1960 *Present :* **Weerasooriya, J., and H. N. G. Fernando, J.**

R. P. W. SAMARAKONE, Appellant, *and* THE PUBLIC TRUSTEE and others, Respondents

S. C. 87 B of 1957—D. C. Colombo (Testy.), 16308

Will—Issue of forgery—Burden of proof—Evidence of handwriting expert—Admissibility of evidence of another expert in rebuttal—Civil Procedure Code, ss. 163, 166—Evidential value of evidence of expert—Power of Judge to examine relevant signatures himself—Suspicious features as ground for refusing probate.

Pending an application for probate of a will No. 3911 dated 10th February 1950, there was found a will No. 541 dated 13th June 1954 purporting to have been executed by the deceased and revoking all previous testamentary instruments. The Public Trustee, who was appointed the sole executor under will No. 3911, and those heirs of the deceased who opposed the grant of probate to will No. 541, took up the position that will No. 541 was a forgery. Inquiry was thereafter held on the single issue which was formulated as follows : " Was the Last Will No. 541 of 13.6.54 the act and deed of the deceased ? ". The 5th respondent, being the propounder of will No. 541, was the party that led evidence first. The only witnesses called by him were the Proctor who attested the will and the two attesting witnesses. The case for the 5th respondent was then closed. Among the documents put in evidence as part of his case were the letters 5R3, 5R4 and 5R5 alleged to have been written by the deceased to the Proctor in connection with the will. The Public Trustee next adduced his evidence and called, among others, the Government Examiner of Questioned Documents, who, giving evidence as an expert, expressed an opinion that the purported signatures of the deceased on the will No. 541 as well as on the letters 5R3, 5R4 and 5R5 were not genuine. After the case for the Public Trustee was closed, Counsel for the 5th respondent moved to call another handwriting expert in rebuttal of the evidence of the Government Examiner of Questioned Documents. This was objected to by the Public Trustee and the Court upheld the objection and refused to allow the evidence in rebuttal.

Held, (i) that the 5th respondent was not entitled to lead in rebuttal the evidence of a handwriting expert, whether under section 163 or section 166 of the Civil Procedure Code. When the Public Trustee and those heirs of the

deceased who opposed the grant of probate of the will No. 541 took up the position that it was a forgery, they did no more than put the 5th respondent, as the propounder of the will, to the proof that the deceased signed it. In such a case the provisions of section 163 of the Civil Procedure Code for admitting rebutting evidence are not applicable.

The Alim Will Case (20 N. L. R. 481), distinguished.

(ii) that, on an issue of forgery, the Court may accept a handwriting expert's testimony, provided that there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct.

(iii) that a Judge is not precluded from himself making comparisons of relevant signatures for the purpose of deciding whether the reasons given by a handwriting expert are acceptable or not.

(iv) that where there are features which excite suspicion in regard to a will, whatever their nature may be, it is for those who propound it to remove such suspicion. Suspicious features may be a ground for refusing probate even where the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in arriving at a definite finding of fraud. The conscience of the Court must be satisfied in respect of such matters.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *H. A. Koattegoda*, for the 5th Respondent-appellant.

H. V. Perera, Q.C., with *Walter Jayawardena*, for the 1st Respondent.

D. R. P. Goonetilleke, with *S. D. Jayasundere*, for the 3rd and 4th Respondents.

Cur. adv. vult.

May 25, 1960. WEERASOORIYA, J.—

One Don Simon Wijewickreme Samarakone, an elderly bachelor, died on the 22nd of November, 1954, leaving an estate valued at Rs. 1,781,802.09. On the 2nd December, 1954, the Public Trustee, who is the first respondent to the present appeal, applied to the District Court of Colombo for probate of a last will (referred to as X in these proceedings) No. 3911 dated the 10th February 1950, attested by S. R. Amerasekere, Proctor and Notary Public, and executed by the deceased, under which the Public Trustee was appointed the sole executor. On this application the Court entered order *nisi* declaring the will proved and also directed that the order be served on the respondents to the application, of whom the 5th respondent is the appellant in the present appeal.

On the 30th December, 1954, there was found in one of the locked drawers of a writing desk in the deceased's residence, a last will No. 541, dated the 13th June, 1954, attested by D. A. J. Tudugalle, Proctor and Notary Public, purporting to have been executed by the deceased and

revoking all previous testamentary instruments. Under this will (which is marked Y) the Public Trustee and S. R. Amarasekere are appointed co-executors (but the latter declined the office) and the 5th respondent and his three brothers (the nephews of the deceased) and their mother and sisters got the bulk of the estate in varying proportions. On the 17th February, 1955, the 5th respondent made an application to the District Court praying that the will Y be declared proved and for a grant to him of letters of administration of the deceased's estate. The Public Trustee and two of the heirs of the deceased who were represented at the hearing of the appeal by Mr. Goonetilleke opposed this application on the ground that the will is a forgery. These two heirs were the 3rd and 4th respondents to the application of the Public Trustee for probate of the will X.

The matter proceeded to inquiry on the single issue which was formulated as follows : " Was the Last Will No. 541 of 13.6.54 the act and deed of the deceased Don Simon Wijewickreme Samarakone ? " After a lengthy inquiry the learned District Judge answered the issue in the negative. The present appeal by the 5th respondent is against that finding.

