Present: Bertram C.J. and De Sampayo J. 1919.

THE ALIM WILL CASE.

124 and 125—D. C. Colombo, 6,175.

Burden of proof—Power of Court to call evidence after case is closed—Last will—Probate—Suspicion.

In a contest arising out of an application for probate a single issue was framed, viz., "Was the will duly executed by the deceased?" The party seeking probate contented himself with proof of the execution. The respondent called evidence to prove that the signature was obtained by fraud.

Held, that the party beginning had a right to call evidence in rebuttal on the question of substitution.

Under section 163 of the Civil Procedure Code it is not necessary that the right to call evidence by way of rebuttal should be expressly reserved by the party beginning.

The Court has a discretion at any period in a case to allow further evidence to be called for its own satisfaction, even though it is doubtful whether it is admissible, on the request of the party desiring it as of right.

A respondent who wishes to support a petitioner for probate should call his evidence at the conclusion of the petitioner's case. He is not entitled to wait until the opposing respondents disclose their whole case, and then to start a fresh case for the purpose of upholding the will in reply to the evidence of the opposing respondents.

Where a suspicion attaches to a will, the Court must be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

THE facts appear from the judgment.

Bawa, K.C. (with him *A. Drieberg*), for the petitioner, appellant.

A. St. V. Jayawardene, for second and third respondents.

Elliott and *B. F. de Silva*, for fifth respondent.

Hayley (with him *F. H. B. Koch* and *Keuneman*), for first, sixth, seventh, eighth, nineth, eleventh and twelfth respondents.

Schneider (with him *Rutnam*), for fourth respondent.

Samarawickrama, for tenth respondent.

Cur. adv. vult.

1919.

The Alim Will Case

February 26, 1919. BERTRAM C.J.—

Before approaching the consideration of the issues of the case, it is necessary to deal with certain questions of procedure, and for the purpose of dealing with those questions, it will be convenient to narrate the history of the case from the time of its inception. The document propounded by the executors as a will purported to be a will of an old and wealthy Moslem, known, by reason of his religious habits, by the name of " the Alim," who had built up an extensive business, and had a numerous family derived from three successive marriages. The principal beneficiaries under the will are the two executors, sons of the deceased, and one of their brothers. These three brothers were the three managers in charge of the business. Two opposing affidavits were filed by other members of the family: one on February 14, 1918, by Muhiseen, a young son of the deceased, disputing the execution of the will; and one a fortnight later by one of the elder brothers, Abdul Majeed, alleging that the signatures of the deceased were obtained by fraud, or false representations made to him; that the document and its protocol were copies of a deed of gift which the deceased had entrusted Isdeen, one of the executors, to get ready.

At the trial the District Judge proceeded to settle issues in accordance with section 533 of the Civil Procedure Code. Mr. Bawa, for the propounders of the will, suggested the following issue: " Was the will dated October 22, 1917, duly executed by the deceased, O. L. M. A. L. Marikar Alim? " All the respondents agreed to this issue. But it appears that Mr. H. J. C. Pereira, leading counsel for the members of the family who were attacking the will, observed that he understood the issue to embrace all the defences set up by the respondents in their affidavits, and no objection appears to have been taken to this on behalf of the petitioners. In addressing himself to the discharge of the onus which lay upon him, Mr. Bawa, for the petitioners, contented himself with calling certain witnesses to prove the execution of the will, that is to say, the notary who attested the will and the two witnesses who were said to have subscribed their names in his presence. Isdeen, the principal executor and beneficiary, who took an active part in making the arrangements for the will, was not called. Mr. Bawa was asked early in the case if he intended to call him. He replied that at present he did not intend calling him, but that, if necessary, he might call him, and Isdeen was thereupon asked to leave the Court. Mr. Ismail, the attesting notary, was called, and was examined and cross-examined at considerable length, and the allegation that the supposed will was substituted for a document which the deceased intended to execute as a deed of gift was specifically and adequately put to him in cross-examination. Mr. Bawa having closed his case, Mr. H. J. C. Pereira opened the case for the respondents, and among other things opened facts

pointing to, or at least providing, an opportunity for the fraudulent substitution above referred to. He intimated that among other witnesses whom he would call would be the wife, the widow of the deceased, and Haniffa Hadjiar, one of the witnesses to a deed of gift which was said to have been executed at the same time as the alleged substitution. He called three witnesses, who gave very important evidence with regard to this suggested substitution: Uduma and Majeed, sons of the deceased, who swore that he gave instructions to the notary to prepare deeds of gift in favour of his sons Haniffa, and Hassim, one of the executors, and Muhiseen, who confirmed the evidence of the other two witnesses on that point, and swore that he was present when the deed in favour of Haniffa was executed, and that a document purporting to be a deed of gift in favour of Hassim was executed at the sametime. This document, if it ever existed, has disappeared. Ultimately Mr. Pereira did not think it necessary to call either the widow of the deceased or Haniffa Hadjiar, the witness to the deed of gift to Haniffa, whom in his opening he had intimated that he would call before the Court, and closed his case. Mr. Bawa then proposed to call the two petitioners and Haniffa to lead evidence in rebuttal of the statements that a will had been substituted in place of the deed of gift in favour of Hassim on October 18, and that instructions were given by the Alim for a deed of gift in favour of Hassim. He also proposed to call certain other witnesses not material at this point to mention. The respondents opposed Mr. Bawa's right to call these witnesses, and the Judge refused to allow them to be called. The grounds of his order were subsequently explained in his judgment, and appear to have been two.

The first reason was, in effect, that he had already formed two conclusions : one against the petitioners on the question of the execution of the will, and the other against the opposing respondents on the question of fraud. He considered that the petitioners had not proved the due execution of the will, and that their opponents had not made out a case of fraud, but had only shown its possibility or probability. He, therefore, ruled that it would be superfluous to hear evidence to nagative a case of fraud which had not been *primâ facie* established. I do not think that it was competent for the learned Judge to take such a course at this stage of the case. He had not yet finally heard counsel for the petitioners on the question on which he had formed a conclusion against them. Although he was not satisfied that fraud had been proved, but only an opportunity for fraud, it appears, nevertheless, from the narrative in which he has embodied his views of the case, that he had made certain incidental findings of fact bearing on that question. He accepts the evidence of Muhiseen, Majeed, and Uduma that the Alim instructed Isdeen to get prepared by Mr. Ismail two deeds of gift: one in favour of Hassim, and the other in favour of Haniffa ;

1919.

BERTRAM C.J.

