished." A bench of four Judges held that the will was not legally revoked. Williams J. said—

"It is argued that if a testator throws his will on the fire with the intention of destroying it, and someone, without his knowledge, takes it away that is a fraud which ought not to defeat his act. But so it might be said that, if the testator sent a person to throw it on the fire, and he did not, the revocation was still good. Where would such construction end? The effect of them would be to defeat the object of the Statute, which was to prevent the proof of a cancellation from depending on parol evidence. The will must be torn or burnt."

Coleridge J. said :—

"Here the fire never touched the will. It can only be said that the testator's intention to cancel was defeated by the fraud of another party."

In *Cheese v. Lovejoy*³ a testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked" and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured. It was held that the will was not revoked. James L.J. said :—

"It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the Court below 'all the destroying in the world without the intention will not revoke a will, nor all the intention in the world without destroying : there must be the two'."

There is no evidence in this case that any act specified in the section has been done and it is therefore not possible for us to say that the will has been revoked.

We would dismiss the appeal with costs.

CANEKERATNE J.—I agree.

Appeal dismissed

¹ *Law of Wills 10th Edition page 39.*

² *6 Ad. & E. 198.*

³ *L. R. (1877) 2 Probate Division 251.*