The 5th respondent, being the propounder of the will Y, was the party that led evidence first at the inquiry. The only witnesses called by him were Proctor Tudugalle who attested the will and A. C. Dias and Jayawardene who signed it as attesting witnesses. The case for the 5th respondent was then closed. Among the documents put in evidence as part of his case were the letters 5R3, 5R4, and 5R5 alleged to have been written by the deceased to Proctor Tudugalle in connection with the execution of the will Y. The Public Trustee next adduced his evidence and called, among others, Mr. Nagendram, the Government Examiner of Questioned Documents, who, giving evidence as an expert, expressed an opinion adverse to the case of the 5th respondent in regard to the purported signature of the deceased on the will Y as well as on the letters 5R3, 5R4 and 5R5. After the case for the Public Trustee was concluded, counsel for the 5th respondent moved to call another handwriting expert, one Mr. McIntyre, in rebuttal of the evidence of Mr. Nagendram. This was objected to by counsel for the Public Trustee and the other opposing parties, and after hearing argument the District Judge upheld the objection, and refused to allow the evidence to be led. An interlocutory appeal (S.C. No. 87C) was filed by the 5th respondent against the order of the District Judge. As a preliminary question relating to the alleged failure of the 5th respondent to tender to the Secretary of the District Court, together with his petition of appeal, the proper stamps for the decree of this Court, was awaiting decision in that appeal, it was not listed for argument along with the present appeal. When the present appeal was taken up, Sir Lalita Rajapakse who appeared for the 5th respondent requested that the hearing be deferred until the decision of the preliminary point in Appeal No. 87C, so that both appeals may be considered together in the event of that point being decided in favour of the 5th respondent. But on Mr. H. V. Perera objecting, and as it

was clearly open to the 5th respondent to canvass in the present appeal the correctness of the order disallowing the application made by the 5th respondent's counsel at the inquiry to lead evidence in rebuttal, we saw no reason to accede to that request. The hearing of the present appeal was, accordingly, proceeded with, and the question whether rebuttal evidence should or should not have been permitted by the District Judge was fully argued both by Sir Lalita Rajapakse and Mr. H. V. Perera.

The preliminary point in Appeal No. 87C was subsequently decided against the 5th respondent, and the judgment of this Court rejecting his appeal is reported in 61 N. L. R. page 452.

In order to consider the submissions addressed to us on the question whether rebuttal evidence should have been permitted or not, it is necessary to refer briefly at this stage to certain items of evidence. The will X, probate of which is applied for by the Public Trustee, was attested by Proctor Ameresekere, who, it is common ground, had been the deceased's legal adviser for several years prior to June, 1954, when the disputed will Y is alleged to have been executed. According to Mr. Ameresekere, whose evidence has been accepted by the District Judge, he continued to be entrusted with the deceased's legal work right up to the deceased's death. Mr. Ameresekere expressed the belief that the deceased would never have revoked the will X without consulting him. He said that in November, 1953, the deceased did in fact give him instructions to prepare a new will revoking X, and shortly afterwards he prepared the draft P7 which he sent to the deceased on the 2nd December, 1953, for approval, along with the covering letter P7B, but he received no further communication regarding it from the deceased, and, as far as he was concerned, the matter ended there. He also said that he did not know the existence of the will Y until after it was found on the 30th December, 1954, and that he came across the draft P7 and the letter P7B on the 25th November, 1954, on a teapoy in a room of the deceased's residence.

A comparison of the provisions in the draft P7 with those in the will X does not reveal any differences of a substantial nature. Instead of each of four of the employees in the deceased's firm of Samarakone Brothers receiving a legacy of Rs. 500 as provided in X, only one of them was to receive that sum in P7. A direction in X for three of the daughters of the deceased's brother Solomon being given a sum of Rs. 2,000 on marriage has been altered in P 7 to a payment of that sum to only two daughters. Possibly the other daughter had married in the meantime. A clause in X providing for the erection of two monuments at a cost of Rs. 1,000 each, in memory of the deceased's parents (should the monuments not have been erected previous to his demise) is omitted from P7. The reason for the omission may be that the monuments had already been erected at the time when the deceased gave the instructions in the terms of which P7 was drafted. P7 also contains two new bequests which are not in X, for the annual payment of a sum of Rs. 250 each to the

Home for the Aged and the Home for Incurables, Colombo, and a further direction for the recovery of a sum of Rs. 500 per mensem as rent for premises No. 1022, 3rd Division, Maradana, from Mr. V. R. Abeygoonesekere (a nephew of the deceased) if he should choose to carry on the business of Samarakone Brothers at those premises. All the other dispositions in the two documents are identical. Mr. Ameresekere was unable to assign any reason why the deceased, having instructed him to prepare the draft P7, did nothing more about it, but it is possible that the deceased did not consider the matter as one of much importance or urgency.