The Alim Will Case

that documents purporting to be these deeds were presented to the Alim for execution on October 18, and were executed by him one after the other. The supposed deed in favour of Hassim, if it was executed, has entirely disappeared. The learned Judge also accepts the evidence of Mr. and Mrs. Rodrigo that on the morning of this very day, October 18, the draft will, which afterwards bore the Alim's signature, was handed by them to Mr. Ismail, having been hurriedly prepared by them in pursuance of his directions given to them the previous evening. All this, it would appear, the learned Judge had found as facts, but he bases his conclusion that the due execution of the will had not been proved, not on these considerations, but on the fact that he did not believe the evidence of Mr. Ismail and the attesting witnesses. Whether he was influenced in his disbelief by his incidental findings above mentioned he does not expressly affirm or deny. But, in my opinion, he ought to have been profoundly influenced by them. It is impossible to divide this case into separate partitions. If the learned Judge thought that Mr. Ismail was perjuring himself, when he denied that he ever received instructions for a deed to Hassim, that he ever presented a document purporting to be this deed to the Alim, or that the Alim ever executed such a document, how could Mr. Ismail's credibility on the question of its execution fail to be affected? Similarly, if the learned Judge on hearing the evidence had come to the conclusion that Hassim was not present on October 18 as alleged by Muhiseen, such a conclusion must materially have affected his view as to the credit to be attached to the evidence given by Muhiseen of the Alim's declared intentions and to his evidence on other parts of the case. If, therefore, the evidence tendered by the petitioners to rebut this whole story of the deed to Hassim was otherwise relevant, it ought not to have been excluded merely because the Judge, though believing the story, thought that it fell short of proving fraud. The two parts of the case were closely intertwined, and the petioners were entitled to demand that before forming his conclusion, whether on the issue of execution or on the issue of fraud, the Judge should hear the whole evidence, and be addressed on the case as a whole. In holding that, unless he was satisfied with the evidence of the execution of the will, he need not concern himself with the question of fraud; the learned Judge was unquestionably right in law, but in excluding the evidence which he excluded, he was, in my opinion, incidentally mistaken, inasmuch as this evidence, in view of the course which the case had taken, had an important bearing on the question of execution.

The second ground on which the learned Judge rejected the evidence, if I rightly understand him, is a distinct one. It is, that the petitioners were not entitled in law to call rebutting evidence. The issue was a single issue. The onus was on the petitioners. "Our law," he says, "provides for evidence to be led in rebuttal

when there are several issues, the burden on some of which is on one party, and on others on the opposing party. But here there was only one issue, pure and simple, the onus of which was on one party, the petitioners. I cannot understand how any one can seriously contend that this simple issue should be construed as two issues, throwing the burden on both the petitioners and the opposing respondents." The learned Judge appears to consider that, this being the position, Mr. Bawa was bound to produce his whole case before the respondents were called upon, and could not claim to rebut any of the respondents' evidence after the respondents' case was called. I do not think that this view of the case can be justified. 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. In electing to confine his evidence, in the first instance, to evidence of execution, Mr. Bawa was acting entirely in accordance with the principles which have been laid down on the subject in the English Courts. (See the cases of *Shaw v. Beck* [1] and *Penn v. Jack* [2] The observations of Pollock C.B. in *Shaw v. Beck*[1] are almost exactly in point in this case: " But there are cases in which, I think, the plaintiff is entitled, almost as a matter of right, to give evidence in reply. Where there are several issues, some of which are upon the plaintiff and some upon the defendant, the plaintiff may begin by proving those only which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff may then rebut the facts which the defendant has adduced in support of his defence. But it is urged that, in the present case, there are no pleadings, and that the plaintiff's case is resolved into a single proposition, with which he must deal at once, and that he was bound to go into the whole of his case upon receiving the intimation of the defence, and that such an expression of opinion is to be found in the case cited in the Court of Common Pleas. But I think that the plaintiff was entitled to rely upon a *primâ facie* case, by proving the execution of the deed, for that was all which it was incumbent upon him in the first instance to establish. He had a perfect right to do so, and to leave it to the defendant to impeach the consideration, and he was entitled in reply to rebut the defendant's evidence." See also the observations of Lord Brougham in *Waring v. Waring*.[3] There seems no doubt, therefore, that, if the principles of English procedure are to be applied, Mr. Bawa ought to have been allowed to call his rebutting evidence on the question of fraud. He 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

[1] *8 Ex. 392.* [2] *(1866) L. R. 2 Eq. 314.* [3] *Moore P.C.315*

1919.

BERTRAM C.J.

The Alim Will Case

issue. But he was entitled to call Isdeen and the other witness he mentioned to rebut the evidence given by the respondents on the issue of fraud. Reliance is, however, placed on section 163 of our own Civil Procedure Code. This section declares that " where there are several issues . . . . produced by the opposing party as parties. " There is no question that this section was intended to embody the principle of the English law above explained. On the words of this section Mr. Hayley makes two points. In the first place, he contends that section 163 of the Code, when it says that a party " may reserve " the evidence, means that the reservation must be made in express terms before the other party is called upon. Here Mr. Bawa said nothing. He simply closed his case, and never mentioned the subject of rebutting evidence until the respondents' case was closed. Mr. Hayley urged that it is the practice in Ceylon Courts, when such an election is made, for it to be made in express terms, and desired an opportunity of tendering evidence as to this practice. My brother De Sampayo, who has an unexampled experience of the practice of our Courts, knows no such regular rule as that suggested by Mr. Hayley. We did not think it necessary to hear the evidence tendered. There is nothing in the words of the Code itself to justify the plea that the election must be expressly made. It is plain, from the English cases above cited, that there is no such principle observed in England, and I do not think that such a principle ought to be imported into a provision which was clearly intended to embody the English law. In the second place, Mr. Hayley contends that the word " issue " in that section must be interpreted as meaning an issue expressly framed in accordance with section 386 of the Code, and that it cannot be interpreted as meaning simply a question to be decided by the Court. In this case he points out that only one " issue " was framed, and consequently he says that there was no opportunity for the application of the section. This is a highly technical contention. It is true that only a single issue was framed, but it was understood by the parties that the issue covered all the points raised in the affidavit, and one of those points was a distinct charge of fraud. Had the issues been more regularly framed, there would have been a separate issue on that point. It is unfortunate that any such loose arrangements should have been tacitly come to. As is was come to, it would not be in the interests of justice that it should be rigidly interpreted. Technically speaking, Mr. Hayley's point is a good one. But the Court fortunately has it in its power to escape from such technicalities. The Court has a discretion, at any period in a case, to allow further evidence to be called for its own satisfaction, even though it is doubtful whether it is admissible, on the request of the party desiring it as of right. (See *Budd v. Davison.*[1]) Mr. Hayley protests that to act on such a principle

[1] *29 W. R. 192.*

is to brush aside the terms of the Civil Procedure Code. In my opinion so to act is not to brush aside the Code, but to interpret it according to its spirit, instead of according to its letter. In this case the learned Judge ought, in my opinion, to have exercised his discretion to allow the evidence, even though Mr. Bawa, on the strict terms of the Code, was not entitled to call it as of right; and if the learned Judge's first reason for excluding the evidence, which I have discussed above, is to be taken as a reason for not exercising that discretion, I think that that reason is a mistaken one, in that it does not take account of the full facts of the case. It is repugnant to one's ideas of justice that evidence should be given charging persons, who had hitherto borne a respectable position, with a gross fraud ; that the Judge should hold that it was possible, and indeed highly probable, that they had committed this fraud, and yet that they should be denied an opportunity of giving their version of the circumstances when they were anxious to do so, either because the Judge, though he thought it highly probable that they had committed the fraud, did not think that it had been proved that they had done so, or because of a technical interpretation of the rules of procedure. . . . . .

