1947 *Present :* **Soertsz A.C.J. and Cannon J.**

JAYASUNDERA *et al.*, Appellants, *and* PERERA, Respondent.

34—D. C. Kalutara, 3,037

Will—Probate—Denial by attesting witness of due attestation—Effect of such denial—Prevention of Frauds Ordinance (Cap. 57), s. 4—Unsuccessful objection to grant of probate—Liability of estate for costs.

In an application for probate of a will, the only issue was whether or not the will was duly witnessed by the five persons whose names appeared in the document. Two of these attesting witnesses contradicted the attestation clauses of the will, while two others supported the attestation.

Held, that the Court could grant probate on the evidence of the two witnesses who supported the attestation.

Held, further, that where an application for probate is unsuccessfully opposed by blood relations of the testator the costs of the proceedings may be directed to be paid out of the estate, if the circumstances merit such an order.

APPEAL from a judgment of the District Court, Kalutara.

F. A. Hayley, K.C. (with him *N. Nadarajah, K.C., D. W. Fernando* and *A. C. Gunaratne*) for the objectors, appellants.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C., Ivor Misso* and *Vernon Wijetunge*) for the petitioner, respondent.

Cur. adv. vult.

February 18, 1947. CANNON J.—

This litigation concerns the execution of a will by one Andiris Goonetileke of Talpitiya in 1941. It is a non-notarial testament and therefore required attestation by five witnesses. In it the testator, a wealthy man, bequeathed all his property to his adopted son, Tudor Perera. The application for probate, which was made by Tudor's first cousin as the surviving executor, was opposed by the testator's sister and the children and grand-children of another sister and brother. The District Judge granted probate and it is against that order that this appeal is brought.

The evidence adduced at the trial and the argument addressed to us for the appellants would, I think, have been more relevant, had the dispute been as to the existence of the will, or undue influence or the mental condition of the testator, or whether the attesting witnesses had signed in each other's presence. It is, however, conceded that the testator did himself execute the will, and that the question of undue influence was not an issue in the Court below. The testator's mental capacity had been an issue in previous proceedings, but they ended in favour of the testator, and that decision was upheld by this Court. The present issue was merely whether or not the will was duly witnessed by the five persons, whose names appear in the document, in accordance with the Prevention of Frauds Ordinance, Chapter 57, section 4, which requires that—

> . . . . it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution, or if no notary shall be present, then such signature shall be made or acknowledged by the testator in the presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

It was argued in support of the appeal that the evidence was not sufficiently cogent to enable the District Judge to grant probate. At the trial before the District Judge three of the attesting witnesses were called by the petitioner and one, named Vionis Perera, by the objectors. Girigoris Fonseka, one of the three witnesses called by the petitioner,

stated that he did not see the testator execute the will, while Vionis Perera stated that all five witnesses were not there at the time. This evidence of Girigoris was in direct contradiction of an affidavit made by him, while the evidence of both Girigoris and Vionis contradicted the attestation clauses of the will. Vionis also admitted that he had been dismissed from his post of Headman for irregularities regarding finance.

In *Wilson v. Haddock* [1] Vice-Chancellor Shadwell said—

> I have always thought that if any attention at all ought to be paid to the testimony of witnesses who deny the solemn act which they have attested, it ought to be the slightest possible. Perhaps the best way would be to disregard it altogether.

In *Mc.Gregor v. Topham* [2] Lord Brougham cites this dictum with approval and adds—

> And Lord Mansfield was so clearly of this mind that he said that instead of attending to such witnesses they ought to be consigned to the pillory. That was this great Judge's strong exppression, which it may be impossible that we should entirely adopt, but it showed clearly in what light he viewed such testimony.

The District Judge apparently adopted these *obiter dicta* in rejecting the evidence of Girigoris Fonseka and Vionis Perera. He has acted on the evidence of the two witnesses who supported the attestation and against whose credit nothing tangible was elicited. The question is one of the weight of evidence and I do not see anything in the evidence or in the District Judge's judgment which would entitle this Court to interfere with his findings. I would therefore dismiss the appeal with costs.

I do not, however, think that the circumstances merit a departure from the practice, in such cases as this, of sometimes directing the costs to be paid out of the estate. In fact the evidence tends to support Mr. Hayley's argument that some of the testator's "in-laws" (including the petitioner and his mother) contrived to place themselves in a position which would normally be taken by the testator's blood relations (including some of the objectors) and consequently benefited by substantial gifts *inter vivos* made by the testator. I would therefore, in dismissing the appeal, vary the order of the District Judge regarding costs and direct that all the costs of the proceedings in the Court below as well as in this Court subsequent to the Supreme Court judgment, dated February 18, 1944, be paid out of the estate.

SOERTSZ A.C.J.—I agree.

Appeal dismissed.

[1] *(1841) 44 Digest, p. 250.*

[2] *(1850) 3 House of Lords Cases, p. 156.*