The case for the appellant, on the other hand, is that the deceased did not proceed to execute a fresh will on the lines of P7 because he had arrived at certain other decisions in regard to the disposition of his property which were subsequently embodied in the will Y. It was also suggested by counsel for the appellant in the cross-examination of Mr. Ameresekere that his services were not availed of by the deceased for the attestation of Y because at the time Mr. Ameresekere had incurred the deceased's displeasure by having agreed to a reduction in the rate of interest from 8% to 6% per annum on a loan of one million rupees granted by the deceased to one T. A. Fernando and in respect of which certain proceedings (vide copy 5R18) had been taken before the Board constituted under the Debt Conciliation Ordinance, No. 39 of 1941. But while Mr. Ameresekere agreed that the deceased was not pleased over the reduced rate of interest ordered by the Board, he said that even after this incident the deceased entrusted a lot of work to him. The evidence of Mr. Ameresekere on this point receives support from the letters P17 of the 7th June, 1954, P18 of the 16th August, 1954, P19 of the 21st October, 1954, from the deceased to Mr. Ameresekere, from P7 and P7A and also from at least one entry in the deceased's day-book P9.

Mr. Tudugalle stated in evidence that the attestation of the will Y was not the only occasion when his services were utilised by the deceased, and that even in 1942 he had attested a will for the deceased. This is the document 5R1, which is strongly relied on by the appellant as supporting his case that the deceased did in fact execute Y. According to this document, one of the attesting witnesses to the signature of the deceased was Mr. D. E. Weerasooria, Proctor and Notary Public (who died in 1953 and was, therefore, not available as a witness in these proceedings). But the handwriting expert, Mr. Nagendram, in his evidence in this case has expressed very definite views which if accepted lead to the conclusion that the signatures purporting to be those of the deceased as well as of Mr. Weerasooria are forgeries ; and the District Judge has so held.

In submitting that the District Judge should have permitted the evidence of Mr. McIntyre to be led in rebuttal of the evidence of the handwriting expert called by the Public Trustee, Sir Lalita Rajapakse contended

that the appellant was entitled under section 163 of the Civil Procedure Code to lead such evidence, or, in the alternative, the Court should have acted under section 166 and allowed it as an exceptional case.

The relevant part of section 163 refers, however, to a case where there are several issues the burden of proving some of which lies on the party or parties other than the party beginning. But learned counsel relied on *The Alim Will Case*[1], where, too, there was only one issue specifically raised, namely, whether the will propounded was duly executed by the deceased. This Court ruled that in so far as the issue could be regarded as including a question whether the deceased's signature was procured by fraud, the party propounding the will was entitled to lead evidence in rebuttal of fraud after the opposing party, who had alleged fraud and on whom lay the burden of proving it, had led evidence on the point and closed his case. Sir Lalita Rajapakse submitted that if rebuttal evidence is allowed where fraud is alleged, there is no reason why it should not be allowed where forgery is alleged. But, in my opinion, the two cases are far from being the same. In *The Alim Will Case* the opposing party alleged that there was a fraudulent substitution of the will in place of a deed of gift which the deceased had previously given instructions to be drawn up, and which he was deceived into the belief that he was signing. The reason underlying the ruling in that case is contained in the following passage from the judgment of Bertram, C.J.:

> "The petitioners alleged that the will was duly executed. The respondents, as part of their case, alleged that its execution was procured by fraud. It was for the petitioners on their side to prove the execution and for the opposing respondents to prove the alleged fraud."

When the Public Trustee and those heirs of the deceased who opposed the grant of probate of the will Y took up the position that it was a forgery, in my opinion they did no more than put the appellant, as the propounder of the will, to the proof that the deceased signed it. In *The Alim Will Case* this Court found it possible, having regard to the allegation of fraudulent substitution of the document on which the deceased's *admitted* signature appeared, to take the view that the single issue framed really consisted of two separate questions, the burden of proof in regard to the one (due execution) being on the petitioners, and in regard to the other (fraudulent substitution) on the opposing respondents. But even though the single issue raised in the present case—whether the will Y was the act and deed of the deceased—also involves two questions, one being the deceased's competence to make the will (or his testamentary capacity) and the other, whether he signed it, the burden in regard to each of them is clearly on the appellant, and was conceded to be so by Sir Lalita Rajapakse. The question of the deceased's competence was not seriously challenged. The main contest was whether he signed it. For the reason already stated by me, I am unable to agree with the

[1] *(1919) 20 N.L. R. 481.*

submission of Sir Lalita Rajapakse that the alleged forgery of the deceased's signature on Y arose as a distinct and separate question, the burden of proof in regard to which was on the Public Trustee and the other opposing parties.

It is also to be noted that in *The Alim Will Case* (supra) in dealing with the question of the due execution of the will, and referring to the fact that counsel for the petitioners had not called one Isdeen who was alleged by them to have been present at the execution of the impugned will, Bertram, C.J., took care to state as follows: "He (counsel for the petitioners) was not entitled to 'split' his case on any one issue. He could not, having refrained from calling Isdeen on the question of execution, afterwards call him to rebut the evidence given by the respondents on that issue. But he was entitled to call Isdeen and the other witnesses he mentioned to rebut the evidence given by the respondents on the issue of fraud."

On the question whether the deceased signed the will Y, the appellant led the direct evidence of Proctor Tudugalle and the two attesting witnesses that they saw him sign it. There was also adduced a volume of indirect evidence of a circumstantial nature which is relevant to that question. I have already referred to certain items of this evidence (the letters 5R3, 5R4, 5R5 and the will 5R1 of 1942). The evidence of the appellant's handwriting expert, although not led, also fell into this category. I do not think that it was open to the appellant to call, in the first instance, only a part of his evidence touching the question whether the deceased signed Y, and to postpone calling his expert until after the handwriting expert called by the Public Trustee had given evidence. Even if Sir Lalita Rajapakse is right in the submission that there was a distinct and separate question of forgery arising on the issue framed, the appellant was not entitled to "split" his case in the manner in which he sought to do.

