5/1962

No. 19 of 1960

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

BETWEEN:

EVELYN LETITIA PEIRIS — Appellant

- and -

68195

MILLIE AGNES DE SILVA — Respondent

CASE FOR THE APPELLANT

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1. This is an appeal from a Judgment of the Supreme Court of Ceylon dated the 19th December, 1956, dismissing an appeal from a Judgment of the District Court of Colombo, dated the 28th September, 1956, dismissing a Petition by the Appellant dated the 20th October, 1954, whereby she prayed for the recall and revocation of the Probate of a Will of one Sellaperumage William Fernando, deceased, granted to the Respondent on the 16th June, 1954, and that Probate should be granted in terms of an alleged later Will, and for other relief. p.485 p.495 p.419 p.32

2. The circumstances out of which these proceedings arose, and the question which arose for the determination of the District Court, are conveniently summarised in the following passage in the Judgment of that Court (V. Siva Supramaniam, A.D.J.):-

> "Sellaperumage William Fernando (hereinafter referred to as the deceased) of Kaldemulla, Moratuwa, died on 22.2.54 leaving a widow, Nancy Catherine Charlotte Fernando (hereinafter referred to as the widow) and two daughters Millie Agnes de Silva (hereinafter referred to as the Respondent), the only child by first marriage, and Evelyn Letitia Peiris (hereinafter referred to as the Petitioner) the only issue of the second marriage. On an application made by the Respondent, who produced in Court a notarial p.419 p.1 p.5

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writing No.454 dated 13.5.50 attested by Felix de Silva, Notary Public, as the Last Will and Testament of the deceased, in terms of which the Respondent had been appointed the sole legatee
p.22 and executrix of his estate, Order Absolute in the first instance was entered on 14.5.54 admitting the said Will to probate. The Petitioner has now applied to have the said
p.32 Order cancelled on the ground that subsequent to the execution of last Will No.454 dated
p.36 13.5.50, the deceased executed another Will No.474 dated 4.6.51 attested by D.A.J. Tudugala, Notary Public, by which he revoked all earlier Wills and directed that after payment of certain legacies and other charges, the residue of the property be divided equally between herself (the Petitioner) and the Respondent. If last Will No.474 dated 4.6.51 was the act and deed of the deceased, there can be no question that the earlier Will No. 454 of 13.5.50 had been revoked by the Testator and the distribution of the estate of the deceased should be in terms of the latter Will. The Respondent challenges the genuineness of
p.40 Will No.474 of 4.6.51 and states that it was not the act and deed of the deceased. The only question then for determination at this inquiry is whether last Will No.474 of 4.6.51 .....was the act and deed of the deceased".

For convenience, the parties to this appeal are hereinafter referred to, as in the said Judgment, as the Petitioner and the Respondent respectively.

p.474 3. The learned Acting District Judge found that the Will No.474 dated the 4th June, 1951 (hereinafter referred to as Will No.474) was not the act and deed of the deceased. The questions which arise for determination on this appeal are whether the learned Judge was right in so finding, and whether the Supreme Court ought to have set aside the said finding.

p.22 4. The Order Absolute admitting the writing No. 454 dated the 13th May, 1950 (hereinafter referred to as Will No.454) to Probate was made on the 16th June, 1954 (not the 14th May, 1954 as stated in the passage quoted above).

p.32 5. The Petition praying for the recall and revocation of the said Probate, and for a grant

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in terms of Will No. 474, is dated the 20th October, 1954, and contains the following allegations:

"4. The Petitioner was aware that the said Sellapperumage William Fernando had executed a last Will subsequent to the alleged last Will No.454 relied on by the Respondent and that such subsequent last Will was with the said Testator till the time of his death. The Petitioner fears that the Respondent who was in charge of the house and things of the Testator sometime before his death and immediately thereafter has either destroyed it or is fraudulently keeping it away from the Court. p.33

5. The Petitioner was endeavouring to find out where the deceased had executed the said subsequent last Will and it was after much effort and the lapse of some time that the Petitioner ascertained that the deceased had executed it on 4th June, 1951 and that the said subsequent last Will bearing No.474 has been attested by D.A.J. Tudugalla, Proctor and Notary who had the protocol with him."

