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made between this case and the previous case, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, for the appellant, *Macnamara & Smith.*

Solicitor, for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

C. E. W.

[HIGH COURT OF AUSTRALIA.]

GAIR AND OTHERS . . . . . APPELLANTS;

AND

BOWERS AND OTHERS . . . . RESPONDENTS.

GAIR AND OTHERS . . . . . APPELLANTS;

AND

BOWERS AND OTHERS . . . . RESPONDENTS.

FALCONAR . . . . . APPELLANT;

AND

BOWERS . . . . . RESPONDENT.

GAIR AND OTHERS . . . . . APPELLANTS;

AND

H. C. OF A. 1909. FALCONAR . . . . . RESPONDENT.

MELBOURNE. *Sept.* 1, 3, 6, 7, 8, 14.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Will—Execution—Evidence—Will not produced—Affidavit contradicted by oral evidence—Presumption of due execution—Statements made by testator after execution—Revocation by subsequent will.

A testator instructed his solicitor to prepare a will, which was duly engrossed and left with the testator for execution, and he was instructed as to the proper mode of execution. The document was not found at the testator's death, about 18 years afterwards, and an application was made for probate of a draft of it, which was supported by an affidavit of one of the alleged witnesses (the other being then dead), who swore to facts which if believed would have proved without doubt that the will was duly executed by the testator shortly after he received the engrossment. On the hearing of an order *nisi* for probate, that affidavit was put in evidence, but the deponent being examined *viva voce* swore that he did not know that the document he signed was a will except from what the other witness had told him some time afterwards; that he did not see the testator sign; that he did not see the testator's signature upon the will; and did not know whether the other witness signed or not.

Held, that, it appearing that the statements in the affidavits were made on information and belief, there was no evidence that the will was duly executed, and therefore that probate should not be granted of the draft.

Statements made by a person after the alleged execution of a will by him are not admissible as evidence of such execution.

Atkinson v. *Morris*, (1897) P. 40.

The revocation of a will which has been duly executed will not be established by the execution of a subsequent will which is not produced, unless the latter will is clearly proved to have contained an express revocation of the earlier will or dispositions inconsistent with those in the earlier will.

Cutto v. *Gilbert*, 9 Moo. P.C.C., 131, followed.

Decision of the Supreme Court of Victoria: *In re Taylor*, (1909) V.L.R., 235; 30 A.L.T., 203, reversed.

APPEALS from the Supreme Court of Victoria.

Arthur Wellesley Taylor died on 27th June 1908 having made a will dated 13th June 1890, as to the due execution of which there was no question, by which he appointed Mackay John Scobie Gair, Robert Blacklock Bowers and John Burgess Mansfield his executors. These executors having applied for probate of the will, caveats against the granting of the probate were lodged by Robert Blacklock Bowers, George Arthur Price, and Alfred Gillman Hall who claimed to be the executors of a will executed by Taylor and dated 17th December 1900, and by John Falconar who claimed to be one of the next of kin of the testator. Two orders *nisi* were obtained by Gair, Bowers, and Mansfield, one calling upon Bowers, Price and Hall, and the other upon Falconar,

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to show cause why probate of the will of 13th June 1890 should not be granted to the executors named therein.

Bowers, Price and Hall had applied for probate of a draft of the will of 17th December 1900 and, caveats having been lodged by Gair, Bowers and Mansfield and by Falconar, two orders *nisi* were obtained by Bowers, Price and Hall, one calling upon Gair, Bowers and Mansfield, and the other upon Falconar, to show cause why probate of a draft of the will of 17th December 1900 should not be granted to the executors named therein.

The four orders *nisi* were heard together by *Hood* J. who held that the will of 17th December 1900 had been duly executed on 17th, 18th or 19th December 1900, and that probate should be granted to the draft of it. He therefore by orders of 19th February 1909 made absolute the two orders *nisi* in respect of the draft of the will of 17th December 1900, and discharged the two orders *nisi* in respect of the will of 13th June 1890: *In re Taylor* (1).

Gair, Bowers and Mansfield now appealed from the two orders made between them and Bowers, Price and Hall, and by special leave granted at the hearing appealed from the order made between them and Falconar. Falconar also appealed from the order made between him and Bowers, Price and Hall.

The facts sufficiently appear in the judgments hereunder.

At the hearing Bowers who appeared as an appellant with Gair and Mansfield and also as a respondent with Price and Hall, was struck out as an appellant and left in only as a respondent.

Mitchell K.C. (with him *Hayes* and *Winneke*), for the appellants Gair and Mansfield. Probate should be granted of the will of 1890 unless it be established that a subsequent will was duly executed. As to the execution of the will of 1900 statements made by the testator after the date of its alleged execution are inadmissible.

