1947 *Present :* **Soertsz S. P. J. and Canekeratne J.**

NACHCHIA, Appellant, *and* MOHIDEEN KADER, Respondnet.

S. C. 56—D. C. Inty. Jaffna, 432.

Last Will—Petition for probate—Will challenged as forgery—Burden of proof on petitioner—Extent of burden—Removal of suspicions.

The burden of proof on an applicant for probate of a last will which is challenged as a forgery does not extend to the removal of suspicions in regard to the execution of the will. The issue as to its execution is one which must be determined in accordance with the principles applicable to the determination of a fact in civil proceedings.

APPEAL from a judgement of the District Judge, Jaffna.

N. E. Weerasooria, K.C. (with him *H. W. Thambiah*) for the petitioner, appellant.

S. J. V. Chelvanayagam, K.C. (with him *C. Shanmuganayagam*) for the 6th respondent

Cur. adv. vult.

October 22, 1947. SOERTSZ S.P.J.

This is an appeal from an order made by the District Judge, Jaffna refusing to admit to probate a document produced before him as the last will of one Mohamed Nachchia and purpoting to have been executed by her on October 16, 1942, five days before her death. The sole beneficiary under the will was one Pathumma Nachchia, the aunt and foster-mother of the deceased woman. The properties devised by the will were the properties that came to the deceased from this aunt and foster-mother. The 6th respondent, who was the husband of the deceased, objected to the will being admitted to probate on the ground, substantially, that it was a forgery. That being the case of the objecting husband no question of undue influence or of any other kind of influence that Courts are wont to examine with careful scrutiny arose. The sole issue upon which the inquiry was held was whether the will was executed by the deceased and this issue fell to be determined in accordance with the principles applicable to the determination of a fact in issue in civil proceedings. The initial burden of proof was, undoubtedly, upon the petitioner who brouhgt the will into Court. She led evidence to show that the will was executed by the deceased. We must assume that the learned District Judge was satisfied that she had discharged this initial burden because he called upon the respondent to enter upon his case. In the course of his judgement he said that at least one of the witnesses who attested the will was an uncle who knew the executant and that, so far as he was concerned, there could be no question of his mistaking the identity of the executant. This witness declared that it was the deceased who put her mark to the will. The learned Judge did not reject that evidence . In regard to the other attesting witness, the learned Judge thought that he was not sufficiently acquainted with the deceased to be able to say that she was the true executant. The Notary was unable to say whether the woman who put her mark to the document was the deceased woman or some other woman. But the fact remains that upon that evidence the Judge felt called upon to direct the respondent to lead his evidence . That means that he found the burden of rebutting the petitioner's case had now devolved upon the respondent. The respondent's case was that certain circumstances he relied upon negatived the fact alleged by the petitioner that the deceased was the woman who put her mark to the will. The learned Judge, however, put some questions to the respondent to ascertain whether it could have happened that in the house in which the deceased lived a woman

could have been made to impersonate the deceased and to put her mark, to the will without the other members of the respondent's family namely, his parents and his sisters, who lived under the same roof, although in a different portion of the building, becoming aware of such an impersonation or of such a " drama " to adopt the Judge's descriptive word. The apparently unexpected answer of the respondent was that such a drama would not have been possible without the connivance of the other inmates. Thereupon the learned Judge appears to have adopted a theory of his own, namely, that it might well be that the " drama " was enacted in some other building and some woman there mad to impersonate the deceased. There was not a scintilla of evidence to support or even to suggest such a theory. The evidence of the respondent is that the Notary knew the house of the deceased quite well. If that be so, it is most unlikely that the Notary would not know that he had been taken to a different house. The notary himself although he spoke without a positive assertion, said that it was in this house of the deceased's that he took the mark to the will, indicated sufficeintly that it was the house. The result might have been different if the learned Judge had rejected the evidence of the Notary on the ground that it was evidence given in a suspiciously cautious manner, like the evidence of one who derives only a fearful joy from a forgery to which he was a party. But that was not the way the learned Judge dealt with his evidence. He accepted it or, at least, did not reject it.

In the end the learned Judge refused probate on the ground that he had suspicions—not even doubts—in regard to the execution of the will and that the petitioner had not dispelled those suspicions. In other words, he imposed upon the petitioner a heavier burden than that which rests upon a prosecutor in a criminal case. In my view, the learned Judge has misdirected himself in the way in which he dealt with the issue in the case. In my opinion, apart from the direct testimony relied upon by the petitioner and not rejected by the Judge, the circumstances support the petitioner's case. It is most improbable that if the petitioner and her confederates were embarking upon a plot of impersonation they would go to a Notary who had about a year earlier drawn up a deed which the deceased woman had signed. To say the least, they were taking a great risk and their consciences would have, at least, made cowards of them all. Likewise, it is most improbable that they would have led the Notary to a different house. That again would have been an eneterprise fraught with peril. They would, in a case like that, have sought the assistance of a different Notary, unless, of course, the case be that this Notary was himself in the plot. But that, as I have already observed, was not the view of the Judge as recorded by him. I am unable to accept the suggestion of Counsel that the Judge appears to have disbelieved the Notary and suspected his complicity but that he did not wish to say so in so many words. I refuse to believe that a Judge would take such a course. In regard to the circumstance that the deceased had signed a deed but that on the will only a thumb mark appears, that is reasonably explained by the fact that, at the date of the will, this woman was very ill, almost on the point of death. The terms of the will are such that the Judge was satisfied that it was a " natural "

will, that is to say, a will such as, in the circumstances, the deceased may well have wished to make. She was giving back all her property to the aunt and foster-mother from whom she had got it. She and her husband do not appear to have got on well together and there were no children born to them.

Cousel for the respondent asked that the case be remitted to the Court below for a fresh inquiry, but I do not think we should accede to that request. The estate is a very small one, of the value of about Rs. 2,300 and the costs that will have to be incurred will be out of all proportion. But apart from that view of the matter, we are satisfied on the oral testimony and the attendant circumstances that the petitioner has discharged the burden that rested upon her. We would therefore. direct that the last will be admitted to probate. The 6th respondent, will pay the costs of the inquiry and of the appeal.

CANEKERATNE J.—I agree.

Appeal allowed.