Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

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SOYSA *v.* SANMUGAM *et al.*

D. C., Colombo, 23,500.

Quia timet *action—Action to have note declared forgery—Maintainability—Handwriting—"Expert"—Value to be attached to evidence of identity of handwriting—Reasons for opinion—Questions of fact tried by Judge without jury—Presumption of correctness.*

HUTCHINSON C.J.—I have known too many instances in which experts' opinion as to identity of handwriting have been proved to be mistaken to accept them as anything more than a slight corroboration of a conclusion arrived at independently, never so strong enough as to turn the scale against a person charged with forgery, if the other evidence is not conclusive.

WOOD RENTON J.—A *quia timet* action lies in Ceylon; and the Courts will, under proper circumstances, order the delivery up, or the declaration of the invalidity, of instruments on which actions at law might be brought.

WOOD RENTON J.—On questions of fact and credibility the decision of a Judge ought not to be interfered with, unless the appellant displaces the presumption, which arises in a case tried by a Judge without a jury, that it is right.

Shaik Alli v. Jafferjee [1] followed.

Qualifications necessary to constitute a person an "expert" within the meaning of section 45 of the Evidence Ordinance (Ordinance No. 14 of 1895) and the value to be attached to evidence of identity of handwriting discussed.

APPEAL from an order of the Police Magistrate awarding the Judge of Colombo (J. Grenier, Esq.).

The facts material to the report appear in the judgments.

Bawa, Van Langenberg, and *F. M. de Saram,* for defendants, appellants.

H. J. C. Pereira, Sampayo, K. C., H. A. Jayewardene, and *Elliott,* for the plaintiff, respondent.

Cur. adv. vult.

November 4, 1907. HUTCHINSON C.J.—

This is an appeal by the defendants from a judgment of the District Court of Colombo. The plaintiff claimed a declaration that two promissory notes, one for Rs. 25,000, dated March 21, 1906, and the other for Rs. 15,000, dated May 28, 1906, were not granted by the first defendant to the plaintiff, and that the endorsements

[1] (1895) 3 *N. L. R.* 368.

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thereon purporting to be made by J. W. C. de Soysa as the plaintiff's attorney are forgeries, and that the plaintiff is not liable on the notes, and that the notes should be delivered to the Court to be dealt with by the Court as may seem necessary or expedient.

The issues settled for trial were:—

(1) Is the endorsement on the note of March 21, purporting to be that of the plaintiff through her attorney J. W. C. de Soysa, a forgery ?

(2) Is either defendant in possession of a note dated May 28, 1906, for Rs. 15,000, signed by the first defendant, and purporting to be made by him in favour of the plaintiff and to be endorsed by the plaintiff through her attorney J. W. C. de Soysa ? and

(3) If so, is the endorsement on the last-mentioned note a forgery ?

The District Judge found that the endorsements on both the notes were forgeries, and that the note of May 28 was and is in the possession of the first defendant, and he entered judgment for the plaintiff as prayed.

The evidence taken at the trial included that of a witness named Cottle, who was called by the plaintiff, and compared some genuine signatures of J. W. C. de Soysa with the signature endorsed on the note of March 21, and also with some other similar signatures which the plaintiff alleged to be forgeries, but whose genuineness is not in issue in this action. The witness stated his opinion and his reason for it, that the signature on the note of March 21 was a forgery. This evidence was objected to by the defendants at the trial as inadmissible, because Cottle is not an " expert " within the meaning of section 45 of the Evidence Ordinance; and on this appeal they have urged that the judgment ought not to stand, because the District Judge accepted and was influenced by this inadmissible evidence. They also contend that the admissible evidence does not justify a finding that the note referred to in the plaint are forgeries.