Mr. Hayley, indeed, commented with some justice on the fact that no application was made to recall Mr. Ismail to give evidence in rebuttal. This was no doubt due to the fact that counsel for the petitioners found themselves embarrassed by their own tactics. The charge of the alleged substitution had been definitely put to Mr. Ismail in cross-examination, and he had formally denied it in re-examination. If Mr. Ismail had gone into the matter fully in re-examination, there would have been no plausibility in their reserving the evidence of Isdeen for the purpose of giving evidence in rebuttal. Mr. Ismail, however, having dealt with the subject in his evidence, there would have been no plausibility in asking for him to be recalled in order to deal with it again. Similarly, their decision not to call Isdeen for the purpose of proving the execution of the will was no doubt influenced by their desire to reserve him for the purpose of rebutting the charge of fraud when it was fully laid before the Court. Those who advised the petitioners had no doubt very good reasons for the course which they took, but they have had to pay the natural penalty for taking it.

We were of opinion, therefore, that the learned Judge ought to have heard the evidence tendered, and Mr. Bawa contended that if we took that view, he was entitled to a new trial. But by section 15 of the Evidence Ordinance it is provided that the improper rejection of evidence shall not be a ground of itself for a new trial. if it shall appear to the Court that, if the rejected evidence had been received, it ought not to have varied the decision. It would have been obviously very difficult for us to have formed any conclusion as to the effect of the evidence upon the case until it was actually

1919.

BERTRAM C.J.

The Alim Will Case

heard. It seemed to us out of the question at that stage of the case, after twenty-five days' trial in the Court below, and after more than ten days' argument on the whole facts of the case before ourselves, to order a new trial for the purpose of having that evidence taken. We determined, therefore, following the example of the Court of Appeal in *Bigsby v. Dickinson*,[1] to take the evidence ourselves and to reserve any further action on the point until the whole argument on the case was concluded.

We accordingly called the three witnesses whom Mr. Bawa tendered in the Court below, namely, the two petitioners, Isdeen and Hassim, and the fifth respondent, Haniffa, and we directed that their evidence should be confined to the points on which their evidence was so tendered, namely, " the rebuttal of the statement that a will had been substituted in place of the deed of gift in favour of Hassim on October 18, or that any instructions were given by the Alim for a deed of gift in favour of Hassim. " In explaining his reasons or objecting to the reception of this evidence in the Court below, Mr. Hayley had urged that if he had raised no objection to the evidence, he would have been bound to cross-examine the witnesses, not only on the points on which they were called but also on the whole case. We, therefore, directed Mr. Hayley in this Court to confine his cross-examination within the same limits as those above indicated, except in so far as he desired to cross-examine the witnesses as to their credit. Mr. Hayley strongly objected to the course we had taken in calling these witnesses, and we took a note of his objection. But he raised no objection to the limitation imposed upon his right to cross-examine. Mr. Bawa on the other hand formally applied to us that the witnesses called by the Court should be allowed to give evidence to contradict a series of statements, which he enumerated, given in the course of the respondents' evidence. Those statements are as follows: —

(1) Marginal page 258. The statement that the Alim expended Rs. 500 on charity.

(2) Marginal page 260. The alleged attmept of Isdeen and Noordeen Hadjiar to get the Alim to write a will after September 29, 1917.

(3) Marginal page 263. That Isdeen and Majeed mainly tried to get the Alim to write a will.

(4) Marginal page 267. That on October 1 and 2 Isdeen came with a paper showing properties to be given to the various children, and that the Alim refused to make a will, saying that it was against his religion.

(5) Marginal page 267. That the Alim said that he would give 21, Colombo street, to Hassim, &c.

(6) Marginal page 268. That the Alim gave instructions to get a gift of the Kandy property prepared.

[1] *(1876) 4 Ch. D. 24.*

(7) Marginal page 269. That Isdeen asked Uduma Lebbe to get the Alim to make a will at subsequent conversations.

(8) Marginal page 275. That Muhiseen was present on October 18.

(9) Marginal page 275. That Ismail said he had prepared a deed for Hassim.

(10) Marginal page 27. That more than three documents were put before the Alim.

(11) Marginal page 276. That Hassim was present, and the other circumstance of the alleged transaction.

(12) Marginal page 278. That the Alim told Isdeen to get ready a deed of gift to Thassim.

(13) Marginal page 301. That after the will was read, Muhiseen asked to see it and was put off.

(14) Marginal page 307. That Muhiseen told Majeed that his father had told him that two deeds—one of them for Hassim—should be prepared.

(15) Marginal page 316. That on December 13 Thassim and Haniffa asked Isdeen how the will came, and that Isdeen said, "Father had written a will secretly," and that Muhiseen was present at the conversation.

(16) Marginal page 338. The alleged conversation, two or three days after the dowry feast, as to the religious scruples of the Alim.

(17) Marginal page 338. That Isdeen said he had previously tried to get the Alim to make a will and failed.

(18) Marginal page 341. The alleged conversation between Isdeen and Uduma on December 13.

(19) Marginal page 342. The alleged disturbance at the reading of the will.

(20) Marginal page 335. Uduma's statement of his status in the family and his father's affection for him.

(21) Marginal page 368 *seq*. As to Majeed; the history of his connection with the firm.

(22) Marginal page 377. That Majeed tried to persuade Isdeen to settle the matter of the will.

(23) Marginal page 378. That Isdeen said that nothing could be done, but that the matter would be settled after probate.

(24) Marginal page 386. Majeed's valuation of the property.

(25) Marginal page 401. That Majeed said to Isdeen, "What a pity," &c., and the rest of the conversation.

(26) Marginal page 403. That when asked to attend the reading of the will, Majeed said, "What nonsense are you telling," &c.

(27) Marginal page 413. That after the reading of the will Majeed asked and was refused inspection.

Mr. Bawa's application was rejected and he was directed to confine himself to Nos. (5), (6), (8), (9), (10), (11) and (12) of the statements which he enumerated.

1918.

BERTRAM C.J.

