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

SELLAMMAH *et al.*, Appellants, and SELLAMUTTU *et al.*, Respondents

S. C. 24 (Inty.)—D. C. Jaffna, 48/T

Will—Probate—Suspicions created by alterations in a will—Burden on propounder to remove them—Notaries Ordinance (Cap. 91), s. 30 (20) (21)—Prevention of Frauds Ordinance (Cap. 57), s. 7—Civil Procedure Code, ss. 521, 526.

Certain obvious alterations were noticeable in a will in regard to the name of one of the devisees. The alterations were not attested or authenticated by the signatures of the notary or the testator and the witnesses in terms of either section 30 (21) of the Notaries Ordinance or section 7 of the Prevention of Frauds Ordinance. When application for probate of the will was made there was much difficulty in obtaining an affidavit from the attesting notary and witnesses.

Held, that the will should not be admitted to probate in view of the failure of the propounders in the first instance to remove the suspicions created by the alterations, the knowledge of which must necessarily be imputed to them.

APPEAL from an order of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *V. Arulambalam*, for the 1st and 2nd respondents-appellants.

S. Nadesan, Q.C., with *Walter Jayawardena* and *Neville Wijeratne*, for the respondents.

Cur. adv. vult.

February 13, 1957. SINNETAMBY, J.—

The petitioner in this case, one Sellamuttu, applied for probate of a will marked X bearing No. 2372 and alleged to have been executed by one Appiah who died on 10/3/55. The petitioner is the mistress of the said Appiah who was married to the 1st respondent Sellammah and the 2nd respondent Perambalam is their son. The 3rd respondent is an illegitimate son of Appiah by the petitioner and, being a minor, was represented by a guardian, the 4th respondent.

On Order Nisi being served on them the 1st and 2nd respondents appeared and opposed the grant of probate. The issues on which the parties went to trial are as follows :—

1. Is the Last Will dated 7/12/51 attested by S. Ratnasingham, Notary Public, under No. 2372 the act and deed of the deceased Vaithilingam Appiah ?
2. Did the deceased understand and approve the contents of the said Last Will ?
3. Was the said Last Will duly executed ?

4. Was the instrument sought to be propounded as a Last Will the act of a capable testator ?

5. Was the document signed by the deceased, the notary and the two witnesses all being present at one and the same time at the notary's office in Jaffna on 7/12/51 ?

The learned judge held with the petitioner on all the issues and this appeal is against those findings. In coming to his decision the learned judge quite rightly addressed his mind also to the question of whether there were any suspicious circumstances affecting any one of the matters which it is incumbent on the propounders of the will to prove and came to the conclusion that there were not.

Learned counsel for the appellants canvassed in the course of his argument all the findings of the learned judge and although speaking for myself there is much ground in support of his arguments in regard to some of these matters we do not think it necessary to come to a decision on them in view of the opinion we hold on another question of vital importance, viz., that there are suspicious circumstances affecting the execution of the will which the propounders have failed to remove.

The most superficial examination of the original will "X" reveals that there are alterations of a kind which could not have escaped the attention of anyone with even an elementary knowledge only of the Tamil language. Learned counsel for the respondents very readily and quite properly agreed that there were alterations of certain words which for convenience of easy reference by my brother and myself I did in the course of the hearing underline in pencil. The will though not specifically numbered has 13 paragraphs. In para 3 the testator devises half share of a certain land to Paramasamy, an illegitimate son by his mistress the petitioner subject to certain conditions and in para 4 devises the remaining half share to "my wife Sellamuttu subject to the conditions hereinafter mentioned." The word "Sellamuttu" which is the name of the petitioner has been altered from the word "Sellammah" which is the name of the 1st respondent. Para 5 imposes a restriction against alienation on Paramasamy and the translation of para 6 reads as follows:

"The *said Sellamuttu* shall maintain the three minors" etc., etc. It was admitted by counsel on both sides that this translation was wrong and should read as follows:

"until the *said Paramasamy*, and Sivapakiam and Thanaledchimy . . . . attain majority Sellamuttu, the mother of the *said children* and the *said Paramasamy* shall maintain them out of the income of the . . . . "

The word "Sellamuttu" in this paragraph is not altered and appears as such in the original.

In paragraph 7 appear the words "that the said Sellamuttu shall hold, possess and enjoy the property devised to her and shall settle the

same on her child or children." The translation here too was admitted to be wrong and should have read as follows:

> "the said Sellamuttu shall . . . . and after the said Sellamuttu has enjoyed the same etc. . . . . ".

The name "Sellamuttu" occurs twice in the paragraph and has been altered in both places.

In paragraph 11 the will provides as follows:

> "I do hereby nominate and appoint *Sellamuttu daughter of Nagalingam* as executor."

No alteration occurs here in regard to the word "Sellamuttu".