In my opinion section 163 of the Civil Procedure Code does not avail counsel for the appellant in his contention that the appellant was entitled to lead in rebuttal the evidence of Mr. McIntyre relating to the impugned signatures on the wills Y and 5R1 and the letters 5R3, 5R4 and 5R5.

I shall now consider the alternative contention that the District Judge should have allowed such evidence to be led as an exceptional case under section 166 of the Civil Procedure Code. That section provides that the Court may for grave cause, to be recorded at the time, permit a departure from the course of trial prescribed in the earlier sections. The Court may, therefore, for grave cause permit a party to lead evidence in rebuttal even though the party may have no right to do so under section 163. An obvious instance for the application of section 166 would be where a party, having closed his case, is faced with evidence of a decisive nature arising *ex improviso* which he could not reasonably have foreseen. In the present case, however, the objections filed by the Public Trustee to the grant of probate of the will Y made it clear that forgery was the only ground on which probate was opposed; and it was for this reason that

on the 16th February, 1955 (according to a journal entry made under that date) the proctors for the appellant obtained the permission of Court for Mr. McIntyre to examine and take photographs of Y, and also of X and certain other documents, which he subsquently did on the 23rd May, 1955. The Government Examiner of Questioned Documents and the Assistant Government Examiner are mentioned as witnesses in the lists of witnesses filed by the Public Trustee and the other opposing parties. In the appellant's own list of witnesses filed on the 27th May 1955, appears the name of Mr. McIntyre. It may, therefore, be inferred that the appellant's lawyers knew long before the inquiry commenced on the 14th October, 1956, that the principal issue in the case was whether the deceased signed the will Y, and the importance of expert evidence relating to handwriting in the decision of that issue. In the circumstances, appellant's counsel could not have been taken unawares by any evidence on that issue by the Public Trustee ; nor can he be heard to complain of surprise in respect of the evidence adduced by the Public Trustee on the question whether the signatures on the will 5R1 purporting to be those of the deceased and of Proctor D. E. Weerasooria are indeed their signatures, since in the cross-examination of Proctor Tudugalle regarding 5R1 it was sufficiently indicated that those signatures were also impugned as forgeries.

In the course of the cross-examination of Mr. Nagendram, counsel for the appellant elicited certain evidence regarding Mr. McIntyre's competence as an expert which was objected to by counsel for the Public Trustee on the ground that Mr. McIntyre had not been called as a witness, but which the learned District Judge allowed in view of an undertaking given by appellant's counsel to call Mr. McIntyre. The judge also allowed counsel for the appellant to put in evidence certain documents (5R19, 5R20, 5R21) on his undertaking to prove them, despite the objections of counsel for the Public Trustee that the appellant's case had already been closed. It was at a much later stage of the inquiry that the District Judge gave his ruling that the appellant was not entitled to call any evidence in rebuttal, but Sir Lalita Rajapakse referred to these antecedent matters as in some way reinforcing his contention that this was a proper case for the District Judge to have exercised his powers under section 166 even if the appellant was not strictly entitled to call such evidence under section 163.

I do not think, however, that the wrong admission of the evidence objected to (which in no way caused prejudice to any party) can be put forward for our holding that the District Judge should have, in the exercise of his discretion, permitted to be done under section 166, that which the appellant could not have done under section 163. In my opinion, there was no ground at all for the District Judge to have acted under section 166. No application in that behalf was made to him by appellant's counsel. On the contrary, counsel expressly stated that he was not inviting the Court to exercise a discretion in favour of the appellant, but that the application to call evidence in rebuttal was based on, what he contended, was a legal right to do so under section 163.

On the facts, the District Judge has expressed strong findings which are fatal to the case of the appellant that the will was executed by the deceased. He described Mr. Tudugalle, the Notary who claims to have attested the will Y, as a witness entirely lacking in candour, unworthy of credit and as " the type of Notary who could be employed to fabricate a document ". The evidence of this witness has many unsatisfactory features. He said that having made notes of the deceased's instructions regarding the will Y, he typed out a draft of it and sent it to the deceased for approval, and that the deceased returned it to him after making certain alterations in it in his own handwriting. But while Mr. Tudugalle has produced, marked 5R2, the notes alleged to have been made by him, he said that the draft with the alterations in the deceased's handwriting was destroyed by him after Y was executed as he did not think it necessary to preserve it. He also said that on the 13th June, 1954 he was paid a fee of Rs. 80 in cash by the deceased for his services after the will was executed, but it is strange that no such payment appears in the deceased's day-book, P9, which is for the period 1st April, 1954, to the 31st March, 1955, although it shows various other legal disbursements during that period.