The Alim Will Case

At this point we had to consider another question of procedure raised by Mr. Brooke Elliott, counsel for Haniffa, the fifth respondent, who was separately represented both in the District Court and on appeal. In the District Court counsel for the fifth respondent appeared in Court, and, from certain evidence taken before ourselves, it would appear, as was indeed natural, that he was acting in co-operation with the two petitioners. He acquiesced in the course taken by the two petitioners with regard to the proof of their case, that is to say, in their confining their case, in the first instance, to evidence of the execution of the will. At any rate, he raised no objection to this course. As evidence was called on behalf of the opposing respondents, counsel for the fifth respondent cross-examined the witnesses, taking his turn in the order in which he stood on the record. When the opposing respondents had finished their case, and before Mr. Bawa had made his application to call evidence in rebuttal, counsel for the fifth respondent proposed to call general evidence on behalf of his client. The learned Judge having heard argument, refused to allow the fifth respondent to lead any evidence at that stage. No substantive application was made by counsel for the fifth respondent to call his client or any other witness in rebuttal of the evidence of fraud. The learned Judge gave his reasons for rejecting the evidence tendered on behalf of the fifth respondent in his judgment. (See marginal pages 553 to 555). The position of a beneficiary under a will, who, for the purposes of the testamentary action, is made a respondent under our Code, and who appears in Court solely for the purpose of supporting the will, has never been definitely settled. He is not a party to the issues joined between the petitioners and the opposing respondents, but he is a party to the case. Whether he is entitled to take an independent line in the action, to object to the tactics adopted by the executors propounding the will, to insist on calling additional evidence, or to raise independent objections to the course taken by those who oppose the will, it is not necessary for us here to discuss. We are informed that in a local case a respondent who appeared in support of the will was allowed by this Court to object to a compromise come to between the executors and the opposing respondents, and justice certainly seems to require that he should be allowed to be heard for this purpose. Mr. Elliot further pressed us with the case of *Beardsley v. Beardsley*,[1] as showing that such a respondent would be estopped by a decision in the testamentary action as *res judicata* against him. As I have said, however, it is not necessary for us to discuss this question or to discuss the reasoning of the learned Judge in his judgment, because it is quite clear that, even if we accept the position that the fifth respondent was entitled to tender independent evidence in support of the will, such evidence ought to have been tendered at the conclusion of the case.

[1] *(1899) 1 Q. B. D. 746.*

of those whom he was supporting. The proxy which the fifth respondent signed in favour of his proctor was simply a proxy to support the will. The fifth respondent was not entitled to wait until the opposing respondents had disclosed their whole case, and then to start a fresh case for the purpose of upholding the will in reply to the evidence of the opposing respondents. Mr. Elliott complained that no definite charge of fraud was made against his client until the opening speech of counsel for the opposing respondents, and pointed out that as soon as he was personally implicated in the fraud he filed a special list of witnesses. This list of witnesses, however, does not differ substantially from the list filed by the petitioners, with whom the fifth respondent was co-operating. We were informed on the last day of the argument that it contained the name of one of the attendants, but no application was made to us to call this attendant. With regard to the charge of fraud against him, the fifth respondent was exactly in the same position as Isdeen and Haniffa, the two petitioners, who are also implicated in the fraud. The aleged fraud was specifically put to Mr. Ismail in his cross-examination on March 16. The name of Haniffa, the fifth respondent, was definitely mentioned. He knew at that date, even if he did not know before, that he was said to be involved in the fraud. He was, therefore, fully in a position to take any action on the matter when Mr. Bawa closed his case on March 28. It is not possible to treat seriously the suggestion that he was misled by the fact that he had cross-examined the witnesses in the order of his place on the record into the belief that he would be entitled to call independent evidence in support of the will in the same order. We thought, therefore, that the evidence on behalf of the fifth respondent at the stage at which it was tendered was rightly rejected.

Before this Court Mr. Elliott claimed that, not having been heard in the Court below, he was entitled, if further evidence was adduced in this Court, to lead evidence on the whole case. He applied for permission to call, in the first place, the fifth respondent himself; secondly, Mr. Leslie de Saram, to prove that Mr. Ismail had had several conversations with him on the subject of certain legal business on which he had been employed by the Alim; thirdly, a well-known auctioneer and valuer, Mr. A. Y. Daniel, who is said to have valued the properties in the inventory to the will, to prove his valuation. The Court did not think it necessary to examine either Mr. de Saram or Mr. Daniel. It was prepared to assume that, with regard to the important business which had been entrusted by the Alim to Mr. Ismail, he would have had conversations with the proctor for the purchasers. It was also prepared to assume that the valuation of the properties contained in the inventory were duly and properly made. The Court was calling Haniffa of its own motion, and gave Mr. Elliott an opportunity of examining him in

1919.

BERTRAM C.J.

The Alim Will Case

chief. Mr. Elliott further applied for leave to examine Isdeen on the whole case. This application the Court rejected.

It may be incidentally mentioned on this point that, as Mr. Bawa in his opening address to the Court laid stress upon what was said by Mr. H. J. C. Pereira in his opening speech for the opposing respondents in the Court below, and as Mr. Pereira has since left the Colony, we thought it best that the terms of Mr. Pereira's speech should be before us on affidavit. Mr. Hayley upon this desired to tender a counter-affidavit as to the statement of Mr. Pereira above referred to, that he understood the issue settled to cover all the points raised in the respondents' affidavits, and also generally on the whole case, to rebut certain suggestions made by Mr. Bawa that the appellants were misled and prejudiced by the conduct of the respondents' case in the Court below. We intimated to Mr. Hayley that we considered that there was no occasion for him to submit an affidavit on these points. With regard to the first, we were content to rely upon the reference made by the learned Judge in his judgment; and in regard to the other points, we did not consider them substantial. Mr. Hayley also desired to tender evidence as to the supposed practice of practitioners in the Ceylon Courts, with regard to intimating an election, to reserve evidence under section 163. We have dealt with this matter above.

These preliminary matters being disposed of, and the additional evidence having been taken, we were in a position to consider the whole of the evidence in the case for the purpose of our decision on appeal. The case on this point could be approached in two ways. It would be possible for us, on the one hand, to say that the case is throughout a question of fact; that the Judge had made certain findings of fact; that he had accepted the evidence of some witnesses and distrusted the evidence of others, relying very largely on the manner and demeanour of those witnesses; and that all that we need ask ourselves was, firstly, whether there was evidence in the Court below to justify his findings; and, secondly, whether we thought that those findings would have been affected by the additional evidence given before ourselves. We might, on the other hand, approach the case directly, and ask ourselves what ought to be the view of the Court on the whole facts of the case as now disclosed before us.