Section 45 of the Evidence Ordinance, No. 14 of 1895, enacts that when the Court has to form an opinion as to identity or genuineness of handwriting, the opinions on that point of persons specially skilled in questions as to identity or genuineness of handwriting are relevant facts, and that " such persons are called experts." Cottle is the Government Printer; in the course of his business he has had large experience in deciphering handwriting; and he said: " I have taken a considerable amount of interest in handwriting. In a slight degree I have made a study of handwriting. I once gave evidence in Court in the case of *Cave v. Kreltszheim*, in which there was a question of handwriting. . . . . I was called as an expert . . . . . I have studied handwriting in order to be able to study character from the handwriting. . . . . I have not advanced my study very far in this

respect. . . . . I have read no books on the comparison of handwriting or signatures. . . . . My interest in handwriting was partly from the character point of view, and partly because I took an interest in deciphering difficult handwriting." It does not appear that he has ever in his life, except in the one case to which he referred, been asked or has asked himself to form an opinion as to whether two writings were by the same hand (*i.e.*, a question as to "identity"), or whether a writing purporting to be in the hand of a particular person was in that person's hand (*i.e.*, a question as to "genuineness"). I think that he is not an "expert" as defined in section 45, and that his opinion was wrongly admitted in evidence.

By section 167 of the Evidence Ordinance the improper admission of evidence is not ground of itself for a new trial or for reversal of a decision, if it appears that, independently of it, there was sufficient evidence to justify the decision. So that it is necessary to consider whether there was, independently of Cottle's evidence, sufficient evidence to justify the judgment under appeal.

But before entering on that inquiry I will first deal with an argument which was strongly urged by the appellants, that the Judge placed so much reliance on Cottle's evidence that his opinion as to the truthfulness or falseness of the other witnesses must have been greatly influenced by it, and so his whole judgment was vitiated. What, then, did Cottle's evidence amount to, and how far does it appear to have influenced the Judge in arriving at his verdict ?

Cottle was the ninth witness called for the plaintiff. When he had stated his qualifications, the defendants' counsel objected to his evidence on the ground that he was not an expert, but the Judge over-ruled the objection. The witness then stated that he had compared certain genuine signatures of De Soysa with some which were alleged to be forgeries, and said: "In my opinion the signatures which are alleged to be forged were not written by the same person who wrote the genuine signatures." He then gave his reasons at length, pointing out peculiarities in the different signatures. One of the signatures "alleged to be forged" was the endorsement on the note of March 21; the others were signatures said by the plaintiff to be forgeries, but not proved or admitted to be so.

In his judgment the Judge first discussed the evidence of the two principal witnesses, De Soysa and Sanmugam, and then that of the second defendant, and came to the conclusion that De Soysa's story on the main points at issue was true, and Sanmugam's and Vellasamy's false. After dealing with this part of the case in sixty-four pages he comes to Cottle's evidence; he states the opinion which Cottle had given; he says that he will not go minutely into Cottle's evidence, and adds: "The reasons which Mr. Cottle has given in support of every single proposition he has put forward to sustain his ultimate conclusions appear to me to be convincing; but, in

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addition to Mr. Cottle's evidence, I had my own senses to guide me as that evidence was being given; and it does not now appear to me to be a difficult matter, with the whole case before me and with the assistance which Mr. Cottle has afforded, to say that the endorsement on P 1 (*i.e.* the note of March 21) is the work of a forger, who has stamped his character as such on almost every line and stroke and curve of his work. . . . . Even if I have doubts as to these endorsements being forged, and I have none, they have been effectually removed, not only by Mr. Cottle's evidence, but by what I shall proceed to show were certain acts done by Sanmugam himself almost contemporaneously with the making of the note for Rs. 25,000 on March 21." And he then passes on to other parts of the evidence.

The Judge, therefore, does not seem to have been greatly influenced by Mr. Cottle's opinion, though he believes it to be quite sound. He says that the reasons given by Cottle appear convincing, and that using his own senses and with the assistance which Cottle has given (meaning, I think, in pointing out the peculiarities in the different signatures, which might otherwise have escaped the Judge's notice), it is not difficult to say that the endorsement on the note of March 21 is a forgery. But it certainly seems to me on reading his judgment through that he had arrived at the same conclusion independently of Cottle's evidence, and also that, when he came to discuss Cottle's evidence, he did not accept Cottle's opinion without examination, but considered the reasons which the witness gave, and tested them for himself by using his own eyes and scrutinizing the signatures.