Mr. Tudugalle seems to have created such an unfavourable impression in the witness-box that even counsel for the appellant at the inquiry was constrained to admit that his evidence " if it stood by itself could not be accepted ". The Judge also rejected the evidence of A. C. Dias and Jayawardene, the only witnesses called by the appellant who were in a position to support Tudugalle in regard to the execution of Y. Dias was an attesting witness in the will 5R8 executed by the deceased in 1933, and claims to have been a long standing friend of his. But of both Dias and Jayawardene the Judge has stated that their evidence was not of such a nature as to enable him to act upon it despite the shortcomings of Tudugalle as a witness. Very strong grounds would be required to reverse in appeal the learned Judge's finding of fact in regard to the credibility of this trio of witnesses. In my opinion, no such grounds have been shown to exist by Sir Lalita Rajapakse although he strenuously attacked these findings.

The decision of the District Judge that Y is not the act and deed of the deceased is, however, not entirely based on his rejection of the evidence of Tudugalle, A. C. Dias and Jayawardene. He also took into account various other factors and items of evidence, in regard to the more salient of which his conclusions may briefly be summarized as follows :—

(*a*) The provisions in the will Y are completely different from those in X, the draft will P7 and the will 5R8 of 1933, and are " out of line " with the character of the testator. Y may even be termed an " unnatural " will and needs the closest scrutiny.

(*b*) " The circumstances in which the will Y was found are, to say the least, most suspicious ".

(*c*) It is most unlikely that the deceased would have employed Mr. Tudugalle to attest Y, ignoring his usual legal adviser, Mr. Ameresekere. The appointment of Mr. Ameresekere as co-executor in that will is only a subterfuge adopted to explain why Mr. Ameresekere did not attest it.

(*d*) It is even more unlikely that the deceased would have employed Mr. Tudugalle to attest the will 5R1 of 1942. 5R1 is an obvious forgery. The only purpose in fabricating it was to lend support to the will Y. It follows that Y too must be a forgery.

(*e*) The letters 5R3, 5R4 and 5R5 have also been fabricated in order to create the impression that Y is a genuine will.

(*f*) The fact that the numbers and dates of 5R1 and Y appear in the two returns made by Mr. Tudugalle to the Registrar of Lands for the month of September, 1942, and June, 1954, respectively, do not necessarily establish that 5R1 and Y are genuine.

(*g*) The evidence of the handwriting expert, Mr. Nagendram, corroborates the inferences arising on the other evidence in regard to 5R1 and Y, and also 5R3, 5R4 and 5R5.

The District Judge's conclusions at (*a*), and in particular the description of Y as an " unnatural " will, were much criticised by learned counsel for the appellant who submitted that the dispositions in Y in favour of the deceased's nephews, especially the appellant and the other sons of his brother David Samarakone, are fully in keeping with the evidence that he was very fond of them and that they were living with him in his house in Pamankade prior to his death and looking after him. But this evidence was given by A. C. Dias whom the Judge disbelieved on the question whether the deceased executed Y. The Judge seems to have preferred the evidence of Mr. Ameresekere that none of the deceased's relations were on good terms with the deceased. This somewhat sweeping statement is, however, not borne out by the deceased's confidential clerk, Henry Dias, from whose evidence it may be inferred that the deceased was not unfavourably disposed towards some at least, of his relations. For instance the deceased allowed his brother David Samarakone and his family to live on his estate, Ambagahahena, and had, as far back as in 1933, under the will 5R8, devised this same estate to David, subject to a *fideicommissum* in favour of David's sons, Stanley, Vernon and Bertram. Even after the death of David his family continued to live there. Stanley was at one time employed as Superintendent of Ambagahahena Estate and three other estates in the vicinity belonging to the deceased. Victor Abeygoonesekere, another nephew of the deceased and the 6th respondent to the application by the Public Trustee for probate of the will X, was employed as the manager of the deceased's office at Borella and was also associated with the deceased in the firm of Samarakone Brothers.

I do not think that in view of this evidence, which was, perhaps, overlooked by the District Judge, the will Y can be described as an " unnatural " one. But even so, there appears to be a striking disparity

between the provisions of Y when compared with P11 of 1947, X of 1950, both of which were attested by Mr. Ameresekere, and the draft P7 which he prepared on the instructions of the deceased not many months before Y is said to have been executed. In P11, X and P7 the deceased's nephews have been left out entirely in the cold. Even under the earlier will, 5R8, although the deceased had to an extent provided for some of them, the bulk of his estate was bequeathed to his trustees for certain specified objects to the exclusion of his relatives. But in Y, apart from the directions to the Public Trustee for the payment of a sum of Rs. 150,000 for the building and equipment of a hospital on a portion of a land belonging to the deceased at Wewala, a sum of Rs. 5,000 for the building fund of the Colombo Young Men's Buddhist Association, and small allowances to a few of the deceased's employees, practically the entire estate is distributed among his nephews and nieces, the appellant and the other sons of his brother David getting the lion's share of it. Having regard to this disparity and the allegation of forgery of Y, I am not prepared to say that the District Judge was wrong in addressing to himself the caution that it should be subjected to the closest scrutiny.

