1957 *Present:* **Weerasooriya, J., and Sinnetamby, J.**

JOSEPH FERNANDO, Appellant, *and* PEARLIN FERNANDO, Respondent

S. C. 233—D. C. Negombo, 16,654/L

Evidence—Proof of execution of a deed when attesting witness denies the execution—Handwriting—Proof of its genuineness—Evidence Ordinance, ss. 68, 69, 71.

When an attesting witness, who is called for the purpose of proving the execution of a document required by law to be attested, denies the execution of the document, proof of his signature is not sufficient to establish due execution. Under section 69, read with section 71, of the Evidence Ordinance there must be, in addition, proof of the executant's signature.

Quaere, whether, in the absence of other evidence and without the benefit of the opinion of an expert, it is open to a Court, on a mere comparison of two documents containing respectively an admitted signature and a signature which is repudiated, to express the opinion whether the two signatures are of one and the same person.

[1] *(1899) 3 N. L. R. 325.*

APPEAL from a judgment of the District Court, Negombo.

Ivor Misso, with *A. Nagendra*, for the 2nd defendant-appellant.

E. R. S. R. Coomaraswamy, with *E. B. Vannitamby* and *T. G. Gunasekera*, for the plaintiff-respondent.

Cur. adv. vult.

February 15, 1957. WEERASOORIYA, J.—

The substantial question which arises in this appeal is whether the learned trial Judge was right in holding that deed No. 154 of 1933, which is one of the deeds relied on by the plaintiff-respondent in proof of her title to the entirety of the land in suit, and of which P1 is a certified copy, had been duly executed. Deed No. 154 is a deed by which the 1st defendant (who died while the action was pending) and one of her children, Emaline, purported to sell the land for a sum of Rs. 6,000 to one Matilda Pieris. Although the deed purports to convey the entire land, actually the 1st defendant was entitled to only an undivided three-fourths share, and Emaline to an undivided one-sixteenth share, at the time of its alleged execution.

The 2nd defendant, who is the appellant and a son of the 1st defendant, claims to have acquired the undivided three-fourths share of the 1st defendant by virtue of a subsequent deed, D4 of 1951, from the 1st defendant.

The 1st and 2nd defendants in the answer filed by them challenged deed No. 154 as a forgery, and certain of the issues on which the case went to trial related to the questions whether the signature on it purporting to be that of the 1st defendant was a forgery and whether it had been duly executed. Although the name of the attesting notary was included in the list of witnesses filed by the plaintiff, and summons issued on him, the plaintiff refrained from calling him at the trial, on the ground, as stated by her counsel, that he was "not available". Prior to the trial, and shortly before her death, the 1st defendant was examined on commission as a witness, and she denied having been a party to any transaction as embodied in P1. Neither P1 nor the original deed or the duplicate, nor the other certified copy, P1[a], (all of which were subsequently produced at the trial) was shown to her.

The names of the two attesting witnesses in P1 refer to the 2nd defendant and one Leo Fernando (who is the husband of Emaline). The question whether in the absence of the notary and in view of the evidence given by the 1st defendant it was incumbent on the plaintiff to call one or other of the attesting witnesses was discussed at the trial and counsel for the plaintiff conceded the burden being on the plaintiff (as it undoubtedly was) to call one of them. He ultimately decided to call the 2nd defendant who, however, denied in his evidence that he signed the deed or was present at its execution. In the course of his examination by counsel for the plaintiff he was shown what, presumably, was the proxy granted by him for the purposes of this case and he admitted that

the signature in it looked like his. He was next shown an unmarked document, described in the transcript of the evidence of the witness as the " original deed " and he denied that a particular signature appearing in it, and to which his attention seems to have been drawn, was his. It is not known what this document is, nor is the original of P1 to be found in the case record ; and none of the counsel who represented the parties at the hearing before us could throw any light on the matter.

In the course of the address of counsel for the plaintiff he seems to have invited the trial Judge to compare the signature of the 2nd defendant in his proxy with his purported signature in the unmarked document described as the " original deed ", with a view to satisfying himself whether the signature in the " original deed " was that of the 2nd defendant, and it appears from the judgment that the learned Judge proceeded to compare the 2nd defendant's signature in his proxy with a signature appearing, not in the document described as the " original deed ", but in the document P1[a] which is referred to in the judgment as the protocol (of deed No. 154) ; and the Judge came to the conclusion that the 2nd defendant had signed P1[a] as a witness, but on what grounds he came to that conclusion are not set out in the judgment. It appears from the proceedings that counsel for the plaintiff put P1[a] in evidence as being the duplicate of deed No. 154. An examination of P1[a] shows, however, that it is neither the protocol nor the duplicate of deed No. 154, but is only a certified copy issued by the Registrar of Lands on the 1st March, 1954, of the duplicate in his custody. As such, P1[a] is obviously of no use at all for the purpose of comparison with the signature in the proxy. Since the proceedings do not show that the Registrar of Lands or any officer from his department was summoned, or attended Court with the duplicate, it may be assumed that the duplicate was never at any stage of the trial produced before the Court for inspection. If I may say so with respect to the learned trial Judge and the others concerned, these documents have been placed before the trial Court and referred to in the proceedings in a most slip-shod and perfunctory manner which is of no assistance whatever to us in dealing with this case in appeal and considering whether there was sufficient material before the trial Judge to enable him to come to a correct conclusion on the question whether the 2nd defendant was in fact a witness to the execution of deed No. 154.