[GRIFFITH C.J.—We need not trouble you upon that question.]

This is a case in which the Court will review the Judge's findings of fact: *Luke* v. *Waite* (2). There is no evidence that the will of 1900 was duly executed. *Hood* J. acted upon probabili-

(1) (1909) V.L.R., 235; 30 A.L.T., 203. (2) 2 C.L.R., 252.

ties only. Where there is a will on its face in regular form a presumption will arise that it was duly executed.

[HIGGINS J. referred to *Burgoyne* v. *Showler* (1).

ISAACS J. referred to *Lloyd* v. *Roberts* (2).]

There is no case which supports the contention that the presumption will arise if the will is not produced.

[*Agg* cited *Harris* v. *Knight* (3).]

In that case the will was lost after the testator's death. See also *In re Thomas* (4); *Bird* v. *Lake* (5). There is no evidence that the document which Mollison signed was a will, or, if it was a will, that it was duly executed, except Mollison's affidavit, and that was evidently made by him under a misapprehension.

Agg (*Duffy* K.C. with him), for the respondents Bowers, Price and Hall. *Hood* J. could properly find that the will of 1900 was duly executed. He was justified under the circumstances in disregarding the oral evidence of Mollison and acting upon his affidavit: *Pilkington* v. *Gray* (6); *Wright* v. *Rogers* (7).

The facts deposed to in the affidavit are much more probable than those deposed to in the oral evidence and should be acted on: *Cooper* v. *Bockett* (8). The declarations of the testator made after the execution of the will are admissible as evidence of its due execution. They are admissible as being declarations accompanying an act done, viz., the making of the will: *Roscoe's Nisi Prius Evidence*, 13th ed., pp. 54, 163. They are at any rate evidence of the contents of the will: *Johnson* v. *Lyford* (9), and being admitted on that ground, they are admissible for all purposes. [He referred to *Doe* v. *Palmer* (10); *In re Ripley* (11); *Cutto* v. *Gilbert* (12); *Sudgen* v. *Lord St. Leonards* (13); *Atkinson* v. *Morris* (14); *Clery* v. *Barry* (15).]

[HIGGINS J. referred to *Wills on Evidence*, 2nd. ed., p. 368; *In re Sykes* (16); *In re Adamson* (17).

ISAACS J. referred to *Blake* v. *Blake* (18).]

(1) 1 Rob. E., 5.
(2) 12 Moo. P.C.C., 158.
(3) 15 P.D., 170.
(4) 1 Sw. & Tr., 255.
(5) 1 Hem. & M., 111.
(6) (1899) A.C., 401.
(7) L.R. 1 P. & M., 678.
(8) 4 Moo. P.C.C., 419, at p. 439.
(9) L.R. 1 P. & M., 546.
(10) 16 Q.B., 747.
(11) 1 Sw. & Tr., 68.
(12) 9 Moo. P.C.C., 131.
(13) 1 P.D., 154.
(14) (1897) P., 40.
(15) 21 L.R. Ir., 152.
(16) L.R. 3 P. & M., 26.
(17) L.R. 3 P. & M., 253.
(18) 7 P.D., 102.

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Cohen (with him *Braham*), for the respondent Falconar. There is evidence that a will was undoubtedly made in 1901, and if it was it would invalidate the will of 1890 and that of 1900, and not being in existence now there would be an intestacy.

If the will of 1900 were found to have been duly executed, it revoked the will of 1890, and as it is not now produced, and as it was in the testator's custody, the presumption is that it was destroyed with the intention of revoking it. Assuming that a will was executed in 1901, the declarations that the testator meant to revoke his former will is evidence that the will of 1901 contained a clause of revocation and that would invalidate the will of 1890, if it was then valid. The printed will form was admissible in evidence for the same purpose. [He referred to *Taylor on Evidence*, 10th ed., p. 335; *Keen* v. *Keen* (1); *Sudgen* v. *Lord St. Leonards* (2); *Wood* v. *Wood* (3)].

[ISAACS J. referred to *Nawab Sahib Mirza* v. *Mussammat Umda Khanam* (4).]

The statements made by the testator after the execution of the will of 1900 are admissible to show that the document was signed, and there is sufficient evidence that the testator and two witnesses signed it. [He referred to *Johnson* v. *Lyford* (5); *Phipson on Evidence*, 4th ed., p. 298; *In re Peverett* (6); *Dayman* v. *Dayman* (7); *Olver* v. *Johns* (8); *Pilkington* v. *Gray* (9).] Once the conclusion is arrived at that the will was signed by the testator and two witnesses, the presumption of due execution arises, and Mollison's evidence may be disregarded. See *Blake* v. *Knight* (10); *Brenchley* v. *Still* (11). Assuming the will of 1900 to have been duly executed, it must under the circumstances be deemed to have been revoked by the testator destroying it while he was of sound mind. *Theobald on Wills*, 7th ed., p. 51; *Allen* v. *Morrison* (12); *Harris* v. *Berrall* (13); *Sprigge* v. *Sprigge* (14); *Gould* v. *Lakes* (15).