In regard to (*b*), the circumstances referred to by the District Judge are as follows :—Although the deceased died on the 22nd November, 1954, the will X was not to be found until eight days later. Mr. Ameresekere, who had attested it, stated that on hearing of the deceased's death he immediately informed the Public Trustee who was the executor appointed under X, of the existence of that will as Mr. Ameresekere had no reason to think that it had been revoked by the deceased. According to Mr. Ameresekere, when the deceased gave him instructions in November 1953, to prepare a fresh will (and in terms of which instructions P7 was drafted) he also handed to Mr. Ameresekere the will X, and it was never returned to the deceased thereafter. But forgetful of the fact that it was still with him, Mr. Ameresekere went to the deceased's residence in Pamankade on the 22nd November with the Public Trustee and searched for the will. On that occasion the iron safe in the house was not examined, presumably, as it was locked and the key was not there. That safe was forced open on the 26th November in the course of further search for the will. Search was also made at Wewala Estate on the 27th November and at the Maradana office of Samarakone Brothers on the 29th November. Not until the 30th November did it dawn on Mr. Ameresekere that the will was in the safe in his office, whereupon he immediately went there and obtained the will and gave it to the Public Trustee, who on the 2nd December, 1954, as stated earlier, filed it in the District Court of Colombo and applied for probate of it. He also applied for an order of Court under section 29 (1) of the Public Trustee Ordinance (Cap. 73) directing him to collect and take possession of the estate of the deceased, which order issued on 4th December, 1954. In pursuance of the order the Public Trustee went on the 6th December to take possession of the deceased's Pamankade residence but found the gates barred against him. This situation continued until the 23rd December, 1954, when the Public Trustee was informed by some of the heirs of the deceased who were in

occupation of the Pamankade house that he or his representative could call over and make an inventory of the articles which were there. Accordingly, Mr. Selvanayagam, an officer from the Public Trustee's Department went there on the 30th December and was met by the appellant, who in the course of conversation, directed the attention of Mr. Selvanayagam to a writing desk in the office room on which the telephone was placed the drawers of which, the appellant said, may contain papers belonging to the deceased. The drawers were secured by means of a flap which was fixed to one side of them. The flap was locked, but as there was no key that fitted the lock, the appellant forced open the flap with a screw driver. In the top drawer were found among some other papers the letters P1, P2 and P3, and in a separate envelope, the will Y.

If Y is a forgery, as the District Judge has held, and it was fabricated after the deceased died, a drawer of the writing desk may well have been regarded by those responsible for the fabrication as a suitable place for depositing Y, because it did not occur to Mr. Ameresekere, or the Public Trustee or any of the other officers of his department, to examine the drawers of this desk between the 22nd and the 30th November, 1954, which had remained locked throughout that period.

I think that the circumstances leading to the discovery of Y on the 30th December, 1954, as stated in the preceding paragraph, are such as to excite suspicion. This suspicion is in no way allayed when one considers certain other matters connected with the alleged drafting and execution of Y. No satisfactory answer is forthcoming to the question as to why the deceased did not get the will attested by Mr. Ameresekere. Seeing that Mr. Ameresekere is appointed a co-executor under the will, it is not open to the appellant to make much of the suggestion (to which I have already referred) that the deceased was at the time displeased with Mr. Ameresekere. The learned District Judge has expressed the view that those responsible for Y anticipated this obvious question when they appointed Mr. Ameresekere a co-executor under it, and I think that there is much to be said for that view. Mr. Ameresekere said that he " would be the last man to become an executor of a will ". It seems unlikely that the deceased would have appointed him as such without having first ascertained that he was willing to accept the appointment.

Another question that arises is why the deceased should have employed Mr. Tudugalle in particular to attest the will Y. The reason put forward by the appellant for the deceased having done so is that Tudugalle had also attested the earlier will 5R1, which the deceased is alleged to have executed in 1942. This is a plausible reason which, if accepted, may go far towards proving that Y is not a fabrication. The District Judge has, therefore, rightly regarded 5R1 as a very important document in the case. The evidence of Mr. Tudugalle is that the proctor who drafted the will for the deceased was Mr. Weerasooria, but that as some of the beneficiaries under it were related to Mr. Weerasooria (he and David Samarakone, the brother of the deceased, are said to have married two sisters) he was reluctant to attest it and requested Mr. Tudugalle to do so.

Mr. Tudugalle admitted that at the time he was in the throes of his insolvency case. Allegations of fraud were being made against him in that case. The District Judge was not prepared to believe that Mr. Weerasooria would have been so unmindful of the deceased's interests as to entrust the attestation of an important document like 5R1 to Mr. Tudugalle who, he must have known, was under a cloud at the time. The only person who has given evidence that Mr. Weerasooria signed 5R1 as a witness is Mr. Tudugalle. In signing his name Mr. Weerasooria appears to have mis-spelt it and then corrected the error, which, according to the view of the learned District Judge, was an unlikely thing for Mr. Weerasooria to have done.

The purported signature of Mr. Weerasooria on 5R1 has been compared by the handwriting expert, Mr. Nagendram, with the signatures on the documents 3R4 to 3R23, which are motions admittedly signed by Mr. Weerasooria and filed in D. C. Colombo (Guardian) Case No. 3826 in 1942 and 1943. Enlargements of these signatures appear in P25. Mr. Nagendram has expressed the opinion that the signature " D. E. Weerasooria " on 5R1 is completely different from, and not even an imitation of, the signatures on 3R4 to 3R23.