With the greatest possible respect for the findings of fact of the learned Judge, I prefer to approach the case in the second of the alternative manners above indicated. I should regard it as a misfortune, if a case of this nature, involving a charge of fraud against a professional man, an officer of this Court, should have to be decided on appeal simply upon the basis of the impression which the manner and demeanour of witnesses made upon the Judge in the Court below. In this case I recognize that the opinion of the learned Judge on the manner and demeanour of the witnesses is

entitled to special weight. He is himself intimately acquainted with the Tamil language, in which most of the evidence was given, and, by virtue of his practical acquaintance with the work of the legal profession, he was well qualified to test the evidence of Mr. Ismail as a professional witness. Moreover, the nature of the witnesses on whose evidence he depended gives special force to his conclusions. Muhiseen was a young man barely of age, the son of a religious and conscientious father, with whom he was living at the time of his death. Uduma was an elderly man, who had had a stroked of paralysis between his father's death and his appearance in Court. Like his father, he was of religiious habits, and, if his evidence is to be believed, had been selected by his father to make a pilgrimage to the holy cities on his behalf. At the time when he gave his evidence he might be considered as having one foot in the grave. Two such witnesses might well be supposed to be exempt from the corrupt influences of that debased standard of truthfulness, which from time to time proceedings in these Courts unfortunately force upon our notice. Nevertheless, if there are considerations other than those of manner and demeanour which can guide the Court, I would, in such a case, prefer to be guided by them, or, at any rate, I would prefer not to act on impressions of manner and demeanour, unless they are confirmed by such other considerations. The manner and demeanour of a witness must always depend on the moral standard of the witness and of the circles in which he moves. The confusion of a witness may be due, not to consciousness of guilt, but to nervousness under the dissection of a powerful cross-examiner. While, as I say, I feel that the impression made by the witnesses upon the Judge in this case ought to receive special weight, I should feel rather more confident in acting upon those impressions if they were less enthusiastic and unqualified. In a case of this kind, where a large family is divided into two camps, each accusing the other of the most unscrupulous fraud and perjury, and where either side has not only an acute personal, but also a substantial pecuniary interest in the result, I prefer to regard both parties with a certain suspicion. I prefer, in particular, to distrust the evidence of conversations with the deceased testator. There is, I think, in this case circumstantial evidence, which is decisive of the main issue of fact, and if it is necessary that the Court should give a decision as between the conflicting evidence on that issue of fact, it affords some satisfaction to be able to base that decision upon considerations of that character.

Before proceeding to an analysis of the evidence, I would state briefly what I understand to be the law upon the subject. It has been established by a long series of decisions, the most important of which are *Barry v. Butlin*,[1] *Baker v. Butt*,[2] *Fulton v. Andrew*,[3] *Tyrrell*

[1] *(1838) 2 Moore P. C. 480.* [2] *(1838) 2 Moore P. C. 317.*

[3] *L. R. 7 H. L. 448.*

1919.

BERTRAM C.J.

The Alim Will Case

v. Painton [1] (see also *Orton v. Smith*,[2] *Dufaur v. Croft*,[3] *Wilson v. Basil*, [4] *and Sukhir v. Kadar Nath* [5]), that wherever a will is prepared and executed under circumstances which arouse the suspicion of the Court, it ought not to pronounce in favour of it unless the party propounding it adduces evidence which would remove such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument. It is now settled that this principle is not limited to cases in which the will is propounded by a person who takes a special benefit under it, and himself procured or conducted its execution. It may very well be that a refusal to grant probate in such a case may involve an imputation of fraud upon the party propounding the will. This is no objection to the operations of that principle. (See *Baker v. Butt* (*supra*).) The Court is not necessarily bound to give a decision upon the truth or falsehood of the conflicting evidence adduced before it upon the question of fraud. What it has to ask itself is whether in all the circumstances of the case it will give credit to the subscribing witnesses, or the other witnesses adduced to prove the execution. Nor is it an objection to the operation of this principle that the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in a finding of fraud. (See *Tyrrell v. Painton*.[1]) The principle does not mean that in cases where a suspicion attaches to a will a special measure of proof or a particular species of proof is required. (See *Barry v. Butlin* (*supra*).) It means that in such cases the Court must be "vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." There are two forcible expressions used in the cases which emphasize this principle. One is, that it is the duty of the party propounding the will "to satisfy the conscience of the Court"; and the other is, that the onus lies upon that party "of showing the righteousness of the transaction." The law is summed up by Davey L. J. in *Tyrell v. Painton* (*supra*) as follows: "The question appears to me to be whether the learned Judge applied his mind to the right issue. If the case had been tried by a jury, and he had directed them that what they had to try was whether Tyrrell had made out to their satisfaction that the will of November 9 was obtained by fraud, I should have said that this was a misdirection. There rests upon that will a suspicion which must be removed before you come to the plea of fraud. It must not be supposed that the principle in *Barry v. Butlin* [6] is confined to cases where the person who prepares the will is the person who takes the benefit under it: that is one state of things which raises

[1] (*1894*) *P. D. 151.*
[2] (*1873*) *L. R. 3 P. & D. 23.*
[3] *3 Moore P. C. 136.*
[4] (*1903*) *P. 329.*
[5] *I. L. R. All. 405.*
[6] (*1838*) *2 Moore P. C. 490.*

a suspicion; but the principle is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed. Here the circumstances were most suspicious, and the question a Judge has to ask himself is whether the defendants have discharged themselves of the onus of showing the righteousness of the transaction, and, without going again over the circumstances which have been referred to, I am compelled to say that they have not."

Mr. Bawa, for the appellants, did not dispute these propositions. What he contended was that, properly considered, there was nothing in the circumstances of the case to cast any suspicion on the will at all. The various circumstances suggested were all capable of easy and natural explanation. The will had been proved in the most normal and ordinary manner by the evidence of the notary who drew it and the attesting witnesses who signed it. The only thing which impeached the credit of the will was, not a suspicion, but a charge, namely, a charge that it had been obtained by fraud, and he maintained that, in the absence of any suspicion attaching to the will, he must be considered as conclusively entitled to probate, unless the charge of fraud were affirmatively established. He based this contention upon two of the rules laid down by Lord Penzance in the case of *Guardhouse v. Blackburn*,[1] namely, (1) that the fact of the testator's execution of a will is sufficient proof that he knew and approved the contents; and (2) that the fact that the will was duly read over to him is conclusive proof that he knew and approved the contents. He, therefore, maintained what the Court should ask itself is, "Has the charge of fraud been proved?" The learned Judge does not consider that the charge of fraud was proved. Mr. Bawa, therefore, contends that on the authorities cited he is entitled to probate. In my opinion there is no substance whatever in this argument. In the first place, it rests upon the supposition that there are no suspicions attaching to this document apart from those engendered by the charge of fraud. In my opinion the document is loaded with the most substantial suspicions. Further, *Guardhouse v. Blackburn* [1] has no application at all to the present case. The attempt of Lord Penzance in that case to codify the principles of the law with which he was dealing has not had a wholly fortunate history, and even the principles above cited are now recognized as being subject to qualification. *Guardhouse v. Blackburn* [1] is not concerned with the present class of case at all. The class of cases Lord Penzance was considering was that of cases where a will had been admittedly executed and admittedly read over to the testator, and where the real question to be determined was whether the testator knew and approved what he had signed, or, to speak more precisely, the whole of what he had signed. All

[1] *(1866) L. R. 1 P. & D. 109.*

1919.

BERTRAM C.J.

The Alim Will Case

that Lord Penzance really meant to lay down is expressed by him concisely in the subsequent case of *Atter v. Atkinson* [1]: "Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered." It is, I think, clear that *Guardhouse v. Blackburn* [2] has no bearing on the present case.