It was admitted by learned counsel on both sides that wherever the word "Sellamuttu" is altered it has been altered for "Sellammah", which is the name of the 1st respondent, the legally married wife of the testator. The alterations vitally affect the dispositions of the testator and have the effect of altering the beneficiary from the legally married wife to the mistress. They have not been authenticated by the initials or signature of the testator or the notary. The Notaries Ordinance (Cap. 91) contemplates alterations and erasures prior to execution and provides by section 30 (20) that they should be specifically mentioned in the attestation clause and by section 30 (21) that they should be authenticated by the initials of the notary. In the present case none of these provisions have been observed and it is remarkable that the same alterations that appear in the original also appear in the protocol.

Neither in the original nor in the protocol have the requirements of the Notaries Ordinance been observed and having regard to the fact that the will in question bears No. 2372 it can reasonably be inferred that the knowledge and experience of the notary is such that if the alterations had the approval and authority of the testator they would have been referred to in the attestation clause.

In this connection the provisions of section 7 of the Prevention of Frauds Ordinance Cap. 57 are also relevant. This section which is the same as section 21 of the Wills Act provides as follows:

> "No obliteration, interlineation, or other alteration made in any will, testament, or codicil after the execution thereof shall be valid or have any effect, except so far as the words or the effect of the will, testament, or codicil before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will, but the will, testament, or codicil, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator or testatrix, and the subscription of the witnesses be made in the margin or some other part of the will, testament, or codicil opposite or near to such alteration, or at the foot or end of or opposite or near to such alteration, or at the foot of or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will, testament, or codicil."

The effect of these provisions is that, save in a case falling within the exception contained in the words: "except so far as the words or the effect of the will, testament or codicil before such alteration shall not be apparent," an alteration after execution is ineffective unless it is duly attested or is authenticated by the signatures of the testator and the witnesses. Mr. Nadesan did not seek to bring the present case within the exception, but he submitted that effect should be given to the will in its unaltered state. This we cannot do in view of the evidence that the intentions of the testator were otherwise and also because, for the reasons that will be presently stated, in our opinion the will should not be admitted to probate even in its unaltered form.

Where these provisions have not been complied with the presumption is that the alteration was made after the due execution of the will—vide Jarmin (8th ed. Vol. 1 p174). This presumption can of course be rebutted and the provisions of section 7 of Cap. 57 would not apply if it is satisfactorily established that the alterations were made before execution. Having regard to the provisions of the Notaries Ordinance this burden must necessarily be a heavy burden in the circumstances of this case almost impossible to discharge.

It is, however, strange and remarkable that these changes and alterations in the will were not referred to in the course of the trial. Learned counsel for the appellants stated that they accepted the translation filed with the petition and affidavit of the propounder as correct and did not examine the will itself which was in the custody of the Court—the procedure in the case of impugned documents is for the documents to be kept in safe custody to prevent the loss of the document and to prevent allegations that the document has been tampered with. Whatever excuse may be offered on behalf of those opposing the will the same cannot be said of the propounder and her legal advisers. The will was in their custody and they produce it. They had it translated and had much difficulty in obtaining an affidavit from the attesting notary and witnesses to be filed with the original application for probate. They should undoubtedly have examined the will and scrutinised it very carefully when, according to them, the notary refused to give them his supporting affidavit. The alterations could not have escaped their attention and it was their primary duty to dispel the suspicions which inevitably would follow upon discovery.

Learned counsel for the respondents urged that we should send the case back for a rehearing or at least to enable him to lead evidence to prove that the alterations were made before execution and to remove the suspicions that inevitably arise from the fact of alterations which are in favour of the propounder. We have considered this application very carefully and have come to the conclusion that it is neither necessary nor desirable to do so.

Under the provisions of our Civil Procedure Code a person seeking to obtain probate of a will must do so by petition and establish prima facie proof to satisfy the Court of the execution of the will—vide sections 524 and 526. This is usually done by filing affidavits of the notary and the