The purported signature of the deceased on 5R1 has been compared by Mr. Nagendram with the signatures of the deceased (identified as such by Mr. Ameresekere) appearing on the documents P11 to P19, P26/1–25, X and 5R8. He has expressed the opinion that the signature on 5R1 was not signed by the person who signed as " D. S. W. Samarakone " on P11 to P19, P26/1–25, X and 5R8. On a comparison of the documents Y, Y1 (which is the protocol of Y) 5R3, 5R4, 5R5, with P11 to P 19 P26/1–25, X and 5R8, Mr. Nagendram has also expressed the opinion that the signature " D. S. W. Samarakone " on each of the documents Y, Y1, 5R3, 5R4 and 5R5, was not written by the person who signed as such the documents P11 to P19 and P26/1–25, and that there were similarities in the signature " D. S. W. Samarakone " on 5R1, 5R3, R54 and 5R5.

In regard to 5R1, there is yet another circumstance which appears to contain an element of suspicion. Apart from X, Mr. Ameresekere has attested two other wills for the deceased, the earlier of which is No. 2652 of the 1st August, 1935. It has not been produced in these proceedings but is referred to in the later will, which is P11, dated the 17th March, 1947. 5R1, if genuine, would have been executed between the execution of will No. 2652 and P11. Clause 1 of P11 reads : " I hereby revoke all Last Wills, Testaments, Codicils and Writings of a Testamentary nature heretofore made by me and in particular, Last Will No. 2652 dated the 1st August, 1935 attested by S. R. Ameresekere of Colombo, Notary Public, and declare this to be my Last Will and Testament. " It will be seen that the last will particularly revoked is No. 2652, and not 5R1. Clause 1 of P11 is in the usual form which Mr. Ameresekere seems to have adopted in the wills attested by him for the revocation of previous instruments of a testamentary nature. There is a general revocation of all

such previous instruments, coupled with a particular revocation of the last of them in point of time. See also clause 1 of X and clause 1 of P7. One explanation for the fact that in clause 1 of P11 there is particular reference to will No. 2652, and not to 5R1, may be that no such document as 5R1 had been executed by the deceased. The other explanation is that in drafting P11 Mr. Ameresekere did not specially ascertain from the deceased whether he had executed any last will subsequent to No. 2652, and, being unaware of the existence of 5R1, had assumed that No. 2652 was the most recent of the deceased's wills. It is, perhaps, unfortunate that Mr. Ameresekere was not questioned on the point when he was in the witness-box. On the other hand, the deceased has been described as a careful and methodical man. It is very unlikely, therefore, that he would not have scrutinised the several clauses in P11, both in draft as well as in the form in which he signed it. If he had previously executed 5R1, would it not have struck him that clause 1 of P11 contained an error in that particular mention is made of will No. 2652 and not of 5R1, and would he then not have requested Mr. Ameresekere to rectify it, even if Mr. Ameresekere had not, in the first instance, questioned him regarding the matter ?

In the course of the cross-examination of Mr. Tudugalle on the subject of the alleged execution of Y by the deceased, the following evidence given by him may appear significant in view of his assertion that in 1942 he attested the signature of the deceased on 5R1 :—

" Q : You have not seen the deceased sign before ?

A : I have seen him sign before. I have seen him sign papers when I go there.

Q : All that you have seen him sign are papers, that is letters that are typed and left there for him to sign ?

A : Yes.

Q : You have not seen him sign any other documents ?

A : No. This is the first formal document which I saw him sign . . . . "

Two documents which require to be considered as pointing to the authenticity of 5R1 and Y are the returns 5R6 and 5R7 for the months of September, 1942, and June, 1954, respectively, sent by Mr. Tudugalle to the Registrar of Lands under section 30 (25) (*a*) of the Notaries Ordinance. 5R1 bears the number 338 and is dated the 17th September, 1942. The return 5R6 shows the execution of such an instrument. Likewise the return 5R7 shows the execution of a will bearing the number and date of Y. But, as pointed out by the learned District Judge, in the case of a will the name of the testator or other particulars relating to the instrument are not given in the return, and it is, therefore, possible for a dishonest notary, without running a serious risk of detection, to give to a subsequently fabricated will the number and date of a will appearing in a previous return.

The reasons for the opinions expressed by Mr. Nagendram in regard to the signature " D. S. W. Samarakone " on Y, Y1, 5R1, 5R3, 5R4 and 5R5, the signature " D. E. Weerasooria " on 5R1, are fully set out in his evidence, which was subjected to a close cross-examination by learned counsel for the appellant. In order to illustrate the points made by him in his evidence Mr. Nagendram produced photographic enlargements (P10, P20, P21, P21a, P22, P23, P24 and P27) of the signature " D. S. W. Samarakone " on some of the impugned documents and those used for purposes of comparison.

Sir Lalita Rajapakse made no attempt to canvass the validity of the reasons given by Mr. Nagendram for the opinions expressed by him, but on this aspect of the case he contented himself with making certain legal submissions, one of which is that the District Judge attached too much importance to the evidence of the handwriting expert and accepted his opinions too readily, and that in doing so he acted contrary to the principles laid down in *Soysa v. Sanmugam* [1] and *Mendis v. Jayasuriya* [2] as to the manner in which expert evidence relating to the identity of handwriting should be considered by a Court and the value to be attached to such evidence.