The appellants contend that not only Cottle's opinion, but his reasons also were wrongly admitted; that the whole of his evidence was inadmissible. By section 73 of the Evidence Ordinance, in order to ascertain whether a signature or writing is that of the person by whom it purports to have been made, any signature or writing admitted or proved to have been written by him may be compared with the one which is to be proved. Does this mean that the comparison is to be made by the Judge or jury without any assistance, except from the counsel engaged in the case; or may a witness assist by pointing out likenesses or differences in the writings which are to be compared ? If a witness may not do so, then that part of De Soysa's evidence in chief in which he points out differences between his genuine signature and the impugned signature was also inadmissible; he is not giving his reasons for his " opinion " which would be admissible under section 51 if his opinion was admissible; he is not giving an opinion at all; he is stating what he says he knows to be a positive fact, about which he could not be mistaken, that he did not endorse the note of March 21, and having done so he states other facts which he says he has observed, namely, some differences in the signatures. I do not think that such evidence is inadmissible.

Cottle states certain things—which he says are facts—which he has observed, such as that certain lines ar firm or shaky, that others are thick or thin, or uniformly or not uniformly thick or thin, that certain dots or marks are parallel or not parallel to each other or to the edge of the paper. The Judge, when those things are pointed out, can see for himself whether they are facts or not.

Whether the reasons given by this witness are of any value or not is another matter. My own opinion—though I am perhaps prejudiced as to this by my belief that comparisons of handwritings are a very untrustworthy guide—is that the likenesses and differences pointed out by Cottle in this case are of no value at all. The differences between De Soysa's genuine signature and his alleged signature on the note of March 21 do not carry to my mind the least particle of conviction, or even of opinion that the signatures are not written by the same hand.

The appellants say that the Judge, having accepted Cottle's opinion as correct and his reasons as convincing, must have been influenced thereby in forming his opinion on the credibility of De Soysa and of the defendants; that when he sat down to write his judgment he did not really proceed first to make up his mind between De Soysa's story and that of the defendants, without allowing his judgment on that point to be influenced by his knowledge of Cottle's evidence. How would one expect a Judge to proceed in considering his judgment in such a case as this, assuming that the witness who gave evidence, such as Cottle's, was a real expert, the best in the world? My own procedure certainly would be to make up my mind first, entirely uninfluenced by the expert's opinion, whether I was quite satisfied that the evidence for the plaintiff was true on the main points in issue. I should then be glad if the opinion of the expert agreed with my conclusion, though I should not be shaken if it did not. I have known too many instances in which experts' opinion as to identity of handwriting have been proved to be mistaken to accept them as anything more than a slight corroboration of a conclusion arrived at independently, never so strong enough as to turn the scale against a person charged with forgery, if the other evidence is not conclusive. I see, however, that the Judge who tried this case attaches a greater value than I should do to the evidence of the handwriting. But I think that he would follow the same course of procedure, in forming his opinion on the whole case, as I should have done; and it seems to me that his judgment shows that that is the course which he actually did follow. And I think, therefore, that we ought not to set aside his judgment on the ground that he was influenced by Cottle's evidence; we must examine the evidence apart from Cottle's, and consider whether it is sufficient to justify the judgment.

The Judge first deals with the events of May 28, which he says "refer to the most critical part of this case," and he accepts De

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Soysa's version. This he does, necessarily, without any help from comparison of signatures, because the note which the defendants say was endorsed by De Soysa on that day has not been produced, and, as I have said, the course which he would naturally take, and which it seems from his judgment that he did take, would be to decide on the genuineness of that note first without being influenced by Cottle's opinion as to the signature on the others.

The Judge then comes to the note of March 21. Having already found that the note of May 28 was a forgery, he would inevitably, as between De Soysa and Sanmugam, be disposed to believe De Soysa as to the earlier note and to disbelieve Sanmugam. But as to this earlier note there was also the evidence of Vellasamy, that he showed it to De Soysa on March 21, and that De Soysa then said that it was " all right. " The Judge did not believe Vellasamy.