With this introduction I proceed to consider what are the points of suspicion which attach to the document propounded as a will, and before I do so, I would say, in the first instance, to adapt a phrase of Lord Russell, that these suspicions must be real and reasonable suspicions. They must not be suspicions conjured up. I prefer, therefore, in considering whether on any point a suspicion has been established, and if so, whether it has been removed—to put aside all points on which the considerations relied on as being suspicious seem to me equivocal—that is to say, equally capable of two explanations: one innocent, and the other the reverse.

In the first place, it is suggested that there was an inherent improbability in the Alim making a will by reason of the fact that he was a pious Moslem. There is undoubtedly a passage in the Koran which, though at first sight it seems to recommend and not to prohibit the making of wills, is authoritatively interpreted in the second sense. There is no question that this is the accepted view of all Arabic commentators, and it may be taken that this was also in theory the view of the Alim as an orthodox Moslem. On the other hand, we know that such considerations, when it comes to a practical question, often sit very lightly even on religious minds. We have the evidence of Mr. de Fry, the notary called by the opponents of the will, to the effect that nowadays the making of wills by Moslems is not uncommon. We have the fact that the Alim had in his own safe a will by his uncle (who may also be assumed to have been a pious Moslem), and that he referred to this will in his last illness. . . . . I do not consider, therefore, that the suspicion said to attach to the will by reason of the Alim's religious character is of a substantial nature. . . . . .

We now come, however, to the suspicions of a much more substantial nature. It appears that Isdeen, who was the primary beneficiary under the will, and whose interest in the will was out of all proportion to his legal share, took a very prominent part in its preparation. He sent for Mr. Ismail for the purpose of receiving instructions. He was present when Mr. Ismail came for the instructions. He sent for Mr. Ismail again for the purpose of the execution of the will. He assisted in the arrangements for the selection and the summoning of the witnesses. He was himself present at the alleged execution. With regard to the extent of the

[1] (*1869*) *L. R. I. P. & D. 665.* [2] (*1866*) *L. R. I. P. & D. 109.*

interest under the will, it appears from figures which are not contested, which have been submitted to us by Mr. Hayley, that out of an estate of the total nett value of Rs. 1,013,500, the property bequeathed to Isdeen, including the amount necessary to pay off certain mortgages, amounted to Rs. 475,000 in value . . . . . If we take the bequest to Isdeen in conjunction with those two brothers, Hassim and Haniffa, who are alleged to be his co-conspirators, it appears that the value of those bequests is, roughly, as follows: Isdeen, Rs. 475,000; Hassim, Rs. 199,500; Haniffa, Rs. 177,500; or a total of Rs. 852,000, as against a total of Rs. 153,500 bequeathed to the whole of the remainder of the Álim's numerous children . . . . . But, in the absence of that explanation, the fact that Isdeen took so active a part in the preparation of the will, and that he so largely benefited by it, is a circumstance of a character which has always been held to excite suspicion as to genuineness of wills, and to throw the onus of removing that suspicion on the propounders. The most natural person to call for the purpose of removing that suspicion was Isdeen himself. It should be noted in this connection that he told us in his evidence before this Court that he was acquainted with his father's general testamentary intentions before the will was made.

The next point of suspicion is also substantial, and is of a very singular nature. It appears from the evidence of Mr. Ismail that, at the time when the Alim was giving instructions for this will, and at the very time of the execution of the will, and during the weeks immediately succeeding that execution, he made a series of gifts *inter vivos* to three of the beneficiaries under the will, namely, Haniffa on October 18, Thassim on November 12, and Muhiseen on December 11. The explanation given by Mr. Ismail is a curious one: " He said that his life was uncertain, and that the will was to be written in case of emergency. In the meantime he said he would convey the properties by deeds of gift. " This is a very peculiar story, and is one that strikes me as inherently improbable. Why should a man, who had brought himself to the point of making a will, proceed on such a singular principle? The three gifts made to the three beneficiaries correspond in fact to the gifts made to them under the will. This is emphasized by the counsel for the petitioners as showing the honesty of the will. It is said, How could an inventor, before he forged the will, have anticipated the Alim's intentions? The answer to that by the opposing respondents is that the Alim made no secret of his intentions, and that consequently persons preparing a will to be executed by or imputed to him would naturally take note of those intentions. But there is one point in which one of these gifts differs from the bequest in the will. The deed of gift is subject to a *fidei commissum*. The bequest in the will is not so subject. Why should the Alim give to Muhiseen by will a property free of any *fidei commissum*, and a few weeks after give

1919.

BERTRAM C.J.

The Alim Will Case

him the same property by deed subject to a *fidei commissum* ? Mr. Ismail gives an explanation, namely, that the Alim had wished to insert the *fidei commissum* in the deed, but that Mr. Ismail benevolently remonstrated with him; that he had first succumbed to Mr. Ismail's remonstrances, but that, when he came to execute the deed of gift, he resumed his original intention, and, bearing in mind Mr. Ismail's remonstrances, committed the execution of the deed to another notary. That is the explanation. It may be true, but it cannot be said to be very plausible. But there is another point in the working out of this arrangement which forcibly enhances the suspicion that it excites. From Mr. Ismail's evidence it would appear that the Alim executed a deed in favour of Haniffa on the very day on which he finally approved the draft of the will. In the draft of the will as it originally stood the property given to Haniffa appears as part of the bequest to Haniffa. When Mr. Ismail executed the deed to Haniffa, he struck this property out of the will. He does not say that he had any instructions from the Alim to do so. He does not say that the Alim ever referred to the subject, or that he spoke about it to the Alim. He was closely cross-examined with regard to these two concurrent transactions, and I have endeavoured from the evidence to prepare a time table showing the material dates . . . . . It would appear that, if Mr. Ismail's evidence on this part of the case is true, he has no clear recollection of what occurred with reference to these two parallel documents. If his evidence is false, it would appear that this is a part of the case which he has not thoroughly thought out. In any case, the incident is a very obscure one, and, as I say, enhances the suspicion which this singular story excites.

There is another point in which this singular story of parallel liberalities excites suspicion. According to the original draft of the will, the Alim destined for Haniffa three properties: (1) 213, Sea street; (2) 38, Keyzer street; (3) 148, St. Joseph's street. When he came to direct the preparation of a deed of gift, the Alim authorized a deed only of the first of these properties. Why, if his intention was to execute deeds of gift side by side with the will, should he not include in the deed of gift to Haniffa all three of the properties which he had bequeathed him by will? Isdeen in the box attempted to give an explanation af this. He said that the Alim said to him, " Let us dispose of the properties which are not under mortgage. " The point of this explanation was that 38, Keyzer street, was under mortgage, and it is suggested that the Alim intended to deal with the mortgaged properties subsequently in some other way. But this explanation does not account for 148, St. Joseph's street, and the fact that it is put forward by Isdeen redoubles the suspicion which the circumstance itself provokes.

The next point of suspicion is that the witnesses to the will are not, as one would expect, witnesses of independent character . . . . . .