The said Petition is supported by an Affidavit, verifying the said allegations, sworn by the Petitioner on the same date. From the certified copy of Will No,474 filed by the Petitioner it appears that the same was signed by the deceased in the presence of two Proctors, namely, Victor C.C. Dewapuraratna and C.Vethecan and that they both signed as witnesses. p.34 p.36 p.37

6. The Respondent filed a Statement of Objections dated the 16th December, 1954, wherein she answered the said allegations in the Petition as follows:- p.40

"3. Replying to paragraphs 4 and 5 of the Petition the Respondent states:- p.41

(a) the deceased did not execute any Last Will subsequent to the Last Will No. 454 dated the 13th May, 1960.

(b) the Last Will of the deceased is the one bearing No.454 and attested by Felix de Silva Proctor and Notary Public.

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4. Replying to paragraph 6 of the Petition the Respondent states:

.....

(b) the alleged Last Will No.474 dated the 4th June 1951 is a forgery and is not the act and deed of the deceased.

(c) the alleged signature of the deceased appearing in the protocol of the document bearing No. 474 dated the 4th June 1951 is not the signature of C. Vethecan (sic) and is a forgery.

(d) the alleged signature of C.Vethecan appearing in the protocol of the document bearing No.474 dated the 4th June 1951 is not the signature of the deceased (sic) and is a forgery."

7. The action was heard on a number of days
p. 42 between the 19th September, 1955, and the 26th June,
p. 414 1956. Both parties adduced evidence, both oral and
p. 419 documentary, in support of their respective cases. The Judgment of the District Court was pronounced on the 28th September, 1956. The learned trial Judge reviewed the evidence and reached the following main conclusions, viz:

p.438, l.21 (a) That in the circumstances existing in June, 1951, Will No. 474 is "an unnatural one". He reached this opinion having regard to his findings as to the relationship that existed between the deceased, on the one hand, and the widow, the Petitioner and the Respondent respectively, on the other, and the character of the deceased.

p.450, l.34 (b) That the subsequent conduct of the deceased was not consistent with his having executed a Will in June 1951. The learned Judge found that the deceased had not told anyone that he had executed a document by which both his daughters would equally succeed to his estate.

p.471, l.49 (c) That on the direct evidence of the execution of Will No. 474 (that of the two proctors,

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Mr. Tudugala and Mr. Dewapuraratne) he was not satisfied that that will is the act and deed of the deceased.

(d) That Will No.474 was not the act and deed of the deceased and the signature of the deceased thereon is a forgery.

The learned Judge therefore answered the Issues which had been framed in the action as follows:- p.42 p.474

	Answer
1. Was Will No.454 revoked by the deceased?	No.
2. Did the deceased execute Will No. 474?	No.
3. If issues 1 and 2 are answered in the affirmative, should Probate of Will 454 be revoked and Probate of Will 474 be granted?	Does not arise.

8. By a Petition of Appeal dated the 9th October, 1956, the Petitioner contends that the Judgment of the District Court is contrary to law and against the weight of evidence in the case. The grounds of appeal, set out in the said Petition, refer to the evidence and the learned trial Judge's findings thereon in narrative form and by way of argument, and provide a convenient summary of the main issues and the contentions upon which the Petitioner now relies. They are as follows:- p.475 p.476, l.38

(a) The said judgment is contrary to law and against the weight of evidence in the case. pp.476-484

(b) The deceased was an ordinary carpenter (baas) to whom good luck came after his marriage with Nancy, and he made money as a contractor thereafter. He was temperamental and impulsive, changed his mind after making promise and did not adhere to one proctor but had recourse to several as his moods prompted him. p.43

(c) Will No. 474 was attested by Proctor Tudugala and the two attesting witnesses were Proctor Devapuraratne and Proctor C. Vethecan. In support of her case the Petitioner called p.124 l.20

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both direct and indirect evidence of the making of the Will, viz:-

(i) proof of an intention of the deceased to make another testamentary disposition by the evidence of such witnesses as the retired Village Headman Victor Fernando, the confidante of the deceased;

p.92

(ii) the direct evidence of Proctors Tudugala and Dewapuraratne (Proctor Vethecan being dead) of the actual execution of Will No. 474, and

pp.123 et seq. pp.186 et seq.