attesting witnesses. In the present case the proctor for the propounder did not file with his petition the supporting affidavits to establish due execution : instead he filed a motion stating that the notary who attested the Last Will and the witnesses refused to "swear an affidavit" and moved "for a notice on the said notary and witnesses to appear in Court and sign the said affidavit." The Court allowed this application and issued notice without taking any precautions to see that the notice was correctly worded. The notices which actually issued peremptorily called upon the notary and witnesses to appear in Court and sign the affidavit leaving with them no option but to comply with the order. The order of the learned judge in issuing notice was the subject of much adverse criticism. While we see nothing fundamentally and basically wrong in the Court ordering the notice to issue we do think that the form in which it actually issued was highly unsatisfactory. It would have left in the minds of the parties noticed that they had no alternative but to sign the affidavit. We also think that before issuing the notice the learned judge should have satisfied himself of the truth of the statements contained in the motion filed by calling for evidence either *viva voce* or in the form of affidavits in support of the alleged refusal. It must be remembered that at this time there was not the slightest indication that there would be opposition to the grant. Applications for probate being prescribed to be by way of summary procedure, at this early stage all steps taken must necessarily be *ex parte* and we see no force in the contention that the learned judge was wrong in proceeding *ex parte* to satisfy himself of due execution before entering Order Nisi. What is wrong is the form in which the notices issued. In any event when the notary and witnesses appeared in Court, according to the journal entries in the case, they expressed willingness to sign the affidavits and did so. The notary in the course of his evidence says that he was asked by the judge whether he had any objection to signing the affidavit. He replied in the negative and signed the affidavit without even knowing what its contents were : indeed, his evidence is that at no stage did he refuse to sign an affidavit nor was he ever asked to do so by the petitioner or any one on her behalf. The witness Sellaturai gave substantially the same evidence and added that the contents were communicated to him by the applicant's proctor after he signed. The cross-examination of this witness on this point did apparently so embarrass the learned judge that he refused to allow any further questions on the subject.

It is inconceivable that an applicant for probate would not have made endeavours to secure in the form of affidavits *prima facie* proof of due execution and in my own mind I have no doubt that the statements contained in the proctor's motion are correct in spite of the notary's and the petitioner's evidence to the contrary. I find it difficult to agree with the learned judge that the notary and the witness Sellaturai were speaking the truth when they asserted that at no time did they refuse to sign the affidavits. In any event having regard to the motion submitted to Court by the petitioner's own proctor it is not in her mouth to deny the truth of what the motion stated. Even if she personally was not aware of it her advisers and her proctor knew of the attitude adopted by the notary and the witness to the will and that fact should

have put them on their guard and made it incumbent on them to scrutinise the will more searchingly with a view to ascertaining the reason for the notary's conduct. Had they done so, and I find it difficult to proceed on any other hypothesis than that they did what any prudent, reasonable person who seeks to prove a will would necessarily have done, they would have and certainly should have seen some obvious alterations in the name of one devisee. It was their duty if they expected to succeed in their application to remove the suspicion in regard to due execution created by the alterations in the will they sought to propound. They made no attempt whatever to do so. Instead with the will was filed a translation which they should have known was incorrect and which had the effect by its incorrectness of confirming that the devisee was correctly named.

The first occasion on which the name Sellammah has been altered to Sellamuttu is in para 4 of the will. Sellamuttu is therein referred to as "wife". The Tamil word used is மனைவி (manaivee): an expression which, despite the view expressed by the learned judge, no Jaffna man would use in a formal document to describe his mistress. The notary himself admits that he would not use the expression மனைவி to describe the petitioner and that he made a mistake in so doing. He also states that the deceased at no stage referred to the petitioner as "wife" but described her as வைப்பாட்டிச்சி (Vaipattichchee) or mistress. A mistress is in a formal document described as daughter of so and so or the mother of so and so. The petitioner has been so described later in para 11 of the will as daughter of Nagalingam. The use of the description "my wife" clearly suggests that the original person named was "Sellammah" which subsequently has been altered to "Sellamuttu". It cannot ever be suggested that the alteration took place between the date on which instructions were alleged to have been given and the date of the alleged execution as the notary's evidence is that the original instructions he received were to bequeath the property to Sellamuttu and not Sellammah.

In para 6 the translation reads "the *said Sellamuttu*" which suggests that "Sellamuttu" has been referred to earlier in the document and confirms that the devise in para 4 is to Sellamuttu and not to Sellammah. Apart from the reference in para 4 Sellamuttu has not been referred to anywhere else in the document prior to the reference in para 6. The correct translation of para 6 shows that the word "said" qualifies Paramasamy who has been referred to earlier in para 3 and not Sellamuttu. It was suggested that the wrong translation was deliberately made to mislead the Court and there seems to be much force in that contention. It is curious, however, that a translation made on behalf of the respondents who oppose this application is in the same terms but it was suggested that the translator instead of translating the original document merely copied what already existed.

In regard to the application of learned counsel for the petitioner and respondents that the case should be sent back for a rehearing we take the view that it was incumbent on the propounders in the first instance

to remove the suspicions created by alterations, the knowledge of which must necessarily be imputed to them. Having regard to the far-reaching effects of the alterations it was their duty if the alterations were made before due execution to have led some independent evidence to establish that the deceased during his lifetime confirmed the dispositions made in the will. This was necessary to meet the charge that the testator did not know and approve of the contents of the will. In the words of Soertsz, J., in the case of *Arulambikai v. Thambu*[1] "to send the case back now would be to expose the parties to a stronger temptation than they appear to be able to resist."

In the result we set aside the order of the learned District Judge and direct that the estate of the deceased be administered on the basis of an intestacy. The appellants would be entitled to the costs both of this Court and in the Court below.

WEERASOORIYA, J.—I agree.

Appeal allowed.