1956 *Present :* **Pulle, J., and Sansoni, J.**

A. JANE ELIAS, Appellant, *and* S. C. JOSEPH, Respondent

S. C. 6—D. C. Badulla, 1,263/D

Will—Revocation by destruction—Quantum of evidence.

Where the question for determination is whether a testator destroyed his last will with the intention of revoking it, proof of intention to revoke the will has an important bearing on the factual issue whether the will was destroyed after the intention was formed.

APPEAL from a judgment of the District Court, Badulla.

N. E. Weerasooria, *Q.C.*, with *W. D. Gunasekera*, for the Respondent-Appellant.

H. V. Perera, *Q.C.*, with *S. J. Kadirgamar* and *B. S. C. Ratwatte*, for the Petitioner-Respondent.

Cur. adv. vult.

May 30, 1956. PULLE, J.—

The appellant, Adelaide Jane Elias, is the widow of one Theodore Edward Elias who died on the 19th June, 1952. He was then about 86 years old. He executed a last will on 2nd January, 1942, by which he bequeathed all his property, movable as well as immovable, to the respondent to this appeal, Samuel Christopher Joseph, subject to a life interest in favour of the widow. He was also appointed the executor of the will. On 26th September, 1952, Samuel Christopher Joseph, who will be referred to hereinafter as the petitioner, filed an application to have the will proved and alleged, *inter alia*, that it was in the custody of the widow and that she had refused to deliver it to the petitioner. The will had been executed in the presence of a notary and two witnesses. The copy marked P11 required by law to be kept by the notary was produced and the learned District Judge has pronounced in its favour. The substantial point which arose for determination was whether the testator destroyed the will with the intention of revoking it. The Judge's finding is that the will had not been destroyed but was in existence after the death of the deceased. The widow's submission in appeal is that, having regard to the evidence, the finding in favour of the petitioner cannot be supported.

The testator had no children by his marriage. He was, however, said to be the father of three illegitimate sons, namely the petitioner and two others named Francis Joseph and Benjamin Joseph. They were

educated by him and brought up in his own home. They regarded him and his wife as their parents. In 1932 the testator and his wife made the joint will marked R3 by which they bequeathed to the survivor of them the entire estate. On the very day the testator made his will in 1942 his wife too made a will R4 on the same lines as his, namely, she bequeathed to the petitioner all her properties, subject to a life interest in her husband's favour. Both wills purported to revoke previous writings of a testamentary nature.

The principal asset of the testator's estate was a land called " Sunnyside " in extent seven acres with a commodious house and annexe valued by the petitioner at Rs. 13,500. It was probably worth three times that sum. The rest of the estate consisted of movables valued at about Rs. 2,000.

The eventual destination of the whole of " Sunnyside " was the cause of some bitterness, especially between the petitioner and his brother Benjamin Joseph in the years which intervened between the making of the 1942 will and the testator's death. Strangely enough Benjamin who earned quite a number of uncomplimentary epithets from the petitioner, as could be gathered from the latter's correspondence with the testator, gave evidence for the petitioner and testified to his having been shown the original of the will by the brother-in-law of the testator, the witness Clancy de Silva, on the very day of his death. The learned Judge after dealing with certain aspects of the evidence adduced by the widow on whom the burden was placed of proving that the testator had destroyed the will stated :

" In conflict with the evidence of the respondent (i.e. the widow) and Clancy de Silva, there is the evidence of Benjamin Joseph. He says that he saw the original of X (X being a copy of the will) after the deceased's death and relates the circumstances in which Clancy de Silva showed it to him. His evidence was convincing and I accept it." He further expressed the opinion that it was after the petitioner made the application for probate that the widow had been persuaded to say that the original had been destroyed.

It has been submitted to us that the Judge in coming to these findings has overlooked, if not ignored, a convincing body of oral and documentary evidence pointing to the contrary.

The petitioner who did not give evidence has in effect alleged—and succeeded in satisfying the court—that the widow and Clancy de Silva had, in pursuance of a conspiracy, secreted or destroyed the will which was among the papers of the testator. This indeed is a serious allegation and one has to see whether the intrinsic merits in the evidence of Benjamin Joseph are of such a character as to turn the scales against the widow and Clancy de Silva.

While it is apparent from the letters written by the petitioner to the testator that there were disagreements concerning a property at Hali Ela and Benjamin Joseph's occupation of the annexe at " Sunnyside "

there is nothing in them to indicate that the feelings between the petitioner and the testator's wife were anything but cordial. It is true that at the beginning she disliked the testator adopting the petitioner and his brothers in her home but one sees that in the will she made in 1942 she bequeathed her properties to the petitioner and it is difficult to understand why she should later adopt a hostile attitude towards him. As to Clancy de Silva the petitioner in his letters R25 of the 17th July, 1948, and R13 of 27th April, 1948, pays a tribute to the excellence of his character. In R13 he refers to a brother-in-law of the testator one Mr. C. H. Bartholomeusz in these terms :

"I have great regard for him. He is the only man among your relatives (with the exception of Mr. Clancy de Silva) who will not allow their sense of justice to be perverted or influenced by ties of kinship." In view of this it is only fair by these two witnesses that cogent reason ought to be adduced why on a conflict of evidence the testimony of Benjamin Joseph ought to be preferred.