But, if I may say so with respect, some of the *dicta* in the two cases cited above appear to go too far in that they unduly minimise the value of expert evidence relating to the identity of genuineness of handwriting ; and I would prefer to accept the following observations of my brother Sinnetamby in the recent case of *Gratiaen Perera v. The Queen* [3] as setting out more correctly the manner in which such evidence should be regarded by a Court of law :—

> " I think the modern view is to accept the expert's testimony if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct ; provided, of course, the Court, independently of the expert's opinion, but with his assistance, is able to conclude that the writing is a forgery. "

From a perusal of that portion of the judgment of the District Judge which deals with the evidence of Mr. Nagendram it does not appear to me, therefore, that the complaint of learned counsel in regard to the manner in which that evidence was made use of by the Judge has been substantiated, for, after a discussion of certain of the reasons given by the expert for the conclusions reached by him, the judgment proceeds as follows : " There are many other reasons set out in this evidence from which, after a comparison of the signature on Y with genuine signatures, Mr. Nagendram concludes that the person who signed Y was not the deceased, and further that it was that person who also signed 5R1, 5R3, 5R4 and 5R5.

His opinion corroborates the inferences that I have drawn from the other evidence discussed above. "

[1] *(1907) 10 N. L. R. 365.* [2] *(1932) 12 C. L. Rec. 44.*
[3] *(1960) 61 N. L. R. 522.*

Another submission of Sir Lalita Rajapakse was that, at least in regard to the question whether Mr. D. E. Weerasooria had signed 5R1, the District Judge reached a conclusion adverse to the appellant chiefly on the basis of a comparison which he himself made between the purported signature of Mr. Weerasooria on 5R1 and his admitted signatures on the documents 3R4 to 3R23; and that the adoption of such a course was deprecated in *Cader Saibo v. Ahamadu* [1]. But in that case the District Judge had formed an opinion that a certain document was a forgery on a comparison made by him, unaided by an expert, of the signature on it with the genuine standards that had been produced. In the present case the Judge had before him the opinion expressed by the expert regarding the purported signature of Mr. Weerasooria on 5R1 and the reasons for that opinion. I do not think that the Judge was precluded from himself making comparisons between the impugned signature on 5R1 and the signatures on 3R4 to 3R23 and the photographic enlargements, P25, for the purpose of deciding whether the reasons given by the expert were acceptable or not. Indeed, it was incumbent on the Judge to make these comparisons in the circumstances of this case. The fact that the learned Judge has expressed himself somewhat strongly—perhaps too strongly—that 5R1 is a forgery should not, I think, be taken as an indication that he regarded himself as competent to form an opinion on the question of handwriting independently of what the expert may have stated.

The opinions expressed by Mr. Nagendram in regard to the impugned signatures, uncontradicted as they are by any other expert, are such that, in my view, they add to the tally of suspicious features to which I have already referred in regard to 5R1 and Y.

As held by Lindley, L.J., in *Tyrell v. Painton* [2], where there are features which excite suspicion in regard to a will, whatever their nature may be, it is for those who propound it to remove such suspicion. Suspicious features may be a ground for refusing probate even where the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in arriving at a definite finding of fraud. It has also been stated that the conscience of the Court must be satisfied in respect of such matters. These principles have been applied in several local cases, such as *The Alim Will Case* (supra), *John Pieris et al. v. Wilbert* [3] and *Meenadchipillai v. Karthigesu* [4]. Of the suspicious features in the present case it is impossible for us to say that the appellant has succeeded in removing them.

I have yet to deal with certain matters which Sir Lalita Rajapakse placed at the forefront of his submissions when arguing this appeal. He complained that grave prejudice was caused to the appellant by, what he contended were, the entirely unfounded suspicions with which the Public Trustee viewed the will Y from the very day of its discovery on the 30th December, 1954, and by the manner in which that will came to be forwarded to the District Court. Learned counsel drew attention to the fact that the Public Trustee had on his own responsibility sent Y and

[1] *(1948) 50 N. L. R. 303.*
[2] *(1894) P. 151.*
[3] *(1956) 59 N. L. R. 245.*
[4] *(1957) 61 N. L. R. 320.*

certain other documents containing the deceased's signature to the Government handwriting expert for a report whether the signature " D. S. W. Samarakone " on Y was that of the deceased ; and, having received a negative answer from the expert, he produced Y in Court on the 20th January, 1955, along with an application setting out, *inter alia*, the circumstances in which Y was found, the reasons why he considered it necessary to send Y to the Government handwriting expert for a report (which was also forwarded to Court) and praying for a direction of the Court whether the will Y should be regarded as the genuine last will of the deceased and as revoking the will X (the application for the probate of which was then pending) and also for an order that the will Y be impounded in Court.

In regard to the direction applied for, the District Judge informed the Public Trustee that he " should decide as to what he proposes to do in the matter ". No objection was taken by Sir Lalita Rajapakse to this reply, but he submitted that the order which the District Judge made that the will Y be impounded and kept in the safe indicated that the Judge had already formed an opinion that Y was probably a forgery, and that in view of that order and the circumstances preceding the making of it, the District Judge should not have heard the subsequent inquiry that took place into the genuineness of it. In my opinion, there is no substance in these submissions. I am satisfied that none of the matters complained of by Sir Lalita Rajapakse could have made any difference to the impartial consideration of this case at the hands of the learned District Judge.

The appeal fails and is dismissed with costs payable to the Public Trustee and the other respondents who were represented at the hearing of it.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.