To continue the examination of the method in which the *primâ facie* suspicious elements of the story were met by the evidence tendered for the petitioners, we come to another point. There is a most singular gap in the case for the petitioners. No account at all is given of the finding of the will. The Civil Procedure Code, by section 516, directs that the finder of the will should deposit it in Court with an affidavit describing the circumstances under which it was found. No attempt was made to comply with this provision. It is said that it is a provision which is not always complied with, and that it is only intended to apply to cases in which a will is found by a person other than an executor. But, even accepting this explanation, one would have expected that, in a case of this kind, where the honesty of the will had been directly challenged, care would have been taken to give specific proof of every material detail in the story. No proof is given on this point. It is pleaded in excuse that everybody knew that at some point or other the will was put into the Alim's safe, and that it was common ground that when it was produced to be read it was produced from the safe. This does not make it any the less important that those who propound the will should show the exact circumstances in which it was first found in the safe.

I now come to a point, not derived from the case put forward by the petitioners, but from the case of their opponents, and it is a ppoint of great importance. Evidence, which there is no reason to doubt, was called to show that a typed draft of the supposed will was in existence some days before the date at which, according to Mr. Ismail, instructions were given to him for the making of it. The evidence is that of Mr. and Mrs. Rodrigo, who run a typewriting business not far from the Courts. According to their books, a typewritten draft of the will was prepared by them for Mr. Ismail by October 6. Mr. Ismail in his evidence refers to this typewritten draft, and says that the instructions which led to its preparation were given some five or six days before this typewritten draft was prepared. If this interval is accepted, and the time is reckoned back from October 6, this brings the instructions to a date so soon after the accident that, as the learned Judge very truly says, it seems quite impossible to conceive the Alim being in a condition to give them, or, at any rate, to give them in the manner related by Mr. Ismail. The evidence of Mr. and Mrs. Rodrigo on this point casts the gravest doubts on the whole story of Mr. Ismail's instructions.

Finally, with reference to this stage in our analysis of the case, it must be pointed out that Mr. Ismail himself made the worst possible impression upon the District Judge. We had not the advantage of seeing Mr. Ismail in the box. It is impossible for us to judge whether the impression thus produced was due to the fact that Mr. Ismail was not an honest witness (which is what the

1919.

BERTRAM C.J.

The Alim Will Case

learned District Judge infers), or whether it was due to nervousness under a prolonged and very close cross-examination. We must take the learned Judge's impression as he records it, and that impression must have its weight in the case. I should like to say, however, with regard to certain matters outside this case, as to which Mr. Ismail was very fully cross-examined, that, in my opinion, undue importance has been given to these matters. I am referring to the cross-examination of Mr. Ismail with reference to his conduct in certain litigation in which he was personally concerned. The object of this cross-examination was to show that Mr. Ismail was unworthy of credit. It far too often happens in cases before our Courts that a Judge is asked to form an impression against a witness upon a detailed examination of the witness's conduct, not in the case before the Judge, but in a case which was heard on some other occasion. Mr. Ismail is criticised, because in two actions in which he was personally sued in regard to transactions of no very great importance, he pleaded fully and explicitly in one of the actions, but formally and technically in the other. I cannot see why the fact that he chose to take this course, which was not without reasons to justify it, should be held to discredit him in this action. Nor do I think that he can seriously be criticised, because in the course of cross-examination on these matters he was careful enough to reserve explicit answers until he had consulted the material documents. As far as Mr. Ismail's previous record is concerned, it seems to me that he comes before the Court with nothing against his character.

If the evidence in the case stood there, and if no definite theory as to the manner in which the document purporting to be a will was executed was put forward by the opponents of the will, could it possibly be said that the propounders of the will had removed the very serious suspicion which attaches to their account of the matter? I do not think it could. When one takes into account the age of the Alim, the condition in which he was lying, the improbable nature of the whole story, the disproportionate share allotted to Isdeen and his two brothers, the important part which Isdeen is said to have taken in the arrangements for the will, and the other circumstances I have enumerated, it seems to me that any Court would have been justified in refusing to give credit to the attesting witnesses. I do not say that there is any evidence that the Alim's mind was clouded, or that at the time when the will was signed he had not a full testamentary capacity, but he was in a condition of which advantage could be taken, and the fact that he was at the time executing a great number of legal documents put unscrupulous persons in a position to take advantage of that condition.

But the case does not rest there. A definite alternative theory is put forward by the opponents of the will, and that is, that on October 18 two documents purporting to be a will were fraudulently

put before the Alim in substitution of two copies of deed of gift which he supposed himself to be executing in favour of his son Hassim. . . . . Now, on this part of the story the Judge has definitely accepted the evidence of the opponents of the will. But he has accepted their story without having heard any evidence on the other side, except a formal denial by Mr. Ismail in cross-examination. It is true that we have now heard witnesses on the other side on this part of the case. But I should be most reluctant to form any conclusion under these circumstances between two sets of interested witnesses, unless that conclusion were based on evidence of a circumstantial nature, particularly when a finding in favour of the charge made by one set of witnesses involves a finding of fraud against a professional man, and particularly when part of the case for that charge rests upon alleged conversations with the dead man which no one can contradict.

I propose, therefore, to examine the documentary evidence and the general circumstances of the case, in order to see, firstly, whether the facts which they disclose are consistent or inconsistent with the rival stories, that is to say, the story of the instructions as told by Mr. Ismail, and the story of the substitution as described by Muhiseen; and, secondly, as the whole theory of the substitution depends upon the supposition that instructions were given for the preparation of a deed to Hassim, whether there is any, and what trace of such a deed to be found, apart from the oral evidence of those who put forward the story.

I will proceed, therefore, in the first place, to examine the pencilled instructions produced in re-examination; and, in the second place, the successive drafts of the will produced, partly in re-examination in the District Court, and partly in this Court.

. . . . . .

These two last points, namely, (*a*) the double alteration in the will, and (*b*) the fact that the will was hurriedly prepared for the very morning on which the alleged substitution is said to have been place, give a force and cogency to the evidence of Muhiseen of which otherwise it would have been entirely destitute. It is no longer merely oral evidence. It is oral evidence confirmed by circumstances which cannot lie. It becomes evidence on which one can act even in a case of this sort, with some degree of confidence. Taken with this circumstantial corroboration, it carries conviction to the mind.

We have now completed our examination of the evidence of the case. What is the effect of that examination on the question of the right of this will to probate? Let us first of all ask another question, What is it that the Court has to determnie in order to ascertain whether the will is entitled to probate?

The learned Judge has declared that he is unable to credit the evidence of execution tendered by the propounder, and he refused

probate on that ground. In coming to this conclusion, he put aside the question of the alleged fraudulent substitution, and accordingly excluded certain evidence bearing on the question of that alleged substitution. We have now taken the evidence that was excluded, and we have embraced the question of this alleged substitution in our general review of the case. Is it necessary for the Court to ask itself whether the alleged fraudulent substitution has been proved! In my opinion it is not. It is sufficient for the Court to ask itself, Has an opportunity for this supposed substitution been shown, and is there a reasonable and substantial suspicion that advantage was taken of that opportunity? If the answer to these questions is in the affirmative, then there is an additional suspicion of a very grave character attaching to the will, reinforcing those suspicions which we have already enumerated. It is the business of those who propound the will to remove these suspicions. If the evidence which they adduce for that purpose does not satisfactorily remove it, this fact emphasizes the necessity of scrutinizing with the greatest care, and of weighing with the greatest deliberation, the evidence tendered to prove the execution of the will. Further, in testing the credibility of the witnesses adduced to prove the execution, and, in particular, the evidence of Mr. Ismail, account must be taken of the evidence on the question of the substitution, and the evidence of those witnesses who contradict him.