Some reasons have been pointed out for questioning the Judge's conclusions. First, De Soysa admits that he acknowledged to Shand that the signatures on some other notes were his, and yet he now denies that they are his. The Judge apparently thinks, with good reason, that those signatures or some of them were really his, and that he lied when he said that he had never given Sanmugam any blank note with his endorsement on it. And, secondly, it seems likely that De Soysa lied when he said that he did not know Vellasamy and had never seen him. The Judge does not specially refer to this second point in his judgment. It is urged that when he found that De Soysa had lied on these two points, he ought not to have believed him on the main question at issue in this action. Thirdly, it is said that the Judge was mistaken in the reason which he gives for disbelieving Vellasamy. He said that Vellasamy had given false evidence in a previous case tried before the same Judge in 1903. I have read through the record in that case. Vellasamy sued then on a note which he said the defendant in that case had given him; the defendant alleged that he signed that note in blank—which seems to be quite a common practice in this country—and gave it to the firm of " P.M.R.M. " as security, and that he afterwards satisfied the note, and that Vellasamy was the kanakapulle of " P.M.R.M. " Vellasamy swore that he never was kanakapulle of " P.M.R.M., " and did not know whether the defendant had dealings with that firm, and that he, Vellasamy, was the principal of the firm " R.M.P.L., " which was the name in which he sued in that action. In the present action he calls himself " P.M.R.M. Vellasamy, " and swears that he is a paid servant of that firm, and has been so for the last twenty-two years; that he does not remember stating in the former action that he never was kanakapulle of that firm, or that he did not know if the defendant had dealings with that firm, or that he stated that he was the principal of " R.M.P.L., " and added: " If I stated so, it would not be true "; but in cross-examination he said that he was a principal in the firm of " R.M.P.L. "

with two partners. It seems to me that in the 1903 action he misled the Judge into believing that he had no connection with the firm of "P.M.R.M."; but I do not think that he could be convicted of perjury on the ground of his evidence in the two cases being contradictory.

After having read through the whole of the evidence, apart from Cottle's, and having heard the criticisms on it, and taken into account the considerations to which I have referred, but without having had the advantage of seeing and hearing the witnesses, I think that I should have arrived at the same conclusion as the Court below with regard to the note of May 28; on the evidence recorded, apart from Cottle's, I should have found that the note was a forgery. I cannot explain the conduct of De Soysa and Sanmugam on the theory put forward by the defence, or in any other way, except by believing that the note was a forgery. Being satisfied on that point, I should have found that the note of March 21 was also a forgery.

I do not suppose for a moment that Vellasamy knew that the note of March 21 was forged. Nor do I think that the finding that the two notes impugned in this action were forgeries necessarily involves the conclusion that the other notes now alleged by De Soysa to be forged are also forgeries. De Soysa apparently impugns them, not because he remembers that he did not sign them, but because of the supposed differences between the signatures on them and his genuine signature; and no Judge would declare them to be forgeries on that evidence alone, especially if it is true that De Soysa had sometimes given Sanmugam notes signed by him in blank.

It is said that if Sanmugam had any such blank notes in his possession he would have had no necessity to forge the two notes impugned in this action. But it seems that he could not have got any Chetty to take a note for such large sums as Rs. 25,000 and Rs. 15,000 on De Soysa's signature alone.

In my opinion the judgment appealed from should be affirmed, with costs to be paid by the defendants.

WOOD RENTON J.—

This case has, on both sides, been argued before us on appeal with an earnestness and an ability in all respects worthy of its difficulty and importance. I will not recapitulate the facts. But I propose to deal *seriatim* with every point that has been seriously pressed upon us by counsel in arguing the appeal.

In the appellant's answers to the respondent's plaint it is pleaded that the facts alleged disclose no cause of action. No issue was, however, framed on this plea, and although we were informed at the Bar that it was argued in the District Court, and it is taken again in the petition of appeal, I do not think that we can entertain it now. It is settled law that a *quia timet* action—the category to

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which this case belongs—will lie in Ceylon; and I suppose that, like Courts of Equity in England (*Cooper v. Joel*[1]), the Courts of this Colony will, under proper circumstances, order the delivery up, or the declaration of the invalidity of, instruments on which actions at law might be brought. If the appellants meant seriously to urge that here the circumstances are not such as to justify a *quia timet* action, they should have asked an issue and a formal ruling by the learned District Judge upon the point.