There are conflicting decisions, each of great authority, whether in the absence of other evidence and without the benefit of the opinion of an expert, it is open to a Court, on a mere comparison of two documents containing respectively an admitted signature and a signature which is repudiated, to express the opinion whether the two signatures are of one and the same person. In the case of *Wright* [1], it was held that it is open to a Court to form an opinion on such material. That is a decision in a criminal case but the *ratio decidendi* of it would apply to civil proceedings as well. A contrary view was, however, expressed in the case of *Saibo v. Ahamadu* [2] where certain other decisions indicating the same view are referred to.

[1] *(1935) 36 Cr. Appeal Reports, 36 at 40.*

[2] *(1948) 50 N. L. R. 303.*

In the present case it is not necessary, however, to express a definite opinion on the point since we do not know precisely what document was before the trial Judge for the purpose of comparing any signature in it with the signature of the 2nd defendant in the proxy.

In the result it is not possible to uphold the finding of the learned Judge that deed No. 154 was signed by the 2nd defendant as an attesting witness. I would also observe that his finding, even if accepted as correct, is insufficient to prove the due execution of the deed since, in my opinion, the effect of section 69, read with section 71, of the Evidence Ordinance is that there must be, in addition, proof that the signature of the person executing the document is in the handwriting of that person. Such rights as the plaintiff has in the land in suit must, therefore, be restricted to those acquired by her otherwise than through deed No. 154. These rights consist of the shares inherited by the 2nd, 3rd and 4th defendants from their father (the husband of the 1st defendant) and totalling an undivided three-sixteenths share, which share has devolved on the plaintiff by virtue of deeds P4 and P6.

The judgment and decree appealed from are set aside and decree will be entered declaring the plaintiff entitled to an undivided three-sixteenths share of the land described in the schedule to the plaint. The 2nd defendant will be entitled to his costs of appeal from the plaintiff. I make no order as regards the costs of trial.

SINNETAMBY, J.—

In addition to the reasons given by my learned brother in his judgment, which I have had the advantage of reading, I should like to add a few observations of my own in support of the conclusions we have reached.

Even upon the footing that the documents which the learned judge used for the purpose of comparing the signature contained therein with the signature on the proxy was not the document filed of record, marked P1[a], but the actual protocol copy or the duplicate and that his conclusions in regard to the identity of the signature are correct, I take the view that the plaintiff has still failed to prove due execution of the impugned deed No. 154.

Section 68 of the Evidence Ordinance provides that a document required by law to be attested shall not be used as evidence until one attesting witness at least, if alive and subject to the process of the Court and capable of giving evidence, has been called for the purpose of proving its execution. Section 71 provides that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. One way of doing this may be by calling the other attesting witness. The Evidence Ordinance does not expressly provide that where one attesting witness is unable to give evidence of due execution the other must be called. It may be mentioned, however, that even where one attesting witness is able to give the evidence required our Courts have expressed the desirability of calling all the attesting witnesses—vide *Arnolis v. Mutu Menika* [1]. The question will naturally

[1] *(1896) 2 N. L. R. 199.*

arise whether where primary evidence of attestation is available by evidence of one witness who has not been called—it is open to a party to lead secondary evidence of due execution by proving the signature of the other attesting witness who has been called and who denies his signature. The law in England is that if an instrument is required to be attested by more than one witness the absence of them all must be duly accounted for in order to let in secondary evidence of execution (Taylor, Section 1356).

Construing the corresponding provisions of the Indian Act it has been held by the Privy Council that other evidence should not be allowed unless all the attesting witnesses alive and subject to the process of Court are called or their absence accounted for—vide *Surendra v. Behari* [1] referred to by Sarkar in his book on Evidence.

Where an attesting witness who is called denies his signature and the fact of execution the situation that arises would be the same as where there are no attesting witnesses available. In that case the proof must be given of due execution and the law stipulates that this can only be done by proof of the signature of one attesting witness and also proof that the signature of the person executing the document is in his or her handwriting—vide section 69. The learned judge was under the impression that if the signature of one attesting witness is proved that establishes due execution. In my view this is insufficient for the purpose. There must also be proof of the executant's signature. Even on the footing that the learned judge's conclusions are correct, the plaintiff has therefore failed to prove due execution of P1.

Decree set aside.