(iii) evidence of respectable witnesses to prove statements made by the deceased after Will No.474, that the deceased had left his properties to his two daughters to be taken after his death, such as the witnesses Proctor A.V.Fernando, Revd. Wickremanayaka and Revd. Dhammaloka, the Neelammahara priest.

p.78, p.81 p.84

(d) The deceased had married his second wife, Nancy Catherine, in 1917 and the Respondent had attempted to elope with one Joseph de Mel, which was prevented by Nancy and the deceased. In 1934 the Respondent was given in marriage to one Silva, an architect, and about that time the deceased transferred certain properties in her favour and shortly thereafter some properties in favour of the Petitioner. The deceased was annoyed when the Petitioner eloped with Peiris in January 1940 and married him. Suspecting that his wife had a hand in the matter the deceased left home, made a last Will No. 268 of 1.2.40 making the Respondent, the Executrix and sole devisee and left for Matale where his estate Naugala was and where later he bought an estate called Highwalton. He took a mistress Maria Aponso and thereafter another, Marina Fonseka, with whom he entered into an agreement in 1942 and lived with his mistress during the rest of his life.

p.43

p.286 l.4

(e) The deceased however forgave the Petitioner for whom he bought a set of pearls, but apparently as she identified herself with the mother in a divorce case filed by Nancy Catherine against the deceased in 1944 the deceased gave

p.45 l.15

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instructions in 1946 to Raymonds, Undertakers, that his wife was not to have any hand in his funeral and made Will No. 454 in 1950 and subsequently incorporated his instructions to Raymonds in that Will. p.556

(f) Whether it was due to an immediate cause like the familiarity of the Respondent after her husband's death with her chauffeur or because he felt, with death approaching, that he should be just by his only two daughters, he made the impugned Will No. 474 in 1951. p.197 p.228 p.287 1.36

(g) There is clear and uncontradicted evidence that the deceased had wanted to transfer Naugala Estate in about 1950 to the children of the Petitioner and also that he did in fact give her Rs.15,000/- in October 1952 because she had not been given a dowry by him. The deceased has also gifted a house in Melbourne Avenue, Colombo to the Respondent in January 1953; and about 3 years prior to his death he returned from Matale and lived again in Moratuwa where he died. p.285 1.16

(h) The deceased had not used specific expression that he was making or had made Will No. 474, but he had used language from which the several witnesses understood that the disposition was a last Will.

(i) Victor Fernando was a particular friend of the deceased. He had intervened at the instance of the deceased in the divorce case. The Learned District Judge does not reject his evidence about what the deceased told him and was wrong in holding that his evidence did not disclose that the deceased had manifested his intention to make a testamentary disposition. Rev. Wickremanayake's evidence has been accepted by the Learned Judge and it is submitted that that evidence indicates the testamentary disposition. Proctor A.V.Fernando is one of the leaders of the Panadura Bar and a J.P.U.M., and no reason was suggested either in cross-examination or in the address to Counsel for the Respondent for rejecting his evidence. The Learned District Judge had no reason whatsoever not to accept his evidence. Mr. Fernando specifically stated that the deceased told him in 1952 that he had made provision for the two daughters equally to take effect after his death. The other witness p.92 pp.438-442 p.434 1.14 p.443 1.31 p.78 p.79 1.10

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p.84 l.18 — p.446 l.24 was Rev. Dhammaloka, the Neelammahara Priest, from whom admittedly the deceased took treatment for his last illness. The learned Judge was wrong in holding that he was not a frank or reliable witness.

pp.123 et seq. (j) Proctor Tudugala is a Proctor of 20 years standing. He had taken to politics some years ago and been the Chairman of the Urban Council of Kolonnawa. He had created for himself political enemies. Reference was made to an insolvency case filed at their instance 15 years ago, and he could not remember the details of the evidence he had given in that case. There was an arrangement made by his mother by which he was to be paid a certain sum of money which he referred to as a life-interest as it was so for all practical purposes, though it was not legally in the form of a life-interest.