The fact that the respondent has proceeded by way of *quia timet* action of course throws on her the burden of proof, and we have to see that that burden has been duly discharged. I do not think, however, that we should be justified in treating this action as if it were a criminal prosecution. It is a civil case, coming before us on appeal, mainly on questions of fact and of credibility, and by the settled jurisprudence of this Court (*Shaik Alli v. Jafferjee*[2]) the decision of the learned District Judge ought not to be interfered with, unless the appellants displace the presumption—which arises where a case tried by a Judge without a jury comes before the Appeal Court—that it is right.

The next point that I desire to touch upon is the evidence of Mr. Cottle. I am unable to agree with the learned District Judge that Mr. Cottle comes within the definition of an " expert " in section 45 of the Evidence Ordinance. I am very doubtful whether the reasons for his opinion were admissible under section 73; and in any event I do not think that any conclusion adverse to the appellants in regard to the promissory note of March 21, 1906, ought, on the merits, to be drawn from them. I proceed to state the grounds of these findings. Under section 45 of the Evidence Ordinance no person is an " expert " unless he is " specially skilled " in the science, art, or kindred department of knowledge as to which he comes forward to testify. In the present case Mr. Cottle's opinion is tendered on a question as to the genuineness of certain handwriting. To the formation of a correct opinion on such a subject some degree at least of " special skill " in the comparison of handwritings is, I think, essential. What are Mr. Cottle's qualifications in this respect ? He has gone through every stage of service in the Government Printing Department—Proof Reader, Composer, Controller of Stores, Assistant Government Printer, and now Government Printer. In some of these capacities he has had abundant opportunities of becoming an expert decipherer of manuscripts. But it has been no part of his official work to compare handwritings for the purpose of ascertaining their identity or genuineness. It is, of course, unnecessary that expert knowledge should be so gained. To that extent, *Reg. v. Silverlock*[3] must, I think, be taken to be a decision applicable in Ceylon. I am merely recording the fact that

[1] (1859) 27 *Beav.* 313; 1 *De G. F. & J.* 240. [2] (1895) 3 *N. L. R.* 368
[3] (1894) 2 *Q. B.* 766.

Mr. Cottle's qualifications as an expert have not been professionally acquired. From what other sources have they been derived? He has studied handwriting in order to be able to read character from it. He gave evidence as to whether a particular handwriting was disguised in the case of *Cave v. Kreltszheim*. It appears, however, from the record that in that case his evidence was received subject to an objection as to its admissibility, and that, in spite of Mr. Cottle's evidence for the prosecution, the District Judge and his assessors acquitted the prisoner. Mr. Cottle admits, however, that he has never read a book on the comparison of handwriting, and it does not appear that, prior to the case of *Cave v. Kreltszheim*, he had ever compared a disputed writing with a genuine one with a view to forming an opinion on the question of the identity of their authorship. I do not think that Mr. Cottle can be said to be an "expert" in the comparison of handwritings within the meaning of section 45 of the Evidence Ordinance. Mr. H. J. C. Pereira, in his argument for the respondent, relied on the case of *Reg. v. Silverlock*,[1] as an authority in favour of Mr. Cottle's competency. In my opinion it cannot be so regarded for two reasons. In the first place, although neither of the reports to which I have access here [(1894) 2 *Q. B.* 766; 63 *L. J. M. C.* 233] is clear upon the point, it does seem as if the witness whose evidence was accepted in that case had had some particular experience in the comparison of disputed handwritings. As I have already said, the *obiter dictum* for which the case is reported, viz., that any person who is *peritus* in handwriting would be an "expert," even if his skill has not been acquired in the way of his business or profession, would be as good law in Ceylon as in England. In the second place, even if the decision in *Reg. v. Silverlock* went further than I think it does, and involved the proposition that a witness who has merely had to decipher handwritings is competent to pronounce an expert opinion on a question as to identity or genuineness as the result of a comparison of handwritings, it would not, I think, bind us in Ceylon. Prior to the Common Law Procedure Act, 1854 (17 *and* 18 *Vict. c.* 125), evidence of hand writing by comparison was inadmissible, except where the writing acknowledged to be genuine was already in evidence in the cause or the disputed writing was an ancient document (*Doe d. Perry v. Newton*[2]). Section 27 of that enactment provides that "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute." This provision, which was applied to all courts of civil jurisdiction by section 103, and to criminal cases by 28 *Vict. c.* 18, sections 1 and 8, did not prescribe any

[1] (1894) 2 *Q. B.* 766.

