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

EMIS SILVA, Appellant, *and* LILINIA SILVA *et al.*, Respondents.

S. C. 163—D. C. Colombo, 105 S

Will—Attested by five witnesses—Application for probate—Degree of proof—Calling of witnesses.

Where probate is sought of a will attested by five witnesses it is not necessary to call all the five witnesses to prove the due execution of the will.

1 Lorenz 116, not followed.

APPEAL from a judgment of the District Judge, Colombo.

E. B. Wikramanayake (with him *H. A. Kottegoda* and *Cyril S. Randunu*), for the petitioner, appellant.

G. P. J. Kurukulasuriya (with him *B. Senaratne*), for the 5th, 9th, 10th, and 13th respondents.

Cur. adv. vult.

September 24, 1947. CANEKERATNE J.—

This is an appeal by the petitioner who propounds a document alleged to be the last will of one K. A. Andris Perera dated May 15, 1943. The deceased who is said to have been a carter was apparently living with the petitioner, his nephew, for a considerable time. In September, 1941, he bought some properties in the name of the petitioner's children. Andris

[1] *13 Cox 126.* [2] *14 Cox 101.*

Perera who was about 80 years old got ill, it is said, on the morning of May 15 and some time in the course of the day he sent a message by one Agonis Perera, a brother-in-law of the petitioner, to a petition drawer in Colombo named Perera, whom he knew, to have a last will drafted. Agonis Perera came to Dam street, Colombo, found the petition drawer, got a draft in accordance with the instructions of the deceased: about 2 p.m. the will was signed by the deceased in the presence of five witnesses, the witnesses being Agonis Perera, one Maithipala, one Abeyesinghe, one Jayesinghe and one Podisinno Perera. The respondents pleaded that the document propounded was not the act of the deceased and was a forgery.

By the will all the property was bequeathed to the petitioner's children. The trial Judge does not think that the will in question is an unnatural one but he came to the conclusion that the petitioner has not discharged the burden of proving that the document was duly executed by the deceased. The chief reasons given by the Judge seem to be that there are serious discrepancies in the evidence given by the three witnesses as to what actually took place at the time of the alleged execution of the will and the failure to call the petition drawer.

The three attesting witnesses who were called at the inquiry seem to be ordinary uneducated villagers; they were speaking to events that took place about two years before the date of inquiry, events in which they were not greatly interested. The three accounts of the signing of the will exhibit according to Counsel for the appellants, what is frequently found in honest witnesses, agreement on the main features combined with some difference in the details. A petition drawer having a table in the verandah of a boutique or shop in Dam street is like a lame man standing "on the wrong leg" and a Judge who pays serious consideration to contradictions in the story narrated by three village witnesses is not likely to be impressed by the version deposed to by a petition drawer.

The delay in making an order was due to the fact that a suggestion was made during the argument that the parties would be able to arrive at a settlement. In mercy to the parties we thought that we may spare the expenses of a new trial as to this very small property and did not make an order for some time, but the hope of a settlement seems to have evaporated. The judgment of the trial Judge can hardly be supported and there is no other course but to send the case back for a re-trial. The result is that the inquiry may come on for trial, and in these circumstances it is desirable that the Court should confine its opinion strictly to the matters necessary for the decision in appeal so as to avoid prejudicing the case of either party hereafter.

One point argued in the Court below on the strength of a short judgment reported in *1 Lorenz 116,* was that it was necessary that all the five witnesses to the will should be called to prove its due execution. The authority referred to in the reported case seems to be based on *1 Williams on Executors,* p. 281. This decision was anterior to the enactment of the Evidence Ordinance and hardly deserved to be rescued from oblivion. The general rule is that no particular number of instruments of evidence for proof of a thing is necessary. The testimony of a single witness

relevant for proof of the issue and credible is a sufficient basis for a case (Section 134, Evidence Ordinance). The rule has been well expressed. Testimony should be weighed not counted.

Williams on Executors (12th Ed.) p. 218 of Vol. 1 puts the matter thus :—Formerly the general rule was, that if a party be put to proof of a will, he must examine the attesting witnesses. But since the passing of the Court of Probate Act, 1857, C 33, it has not been necessary to call both the attesting witnesses to prove the execution, which may now be proved by calling one only of the attesting witnesses.

It would be unfortunate if the rule was as Counsel contended in the District Court. The experience of Courts shows that it is not uncommon for a witness to pretend ignorance of what he stated in a declaration or what he said in another Court or to try to give a twist to what has been previously stated. Thus disingenuous attempts to obtain evidence which might be useful hereafter may be made by an opponent who is not very scrupulous in his methods. This question of the number of witnesses required has been decided adversely to the respondents and they will be precluded from re-agitating it at the re-trial.

The appellants are entitled to the costs of appeal. All other costs shall be costs in the cause.

WIJEYEWARDENE J.—I agree.

Sent back for re-trial.