p.468 l.47 — pp.186 et seq. It is submitted that the Learned District Judge erred in holding that his evidence could not be accepted. A witness to Will No. 474 was Mr. Devapuraratne, a Proctor of 19 years standing. There was nothing in his evidence to show that his evidence was not true and the Learned District Judge was wrong in not accepting his evidence. The other attesting witness was Proctor C. Vethecan who is dead. The only attempt made to suggest that he did not attest the document was to challenge his signature by the evidence of the handwriting expert, Mr.Muthukrishna. The Learned District Judge for obvious reasons does not hold that it was not Mr. Vethecan's signature.

p.471 l.1 — p.124 l.27 — pp.350 et seq. — pp.473-4

p.52 l.40 (k) Quite apart from this evidence, the Petitioner gave evidence that she identified her father's signature on Will No. 474. There was no cross-examination of her on this point. By way of contrast the Respondent who was the other daughter did not have the courage to state in her evidence that the signature on Will No.474 was not that of her father.

(l) There was thus nothing to negative the evidence of the Petitioner and of her witnesses except the evidence of the handwriting expert, which the Learned District Judge quite correctly states he would not be justified in accepting. Indeed the report of Mr.Muthukrishna, which was put in by the Respondent's Counsel as the last document significantly did not state that the signature on Will

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No.474 was not that of the deceased.

(m) Will No. 474 was a natural last Will. The widow was left a legacy of Rs.5,000/- only, because she had been troubling the deceased consistently requesting him to give up his mistresses and return to her. The legacy of Rs.2,000/- to the Deaf and Blind School was given because the deceased had assisted certain Church charities and he felt he should do something more as he had not fulfilled other such promises. John to whom he had left a legacy of Rs.1,000/- had been his faithful motor car driver for 18 years. He was a trusted servant whose daughter was adopted by the deceased and Marina on the writing P21 of May 1953. The deceased had given during his lifetime proportionately more to the Respondent than to the Petitioner and he therefore left the residue equally to the Petitioner and Respondent his only children, but he made the Respondent the elder daughter the executrix as in his previous Wills. It is submitted that the Learned District Judge was entirely wrong in holding that this last Will was an unnatural one.

(n) There was clear uncontradicted evidence that the deceased had about Rs.60,000/- in his safe, money which he had received by the sale of property to one Vincent Corera. The evidence disclosed that the deceased had always a considerable sum of money in the safe in which he kept his deeds and other valuable documents. It is admitted that the Respondent came to the house of the deceased in his last illness and took charge of the keys etc. When the safe was opened in Court only a sum of Rs.800/- was found in it and the Respondent admitted that she had removed some deeds from the safe. The bank balance of the deceased was Rs.3801/20. There is little doubt that the Respondent had appropriated the large sum of money to herself and had destroyed the Will No.474, a circumstance which necessitated the proof of the said Will by the protocol found with Proctor Tudugala. p.49 l.27

(o) There was literally a race between the Respondent and the Petitioner. The deceased died on 22.2.54. On 26.2.54 the Respondent applied for order absolute in the first instance without making anybody a Respondent and there was no reference to any widow or other heir in the petition. The Learned District Judge however entered order nisi. p.1

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p.18 A second attempt was made by the Respondent again to obtain order absolute in the first instance on 14.5.54. In this petition too there was no Respondent named, but the existence of the widow and the Petitioner was disclosed only then. It was this second application which was granted on 16.6.54.

p.22 Meantime the Petitioner's husband was going to the Proctors in different parts of the Island with whom

p.249 the deceased had dealings to ascertain if he had left a last Will. There is evidence among others he went to Proctor Samarasekere in Matale, Proctor Velupillai in Avissawella, Proctor Sathasivam in Nawinna and Proctors Wikesekera and A.V.Fernando in Moratuwa. It was finally at Proctor Tudugala's that it was ascertained that the last Will for which the Petitioner was searching had been made. Consequently it was only on 8.7.54 that application was made by the Petitioner to revoke the order absolute by the production of P11. If the Petitioner had decided to get a last Will forged, it is inconceivable that it should have been done after the order absolute had been made in respect of the probate of Will No.454. It should have been done long before. The Learned District Judge has completely omitted reference to this part of the argument of the Petitioner. He does not hold anywhere when the Will No.474 was forged nor did the Respondent or her Counsel suggest when it was forged.