[2] (1836) 5 *A. & E.* 514.

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qualification on the part of a witness to handwriting as a condition precedent to the reception of his evidence, and although the English Courts (see *Reg. v. Silverlock*) in practice require such witnesses to be *periti*, the text of the law itself, unlike section 45 of our Evidence Ordinance, does not contain either the requirement, or any definition, of *peritia*. In Ceylon a person is not competent to give an expert opinion as to the identity or genuineness of handwriting unless he is " specially skilled " in questions of that character. On the grounds I have stated I think that the learned District Judge ought to have upheld Mr. Van Langenberg's objection to Mr. Cottle's competency under section 45 of the Evidence Ordinance.

Moreover, I doubt whether section 73 of the Evidence Ordinance, founded as it is on section 27 of the Common Law Procedure Act, 1854, and sections 1 and 8 of 28 *Vict. c.* 18, has the effect of making the reasons for Mr. Cottle's opinion any more admissible in evidence than his opinion itself. The primary object of section 73 as of its English analogues, clearly was to get rid of the Common Law rule, which prevented a document not otherwise in evidence in the cause from being admitted for the sole purpose of comparison of handwritings. Even in the construction of the English enactments, which provide for the comparison being made " by witnesses " without any express mention of expert knowledge, some degree of *peritia* is, as we have seen, required by the Courts, unless the witness comes to speak to handwriting on one of the grounds of personal knowledge which are reproduced in section 47 of our own Evidence Ordinance. I am not satisfied either (*a*) that a legal decision or conviction could be based on a mere comparison by Judge or jury of an admitted with an impugned writing without some proof *aliunde* as to the identity or genuineness of the latter (*cf.* the doubts of Bonser C.J. in *Cave v. Kreltszheim*[1]); or (*b*) that the opinion, or the grounds of the opinion, of any witness on such a question would be admissible under section 73, unless he is either an " expert " within the meaning of section 45 or qualified by personal knowledge within the meaning of section 47 (see also section 51). But, even if both Mr. Cottle's opinion and the reasons on which it is based were admissible, I should not be prepared to pronounce the endorsement on the promissory note of March 21, 1906, a forgery on the strength of that evidence. In the first place, I note, in passing, the fact that Mr. Cottle was supplied, by the zeal of the respondent's proctor, with a proof of Mr. de Soysa's evidence before giving his own. It was thus impossible for the appellant's counsel to cross-examine him with full effect on the documents to which Mr. de Soysa referred. Again, so far as I can find, Mr. Cottle says nothing, and not a scrap of evidence was adduced on the question, as to the words "pp. Lady de Soysa " in the endorsement on the note of March 21. Moreover,

[1] (1895) 1 *N. L. R.* 146.

Mr. Cottle used as the basis of his comparison with the genuine signatures submitted to him, and reasoned from, not only the impugned note of March 21, but a large number of other signatures of Mr. de Soysa's, whose genuineness is also impugned, but has not been adjudicated upon by the learned District Judge. When we turn from these extrinsic circumstances which detract from its weight, to Mr. Cottle's evidence intrinsically, and confine ourselves, as Mr. H. J. C. Pereira invited us to do, to the note of March 21, the two genuine notes, and the cheques, I can only say—to put the matter compendiously—that the sole point which really strikes me is that in the scroll to the impugned note the dots on each side are parallel to the oblique stroke, not to the bottom edge of the paper, while the dots above and below are parallel to the bottom edge of the paper in all the genuine signatures I have referred to. The other dissimilarities on which Mr. Cottle relies—the building up of the letters in the impugned notes, the character of the outlines of the letters, and the turn of particular letters—may quite well have been due to local conditions, to the pen used, to the quality of the ink, and to the physical position and mental state of the writer at the moment of writing, and they have for the most part been met by exactly similar variations in some of Mr. Soysa's undisputed signatures. I think that Mr. Cottle's evidence, even if legally admissible, does not warrant a finding that the impeached endorsement on the promissory note of March 21, 1906, is a forgery.