(1) L.R. P. & M., 105.
(2) 1 P.D., 154, at p. 225.
(3) L.R., 1 P. & M., 309.
(4) L.R., 19 Ind. App., 83.
(5) L.R., 1 P. & M., 546.
(6) (1902) P., 205.
(7) 71 L.T., 699.
(8) 39 L.J.P. & M., 7.
(9) (1899) A.C., 401.
(10) 3 Curt., 547.
(11) 2 Rob. E., 162.
(12) (1900) A.C., 604.
(13) 1 Sw. & Tr., 153.
(14) L.R., 1 P. & M., 608.
(15) 6 P.D., 1, at p. 5.

Duffy K.C. in reply. Admitting the presumption of revocation by destruction, where the testator had become insane the onus is on those asserting destruction to show that the destruction was done before insanity occurred. Here the testator had an opportunity while insane of destroying the will. If the will was destroyed with an intention of revoking it conditionally upon a new will being made, and if no new will is produced, then the will which was destroyed will still be good: *Dixon* v. *Solicitor of the Treasury* (1).

Mitchell K.C., in reply, referred to *Cutto* v. *Gilbert* (2); *Berthon* v. *Berthon* (4); *Hellier* v. *Hellier* (3); *Theobald on Wills*, 7th ed., p. 44.

Braham, in reply on Falconar's appeal.

Cur. adv. vult.

Sept. 14.

GRIFFITH C.J. This is a very curious case. Several questions have been raised for decision, and, as to all of them, it may be said that there is very strong ground for conjecture. But the question is, whether in respect of any of them the evidence goes further than ground for conjecture. Mr. *Mitchell's* clients propounded a will of 13th June 1890. That was duly executed, and no question arises as to its validity at the time. Caveats were lodged against the granting of probate of that will by Mr. *Duffy's* clients who propounded a will of 17th December 1900, and Mr. *Cohen's* client (one of the next of kin), who alleges an intestacy. Two orders *nisi* were taken out by Mr. *Mitchell's* clients to get rid of those caveats. Mr. *Duffy's* clients having applied for probate of the will of 17th December 1900, caveats were lodged by Mr. *Mitchell's* clients and by Mr. *Cohen's* clients, and two orders *nisi* were taken out by Mr. *Duffy's* clients in respect of those caveats and made absolute by an order of 19th February of this year. Mr. *Mitchell's* clients now appeal against all these orders so far as they are concerned, and Mr. *Cohen's* client appeals against the order against him of 19th February.

(1) (1905) P., 42.
(2) 9 Moo. P.C.C., 131.
(3) 18 L.T.N.S., 301.
(4) 9 P.D., 237.

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No question arises as to the will of 1890. In respect of the will of December 1900, the question is whether its execution has been proved. It is not forthcoming, but its contents, if it ever was executed, are proved, and there is no doubt that if it is valid it revoked the will of 1890. The testator was a dealer in furniture. In December 1900 he instructed his solicitor to prepare a will, which was duly engrossed and left with him for signature, and had at the end of it a full attestation clause. If the document itself were produced and the signatures appeared upon it, a presumption of due execution might be founded upon the position of the signatures. That would be so also if a witness had seen it with the signatures upon it. But no evidence of that sort was available, and so the case must depend upon direct testimony of witnesses without the assistance of presumption.

Two persons are said to have attested that will, Dr. Gray, who is dead, and one Mollison, who was in the employment of the testator at that time. When application was made for probate of that will the ordinary affidavits were filed as is usual when application is made to the Registrar for probate, and amongst them was one made by Mollison on 4th July 1908 which contained the following paragraph (par. 4):—"Just before the abovenamed deceased left for New Zealand in the month of December as aforesaid the abovenamed deceased called me from the storeroom into his office where Andrew Sexton Gray late of No. 13 Collins Street Melbourne Surgeon but since deceased was already in attendance and the abovenamed deceased thereupon in the presence of myself and the said Andrew Sexton Gray signed his name to his will and the said Andrew Sexton Gray and myself in the presence of the abovenamed deceased and of one another wrote our names as witnesses attesting the execution of the same." Now that affidavit was made for the purpose of an *ex parte* application for probate, and, if no more appeared in the case, it would have been quite sufficient to justify the Registrar in granting probate. But caveats were lodged and thereupon the position became changed. What follows in such a case is provided for by the *Administration and Probate Act* 1890. Sec. 18 allows any person to lodge with the Registrar a caveat against an application for probate. Sec. 19 provides that when