(p) On 20.2.54, two days before the Testator's death just before he was taken to the hospital by the Respondent, a letter was sent to the Petitioner purporting to be written by the Testator asking her not to come to see the Testator. The Petitioner contended that the signature and the lower portion of the letter was not in her father's (testator's) handwriting as was contended by the Respondent, but that it was written by Simon the Respondent's employee and her son Lala. She complained to the Village Headman who made inquiry from Simon who admitted to him that it was fabricated by the Respondent and her son and that the Testator was in a state of complete unconsciousness at the time. At the time Respondent's evidence was that the

p.289 l.31 Testator was quite conscious, that he got the upper part of the letter written by Simon and the Testator himself wrote the latter portion, and Simon

pp.328-9 himself supported the Respondent's version and suggested that the Village Headman had deliberately made a false entry. The Learned District Judge

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rejected the evidence of Simon, upheld the Village Headman's evidence and held that the letter was sent at the instance of the Respondent. This finding shows that the Respondent had fabricated a false document, was guilty of causing a document to be forged and deliberately gave false evidence and caused her employee to perjure himself. The Learned District Judge should not have given any credence to the rest of her evidence and it is submitted her entire evidence is not worthy of belief. pp.451-2

(q) With regard to the handwriting expert's evidence called by the Respondent in support of her contention of forgery which occupied 3 or 4 days of trial and ran into 71 pages, the Learned District Judge correctly holds he is not justified in acting on such evidence in regard to the signature of the Testator. In regard to the signature of the witness C.Vethecan, having held that Mr.Muthukrishna the expert had insufficient standards to express an opinion, that the main reason for his opinion was wrong and that Mr. Vethecan's signature was regularly irregular, the Learned District Judge leaves the conclusion he should have drawn in a delightfully vague state by posing a question of the possibility that a forger forged a signature without having any specimen before him. It is submitted with respect that such an absurb possibility was never suggested at any stage of the trial. He then proceeds to create a difficulty in his mind when he wrote the judgment in regard to the cross-bar in the letters "th" which difficulty the learned trial Judge himself disposed of in the course of the trial. p.473 l.7 pp.473-4

(r) The evidence of Mr.Muthukrishna was that he saw a pen-lift in the letter V of the impugned signature of C.Vethecan and this he said proved that it was the work of a forger inasmuch, as there was a fresh piece of the writing or an added stroke. He produced enlarged photographs and enlarged drawings to corroborate what he saw, which made a profound impression on the Court at the time. All objections taken to these drawings made at home by Mr. Muthukrishna were summarily overruled by the Learned District Judge. In cross-examination Mr. Muthukrishna, as the Learned District Judge holds, admitted that in fact there is no pen-lift and no added stroke, and that the original has not been pp.350 et seq.

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tampered with. In re-examination he ventured to offer an explanation which the Learned District Judge held was not in any way satisfactory. Counsel for the Respondent in his address had nothing to say to explain this. The Learned District Judge who in regard to the witnesses of the Petitioner had no hesitation in rejecting evidence or characterising them false, no matter whether the witness was a respectable person or whether there were contradictions in the evidence or not, did not draw the normal and reasonable inference that Mr. Muthukrishna was responsible for this or that his evidence was false.

(s) It is submitted in any case that this proved that an attempt had been deliberately made on behalf of the Respondent to create false documents and mislead the Court. If the Learned District Judge had only given his mind to the fact that the Respondent had caused the forging of the deceased's signature on the letter sent while the Testator was in hospital, and an attempt had been made on her behalf to create false evidence and mislead the Court, he could not have accepted her evidence or held that Will No. 474 was a forgery.

p.427 l.47 (t) The Learned District Judge was misdirected himself both on the question whether the year in which the deceased came to reside in Kaldemulla permanently is a material point for decision, and also on the actual year when he did take up his residence permanently. All the witnesses said they could not remember the actual year. They were giving evidence several years later. As far as they remembered it was in 1950 or 1951. When in cross-examination it was suggested the date was after the sale of Naugala Estate they said it might be so because they could not remember the exact date, The deceased may have left Matale and come to reside in Kaldemulla in 1950 or 1951 perhaps after the sale of High Walton, but gave up all connections with Matale when he sold Naugala Estate in June 1952. If the Learned District Judge had considered the bathing incident and the meeting under the portico uninfluenced by his conclusion with regard to when exactly the deceased returned to Kaldemulla permanently, he would have had no difficulty in believing the two incidents and would have accepted the

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evidence of John Appuhamy and Aloe Nona and not held that this was a malicious fabrication.