A perusal in particular of the letter R20 of 14th August, 1949, written by the petitioner to the testator reveals his estimate of the character of Benjamin Joseph. In that he accuses him of poisoning by devious means the confidence which existed between him and the testator and of distorting the truth. Referring to Francis and Benjamin the petitioner states,

"I agreed to become an executor for the sake of Francis and Ben so that another executor may not deprive them of their share. The result was that they conspired to shed my innocent blood."

One can, therefore, well understand why the petitioner who was well educated and held the responsible position of the principal of a school refrained from entering the witness box. He would certainly have been in difficulties had he chosen to state on oath that the widow and Clancy de Silva were unworthy of credit and that on the contrary Benjamin whom he regarded as a mischief maker could be expected to speak the truth.

There is one aspect of the evidence which has an important bearing on the central issue on which this case was contested in the District Court and before us, namely, whether the testator had destroyed the will. The testator was buried on 21st June, 1952. In about a week the widow was arranging to consult a Proctor, Mr. Joseph Pieris. Benjamin was employed at a Motor Service Station of which the Managing Director was Mr. Pieris. About 29th June Benjamin and Clancy de Silva saw Mr. Pieris regarding the drafting of a will for the widow. He went to her house on the 1st July and took instructions for drawing up her will which was eventually executed in his presence on the 4th July. That is the document R8. He also obtained instructions to prove the 1932 will. Benjamin was not present at the execution of R8 or at the consultation on 1st July.

The evidence of Mr. Pieris is clear that on the 1st July the widow stated to him that the testator had recalled the will which was admittedly

in the custody of the petitioner and destroyed it afterwards and that Clancy de Silva discussed with him the position arising out of the will being destroyed. Further, Mr. Pieris said in his evidence,

"I met the petitioner casually on the road after I had drawn up the respondent's will R8 and told him that Mr. de Silva had mentioned a will in his favour which had been destroyed and asked whether he had the will with him. He said that the deceased had taken that will back from him. I wanted to be certain myself whether Mr. Clancy de Silva had spoken the truth when he said that the deceased had destroyed the will.....I questioned the petitioner as I wanted to be quite certain."

The opinion expressed by the learned Judge that after the petitioner applied to have the 1942 will proved, which was in September, 1952, the widow had been persuaded to say that the original had been destroyed cannot be supported having regard to the evidence of Mr. Pieris who was *a perfectly disinterested witness.* So also the adverse comment by the Judge that a letter R7 written by the widow on the 23rd July, 1952, to the petitioner, while referring to the fact that the testator had recalled the will as he had made up his mind to "scrap it" omitted to state that he had destroyed it, cannot be justified as a ground for suspecting that the story of the destruction was invented after the petitioner moved to have the will proved.

According to Benjamin the will was shown to him by Clancy de Silva on the very day the deceased died and he mentioned this fact to the petitioner on the 10th July when the latter came on a visit to "Sunnyside". It is purely a matter for comment that when the petitioner *wrote to Clancy* de Silva the letter P8 of 1st September, 1952, in which he protested against the steps taken by the widow to prove the will of 1932 he did *not tell* Clancy de Silva that Benjamin had conveyed to him the information that the will was shown to him after the testator's death.

The widow states that about a month after the death of the testator the petitioner called *at her house and she told him that the will had been* destroyed and that it was *not with her.* The petitioner had not chosen to contradict this evidence with his own nor did he choose to support Benjamin's statement that he informed him on the 10th July that Clancy de Silva had shown him the will.

That the testator had an intention for drawing up a new will is evident from some of the letters written by the petitioner. *It is positively stated* in a letter written by the testator on the 9th August, 1949, and which is quoted by the petitioner in R20 of 14th August, 1949. At this time all the affairs of the testator appear to have been in a state of indecision and turmoil. The efforts of the petitioner to ensure that "*Sunnyside*" came to him as a gift before death or under *the will appear, from* his point of view, to have failed. There is a break in the correspondence for in *August, 1950, the petitioner complains* that the testator had not replied to three successive letters. There is no evidence that any letters passed between August, 1950, and June, 1952.

It is true that proof of intention alone to revoke a will does not suffice but such proof could have an important bearing on the factual issue whether it was destroyed after the intention was formed. The learned Judge has chosen to believe the evidence of Benjamin in preference to that of the widow and Clancy de Silva for reasons which do not commend themselves to us. On the contrary there are stronger reasons for holding that the testator had destroyed the 1942 will. The order under appeal is set aside and the case is remitted with the finding of this court that the last will No. 6544 of 2nd January, 1942, was destroyed by the testator with the intention of revoking it. The petitioner will pay to the appellant the costs here and below.

SANSONI, J.—I agree.

Order set aside.