1947 *Present :* **Keuneman and Canekeratne JJ.**

ADLIET RATNAYAKE, Appellant, *and* RATNAYAKE *et al.*, Respondents.

20—D. C. (Inty.) Colombo, 10,504 T.

Last will—Probate—Evidence.

Where there is no doubt of the mental competency of the testator and no element of suspicion arises a will will be held to be proved if the witnesses who speak to the due execution and attestation are believed by the court.

APPEAL from a judgment of the District Court, Colombo.

N. Nadarajah, K.C. (with him *H. A. Koattegoda*), for the 1st petitioner, appellant.

H. V. Perera, K.C. (with him *H. W. Jayewardene*), for the 1st, 5th and 7th respondents.

Cur. adv vult.

March 6, 1947. KEUNEMAN J.—

The main question in this case was whether the alleged will (P 1) of May 23, 1943, was duly executed by James Albert Ratnayake in the presence of five witnesses. The 1st petitioner who propounded the will was the mistress of Ratnayake, who had treated her as he would a married wife, and who had two children by her to whom he was devoted.

The District Judge has held that the will itself was not an unreasonable will, and that no suspicion can attach to the will from the dispositions contained in it which were just and equitable. In fact it is not improbable that the will represented the wishes of the testator. No doubt the will was written in an unusual place, viz., an account book of the testator. But it is also to be noted that this moderately long will was written out entirely in handwriting strongly resembling that of the testator in this account book which contained pages of the testator's writing. If the will was a forgery, the forger was courting immediate detection. The will certainly was accepted for a time as genuine by the 2nd petitioner who is now a strong opponent of the will, and he signed the original affidavit asking for probate as one of the executors named in the will. The 2nd petitioner was familiar with the handwriting of the deceased.

One matter may be specially mentioned. The District Judge says "Grave suspicions arise on the evidence as to whether the will propounded was the act of the deceased". We have carefully examined the judgment and we do not think that in this case any element of suspicion relating to the will can be said to have arisen. The questions which did arise according to the findings of the District Judge related to matters which may have affected the credibility or the reliability of the various witnesses called and cannot properly be said to relate to the circumstances under which the will was made. We do not think that any suspicion with regard to the genuineness of the will can be said to have arisen.

In *Shama Charu Kundu v. Kettromoni Dasi*[1] the Privy Council had to consider a similar problem. "In this case the suspicion, if there was one, would be that on the morning when the will was said to have been made the deceased was in an unconscious state and was unable either to sign the will or to understand what he was doing, that is that the witnesses in support of the will were not telling the truth. If they were, their Lordships do not see anything to excite suspicion. The question was simply which set of witnesses should be believed".

In the present case the question was whether the alleged will was duly executed by the testator and attested by the five witnesses. It was a pure question of fact—as to whether the witnesses who spoke to the due execution and attestation were to be believed. If they were believed no element of suspicion arose. If they were not believed, then the will could not be held proved.

In our opinion the District Judge has been misled into the belief that there were elements of suspicion which it was the duty of the propounder to remove. This belief has influenced the District Judge into thinking that a heavier burden of proof rested on the propounder than the law had in fact imposed upon her. There can be no doubt, on the facts present in this case, of the mental competency of the testator, and if it were proved that he in fact executed the will there can be no doubt that he knew and approved of the contents of the will. The real question to be decided was whether the will had been executed and attested in due course.

In dealing with the witnesses who spoke to the due execution of the will the District Judge mentioned certain facts which in his opinion affected their reliability. Some of these reasons relating to particular witnesses are fairly cogent, some are not so convincing. In the end the District Judge said:—"The evidence of the 1st petitioner and her witnesses has not removed those suspicions. On the contrary their evidence is not such evidence as I feel I can act on with any confidence." In our opinion the District Judge expected an especially high degree of proof for the removal of the suspicion which he thought had arisen in the case.

One matter has been argued, viz., that the District Judge has accepted the evidence of the witness Girigoris called by the opponents of the will. There are, however, some matters relating to this evidence on which we should have been glad to have had the assistance of the District Judge. The point of the evidence was that Girigoris had been present on May 23, 1943, on the premises and that he did not see the witnesses to the will coming to or going from the house of the deceased. But Girigoris had made a statement in cross-examination as follows:—

> "Cocoanuts used to be plucked on the Hendela lands" (these were different lands to that in Talangama on which deceased was living) "in the odd months, January, March, May, July, &c. There would have been a picking in March, 1943. I supervised that picking. The next picking I supervised was in May. That picking took place about May 22 or 23. I did go to the lands for that picking."

[1] *I. L. R. 27 Cal. 522, at 528.*

This evidence on the face of it seriously reduced the value of Girigoris' evidence. Later, however, Girigoris was reminded that May 23 was a Sunday, and stated that no work was permitted by the deceased on Sundays ; and Girigoris added that on each of the Sundays from May 10 to 23, he was on the estate where the deceased resided. The District Judge does not deal with the passage I have cited or consider its relevancy. Apparently the point was not made, when the 1st petitioner's witnesses were in the witness-box, that work on Sunday was not permitted by the deceased. Examination of the account book in which the will P 1 was written does not at first sight appear to be consistent with that, and we do not think this point has been sufficiently explored. In all the circumstances we do not think we are obliged to regard the evidence of Girigoris as conclusive of the case.

The evidence of the handwriting expert was not relied on by the Judge except as "slight corroboration of the conclusions come to independently on the other evidence". It did not conclude the case.

There has been in this case delay in the delivery of the judgment. The District Judge has explained the reasons of the delay, and no fault appears to attach to him in this respect. The delay, however, may have affected his recollection of the witnesses, some of whom gave evidence a considerable time before the date of the judgment. At any rate it makes us less reluctant to interfere in this case.

In the circumstances we set aside the judgment appealed against and send the case back for trial before another District Judge. If the parties agree the evidence already recorded may be utilised, but it is desirable that all the witnesses be presented again for cross-examination.

The 1st petitioner will have the costs of the appeal, and all other costs will be in the discretion of the District Judge who tries the case anew.

CANEKERATNE J.—I agree.

Case sent back for re-trial.