The question, therefore, arises, What effect ought the exclusion of Mr. Cottle's testimony to have on the fate of the present appeal? The answer to that question is furnished by section 167 of the Evidence Ordinance, as interpreted in numerous decisions—some of them decisions of the Privy Council—under the corresponding section of the Indian Evidence Act (*Ameer Ali, 2nd edition, p.* 1025). We have to throw aside the evidence which ought not to have been admitted, and consider whether there still remains sufficient to support the judgment under appeal, remembering always, of course, the incidence of the burden of proof. Although no distinction is drawn in section 167 of the Evidence Ordinance between trial by a Judge alone and trial by a Judge with a jury or assessors, I conceive that we are entitled to take account of it in the practical application of the test I have stated. It is obvious that when you are dealing with the decision of a Judge alone you have the advantage of knowing the reasons that have led him to it, and you can tell to a large extent how far evidence which has been improperly admitted has influenced his mind. In the case of a trial by a jury, this safeguard does not exist; and if the present appeal had been one from the verdict of a tribunal of that character, I should have been disposed to hold, without going further into the matter, that there ought to be a new trial. We have here, however an appeal from the decision of a Judge alone, and of a Judge who has set out the

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grounds of his findings and the process of his reasoning with great clearness and ability and in great detail. I proceed, therefore, to consider whether, eliminating Mr. Cottle's evidence, the learned District Judge's decision ought to be supported. Mr. H. J. C. Pereira argued that it was clear from the structure of the judgment itself that the learned District Judge, in so far as Mr. Cottle's evidence had affected his mind, had been influenced by his reasons and not by his opinions, and had, moreover, come to a conclusion adverse to the appellants, irrespective of that evidence altogether. I am not sure that it is safe to draw deductions from the ultimate literary form that a judgment assumes, as to the order of its evolution in the mind of the writer. I think that the District Judge was clearly influenced by Mr. Cottle's opinion itself. He speaks of his "unique qualifications," and seems at one point to indicate that the mere recording of Mr. Cottle's conclusion made it unnecessary to examine his evidence minutely. For the reasons already given, if the judgment appealed against rested solely on Mr. Cottle's opinion or reasoning, or on both together, I do not think it could stand. At the same time the natural method, which we must assume that the District Judge has pursued, of approaching the consideration of a case of this kind would be to begin with the parties and the ordinary witnesses to facts, and to weigh their relative credibility in the light of the facts themselves. When the case is viewed from this standpoint, I think that, excluding Mr. Cottle's evidence altogether, more than sufficient material remains to render it impossible for us, in accordance with the well-settled rules determining the functions of appellate tribunals, to interfere.

In the first place, we have the decision of the learned Judge on the vital question of the comparative trustworthiness of Mr. de Soysa and Mr. Sanmugam. It is an estimate based not only on their evidence itself, but on their demeanour in the witness box. It is an estimate in which full account has been taken of the shortcomings of Mr. de Soysa, whose version of the critical facts the learned Judge ultimately accepts. It is an estimate which an Appeal Court ought not lightly to revise. In the next place, we have the events of May 28, 1906. They are unconnected with, and entirely independent of, any questions as to expert evidence of handwriting. But they form in themselves one of the issues in the case. And they have also a direct bearing on the events of the preceding March 21. No Judge in dealing with the latter could have kept the former out of view, or would have been justified in doing so.

Now, but for one circumstance, it might fairly have been argued that the rival interpretations of the events of May 28, and indeed of the case as a whole, put forward on behalf of the appellants and the respondent respectievly were so evenly balanced that, in any case, it could not be held that the onus of proof resting on the respondent had been discharged.

On the one side is Mr. de Soysa. He has succeeded in so managing his mother's estate as to burden it with a debt of £150,000, and has consequently aroused strong dissatisfaction with, and suspicion of, his stewardship among his brothers. If the extent to which he has been dealing with his mother's property comes to light, there will be good grounds for, at the least, the revocation of his power of attorney, once already revoked by his mother herself. So he has every motive to conceal the existence of transactions affecting her estate. The necessity for such secrecy is the keynote of the case. It explains Mr. de Soysa's failure to denounce the note of May 28 to Muttiah Chetty as a forgery the instant that it was presented to him, his delay in taking proceedings, and even his visit to the Bank of Madras for the purpose of getting back a promissory note, which if Mr. Sanmugam's story is true, was then safely lying at the bottom of his own pocket. The real object of this visit was not to trace the note, but to find out how much was known. To the same need for secrecy are attributable Mr. de Soysa's subsequent repudiation of notes, the genuineness of which he had previously admitted to Mr. Shand, and the fact that the note of March 21 was not discounted at any of the banks, a precaution that could only have been devised in the interest of Mr. de Soysa himself.