Mr. Bawa, however, in his extremely forcible argument, protested against the idea that it was his business to remove a general atmosphere of suspicion which was supposed to envelop the will. He said that he was entitled to ask—suspicion of what?—to narrow down the suspicion if he could, and to devote himself to dissipating the suspicion so concentrated. He cites the case of *Low v. Guthrie*.[1] There is no serious doubt in this case that the signature which the will bears is the Alim's signature. From the place which the protocol occupies in Mr. Ismail's file of notarial documents, Mr. Bawa very justly argues that the latest date on which this document could have been executed was October 24. The document bearing the next successive serial number to that of the will is dated as of that date. If we accept the evidence of Mr. and Mrs. Rodrigo, it could not have been executed earlier than October 18. The only occasion on which Mr. Ismail, according to the evidence adduced by the other side, is shown to have had access to the Alim within these limits is the occasion of the execution of the deed of gift to Haniffa on October 18 itself. The only possible explanation, so Mr. Bawa says, for the will bearing the Alim's signature, if the theory of forgery is excluded, is that the signature was obtained by fraud. The only form of fraud which can by any plausibility be suggested, so argues Mr. Bawa, is that of substitution; in other words, that the Alim was induced to execute the document under the belief that

[1] *(1909) A. C. 278.*

it was a document of another character. The only date on which this substitution could have taken place is, therefore, October 18. Mr. Hayley, indeed, desires to guard himself by the suggestion that Isdeen may by some device have obtained the Alim's signature to the will without Mr. Ismail being present there at all. I think that that possibility may be excluded. The Alim was far too accustomed to the execution of notarial documents to execute them otherwise than in the presence of a notary. I think, therefore, that Mr. Bawa is to this extent right, that all the suspicious circumstances which attach to the will, if they are to have any significance, point to something which must have happened between the morning of October 18 and some time on October 24, and, if the evidence of those who oppose the will is to be accepted, to something which must have happened on the morning of October 18 itself. He is further right in saying that, accepting that evidence, this something could only have been a substitution. Under these circumstances he asks, " Am I not entitled to a clean answer, ' Aye ' or ' No ' ? Has that substitution been proved, or has it not? " It seems to me that the authorities which I have cited above are against this contention. The fact that the suspicions which attach to the will concentrate upon a particular point does not affect the legal position. It is none the less the business of those who propound the will to dissipate these suspicions. If there are already suspicions attaching to the story, those suspicions are merely intensified, if it is shown that on a particular date there was an opportunity for a particular fraud. They are still further intensified if it is shown that there is very strong reason to suppose that advantage was taken of that opportunity. The fact that the original suspicions are thus doubly intensified ought not to put the propounders of the will in a better position, or to cast upon those who oppose the will an onus which was not upon them before.

All that we need ask, therefore, with regard to the evidence of the alleged sustitution, is this : Is there a reasonable suspicion that that substitution took place, and if so, have the propounders by the evidence which we took in the Supreme Court removed that suspicion ? That there is such a reasonable suspicion no reasonable being can doubt. Has that suspicion, then, been removed by the evidence of Isdeen, Hassim, and Haniffa ? With regard to Haniffa, his evidence was certainly not of the character to remove any suspicions attaching to anything. The manner in which he dealt with two points in his evidence, namely, the question when he first took measures to secure that he should be separately represented, and the question of the date when he signed the paper authorizing the payment of a small sum to Muhiseen from the shop, was so extremely perverse as to suggest at least abnormal obtuseness. It did not seem to me, however, that mere obtuseness would explain the series of answers which he gave. Those answers pointed to the

fact of his being a glib, unscrupulous, and unconscientious witness; a man without any adequate sense of the solemn nature of evidence given in a court of law. With regard to Isdeen and Hassim, their evidence was of a negative character. They both represented themselves as obedient and unquestioning instruments in the hands of an imperious father. This was the explanation which Isdeen, in particular, put forward to cover a transaction relating to the estate of the Alim's second wife, which is in its very nature *primâ facie* unjustifiable, and which, unless explained, must cast discredit upon the persons responsible for it. That responsibility Isdeen casts upon his late father, the Alim. I am not prepared to believe that the responsibility belongs to the Alim alone. At any rate, I think it may be said with confidence that the evidence of these three witnesses was not of a nature to remove from the mind of any Court any substantial suspicion which the other evidence had already generated. Incidentially, therefore, I may remark that if we had to look at the case in the manner suggested by Mr. Hayley, that is to say, if we were to say the District Judge has made certain findings of fact, that there is adequate evidence to justify these findings, and if we were to ask ourselves whether those findings would have been affected by the additional evidence called in the Supreme Court, there could be only one possible answer to that question.

I am, therefore, definitely of opinion that there are the gravest suspicions attaching to the document propounded as a will, that those who propound it have not removed those suspicions, and that the evidence tendered in proof of the execution of the will is not entitled to credence.

In view of the nature of the imputation which this ruling casts upon a professional man, an officer of this Court, and in view of the nature of the proceedings which may be subsequently instituted, I should have preferred to leave the question there. But in case it should eventually be thought that the Court ought to have given an opinion on the definite issue of fact, whether or not a fraudulent substitution was effected on October 18, as alleged in Majeed's affidavit, I will give my own opinion on that issue. In my opinion there is evidence in this case on which a Court would be amply justified in finding that such a substitution did in fact take place.

. . . . . .

I have very carefully considered all these points, and I am satisfied, after balancing all these considerations and counter-considerations, that though it is not possible to fill in all the details of the picture, the true inference to be drawn from the facts is that the execution of those two counterparts of the supposed will was procured from the Alim in the belief that he was executing two counterparts of a deed of gift to Hassim.

What convinces me is, firstly, the inherent improbability of the story of the Alim executing a will, and following it up by a succession of parallel deeds of gift; and, secondly the unexpected and circumstantial corroboration of Muhiseen's story by the evidence of Mr. and Mrs. Rodrigo, and by the double correction made in the draft will with regard to the Colombo street and Sea street properties. There is, further, the fact that the evidence of Mr. and Mrs. Rodrigo not only confirms the story of the alleged fraud of October 18, but stamps Mr. Ismail's account of his instructions as being fictitious, by disclosing that the draft of the will was actually in type some days before those instructions were said to have been received.

I would, therefore, dismiss the appeals, with costs.

De Sampayo J. delivered a seperate judgement dealing with the facts.

Appeal dismissed.