(u) Having formed his theory thus, the Learned District Judge seems to have been overtaken by the feeling that he must disbelieve or reject the evidence of most respectable witnesses who had no motive or interest in giving any evidence that was untrue e.g. Proctor A.V.Fernando and Revd.Dhammaloka Thero. Having done that he proceeded further to disbelieve the evidence of Proctor Tudugala, Proctor Devapuraratne and the Appellant, Nancy Catherine and Peiris wrongly.

(v) The deceased harboured a dislike of his wife Nancy because she was constantly reminding him to give up his mistress Marina and return to her. p.108 l.1 He sometimes identified the Petitioner with her mother because she had to be loyal to her mother, but that he had changed his attitude towards the Petitioner and was no longer resentful is proved by the admitted fact that he bought her a pearl set of jewellery. The Learned District Judge has completely omitted reference to this, and holds incorrectly that the deceased was not on cordial terms with the Petitioner even in 1946 by reasons of an undated letter addressed to some unknown person which the Appellant doubted contained the deceased's signature.

(w) A good deal of the Learned District Judge's conclusions are based on speculation. With reference to the unquestioned evidence that the deceased had intended and made preparations to donate some valuable properties to the Petitioner's Children, the Learned District Judge wonders why such a disposition was not made in Will No. 474 p.425 l.19 and why Proctor A.V.Fernando or the retired Village Headman did not give an explanation in regard to the deceased not carrying out his intention. It was not included in Will No. 474 because the deceased wanted to make the gift inter vivos and no explanation was asked of Proctor Fernando or the Village Headman as to why he did not execute the deed. Admittedly the deceased was temperamental and acted whimsically.

(x) The Learned District Judge had misinterpreted the evidence of Revd. Wickremanayake and was wrong in rejecting the evidence of the retired Village Headman, John Appuhamy and Aloe Nona and should

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pp.92,227, 197 pp.43,105, 244 have accepted the evidence of the Petitioner, Nancy, and Austin Peiris. There was nothing in their cross-examination to suggest that they were giving anything but truthful evidence.

(y) If Will No. 454 of 1950 stood there was no necessity for the deceased to transfer the house in Melbourne Avenue to the Respondent as she was the sole devisee under that Will. The explanation of the Respondent for the transfer was a lame one and p.285 should have been rejected. 10

p.485 p.488, l.46 p.493, l.9 pp.493-4 9. The Supreme Court (Gunasekera and Sansoni J.J.) declined to disturb the findings of the learned trial Judge upon which he based his conclusion that Will No. 474 is an unnatural one, or to reverse his findings in regard to the credibility of the two proctors, Mr. Tadugalla and Mr. Devapuraratne, and appeared to accept the finding that the deceased did not after June 1951 make statements to the effect that he had made Will No. 474.

p.497 10. Final Leave to appeal to Her Majesty in Council was granted on the 4th March, 1959. 20

11. The Appellant humbly submits that this is a case in which it is right that the Judicial Committee of the Privy Council should review the evidence owing to the unusual nature of the case and the gravity of the findings. It is submitted that the Appeal should be allowed, with costs, and the Judgments of the Supreme Court and the District Court be reversed for the following, amongst other,

R E A S O N S 30

(1) BECAUSE on the evidence the Judgment of the District Court was wrong and ought to have been reversed by the Supreme Court on the grounds set out above in paragraph 7.

(2) BECAUSE on the evidence the District Court was wrong in (a) finding that Will No. 474 was an unnatural Will, (b) finding that the deceased had not told anyone that he had executed such 40 a document, (c) rejecting the direct

evidence of the two proctors Tudugalla and Devapuraratna and concluding that this signature of the deceased on Will No.474 was a forgery.

(3) BECAUSE the Supreme Court were not justified in accepting the findings and conclusions of the District Court.

(4) BECAUSE on the evidence the Petitioner is entitled to the relief claimed by her.

10 RALPH MILLNER