On the other side we have Mr. Shanmugam. He is involved in desperate financial straits. Mr. de Soysa's personal guarantee is no longer sufficient to secure his accommodation. Even blank promissory notes signed by Mr. de Soysa himself are not negotiable. The only rod that can be conjured with in the Chetty market is the name of Lady de Soysa. And so the forgeries are committed.

I do not say that, as between these two presentations of the cases alone, it would be impossible for a Court of Law to decide in the respondent's favour. On the contrary, I think that on the face of the facts proved—apart from the crucial circumstances, to which I will refer immediately—there are graver difficulties in the way of the acceptance of Mr. Sanmugam's story than can be urged against that of Mr. De Soysa. Sanmugam's statement (the making of which is, I think, established) at the bank: "I will bring the rascal up," the tearing of the cheque given him by Muttiah Chetty, the whole circumstances connected with the execution of the bond of March 26 in Mr. de Soysa's favour, the original proposal that it should be for Rs. 100,000, the prompt reduction of this amount to Rs. 50,000, when Mr. Vanderstraaten—in whose conduct I confess I do not see ground for the learned District Judge's strictures—referred to the stamp duties that a bond for Rs. 100,000 would involve, are, individually and still more so collectively, matters of more serious import than De Soysa's failure to charge Sanmugam promptly when he met him at the bank, and the incidental falsehoods of which the District Judge has convicted him. Both Mr. Bawa and Mr. Van

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Langenberg urged that the bond of March 26 was useless as a piece of manufactured real evidence in Sanmugam's favour. The consideration alleged in it effectually severed it alike from the note of March 21 and from that of May 28. But the bond could, I think, be utilized by Sanmugam as evidence of the fact that he was endeavouring honestly to cover his own heavy indebtedness to De Soysa. So far at least it would be a testimonial in favour of his good faith, and we have it on record that this was the light in which it immediately presented itself to the mind of Mr. Vanderstraaten when he heard of the alleged forgeries. But, even if the two cases were more evenly balanced than I think they are, there is, as I have already indicated, one circumstance which turns the scale in the respondent's favour. If Mr. Sanmugam's story is true, at the time when Mr. de Soysa called at the Bank of Madras to make inquiries as to the promissory note of May 28 he had that note lying in his own pocket. The appellant's counsel, as one would expect from advocates of their standing, clearly realized the seriousness of this incident, and they made an earnest attempt to deal with it. They contended in effect that the real object of Mr. de Soysa's visit was not to find out if the note had been discounted, but to ascertain whether anything, and how much, had come out as to the transactions in which he had been engaged. After careful weighing this explanation, I feel bound to reject it. It seems to me inconsistent with De Soysa's character as disclosed in the evidence. There is no clear proof that the fact that a promissory note purporting to be endorsed by him as his mother's attorney was in circulation had become a matter of general knowledge, which might easily reach his brothers' ears. There is nothing to show that he ever put himself, prior to his visit to the bank, in communication with Mr. Mendis or with anyone else who could suggest to him the line of action, which, it is argued, that he pursued; and the evidence of Mr. Dunbar, who was not cross-examined on the point, showed that he confined his inquiries at the bank to the impugned note of May 28. In my opinion the learned District Judge rightly held that this part of Sanmugam's story was false, and the finding is decisive of the case. It justified the Judge in believing De Soysa as against Sanmugam, even when corroborated by the somewhat interested and tainted testimony of Vellasamy, in regard to the promissory note of March 21. It justified him also in holding on the whole case that the endorsement on the note of May 28 was a forgery, that the note was and is in Sanmugam's possession, and that therefore he is accountable for it.

The appeal must be dismissed with costs.

Appeal dismissed.