a caveat is lodged the Court may make an order *nisi* for the grant of probate to the person applying. Sec. 21 provides that, if the caveator appears upon the return of the order *nisi*, the hearing is to be conducted "in the same manner as nearly as may be as upon a trial." Sec. 22 allows the parties, subject to rules of Court, to verify their respective cases in whole or in part by affidavit, subject to oral cross-examination if required. Sec. 23 provides that if any question of fact arises it may be tried by a jury, "and the same shall be tried in the same manner as an issue under any rule of Court for the time being in force relating to the trial of issues."

The position then was this: the order *nisi* having been made, the parties were at issue, and the case had to be tried in the same manner as the ordinary trial of an issue, that is, on evidence adduced for the purpose *inter partes*. The onus of proving the will of 1900 was of course upon the propounders. Mollison's affidavit was put in evidence. It is very doubtful whether it was strictly admissible, as the sections of the Act appear to provide for the use of affidavits made after the order *nisi*. Moreover by rules of Court the affidavits are required to be filed in the office of the Master-in-Equity four days before the day appointed for the hearing and this affidavit was not filed in that office at all. But the affidavit was read and no objection was taken to its admission in evidence, and I am disposed to treat the case as if the objection, if good, was waived.

Mollison was then cross-examined. He said:—"I never saw Dr. Gray sign any paper. I saw no signature of Taylor's that I know of. About the time Taylor went to New Zealand he called me into his office and asked me to sign a paper. I did so and walked out. Dr. Gray was in the room. That was all and nothing was said. I noticed no name on the will. Taylor did not say what the paper was. I had very often signed papers for Taylor in the same way without knowing what they were. About 3 or 4 months afterwards I saw Dr. Gray at the Eye and Ear Hospital when he said it was a will I had signed. I saw Hall" (the solicitor for Mr. *Duffy's* clients) "shortly after Taylor's death." Then in examination by Mr. *Duffy* he said:—"When I signed the affidavit I thought I was telling the truth.

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After I made the affidavit I saw Gair in August. He asked me had I signed an affidavit. I said 'Yes.' He said 'Are you aware what you are signing?' (We had never met before). He said 'Would you like to hear it read?' He asked me did I see Taylor sign the will. That was before the reference to the affidavit. Gair came to see me. He told me who he was and asked me did I see Taylor sign the will. I told him 'No.' He said 'Did you see Gray sign the will?' I said 'Not that I know of.' He said 'Would you like to hear the affidavit read?' He said he would get a copy and read it to me. Taylor did not sign in my presence. On 8th February 1909 I saw Pitcher" (a clerk of the solicitor for Mr. *Duffy's* client) "and another gentleman. I did not say to them that I did not remember whether Taylor and Gray had signed the paper. I may have said this first. I do not recollect saying it. If I did I asked them to alter it. Four years after being in Taylor's office I told Hall I had seen Taylor sign the will. I said that Dr. Gray told me the paper I had signed was Taylor's will. I have signed 20 or 30 documents for Taylor. Only one in the presence of Dr. Gray. I cannot tell anything about any of the others. Sometimes a customer was present. I put my name down and walked away. He never said what I was to do except to sign my name. On this occasion the paper was not one of our forms. I once before signed a paper as to which I cannot say whether it was a time payment agreement or not. This was 6 or 12 months before Dr. Gray was there. I cannot say what it was. On 4th July Hall asked me about the will and whether I saw Taylor and Gray sign. I said 'Well it is a long time ago and it is hard to remember.' I cannot say I saw them sign. Dr. Gray said to me that the paper I signed was Taylor's will."

Now the sum of that statement, made on oath in the witness box when Mollison was a witness for the parties propounding the will, is that he did not know that the document which he signed was a will at all, except from what Dr. Gray told him some time afterwards; that he did not see the testator sign; that he did not see the testator's signature upon the document; and that he did not know whether Dr. Gray signed it or not. In order to break down that statement, evidence was offered of pre-

vious statements made by Mollison; and it appeared that he had on previous occasions made statements which were relied upon as if they were evidence of the facts that Mollison had asserted on those occasions to be true. But those statements were not evidence of the truth of what he said on the previous occasions. They were only evidence to discredit his sworn testimony in the witness box, but added nothing by way of positive evidence for the purpose of discharging the burden of proof of the proponents of the will. I will, however, refer to those statements so far as is necessary. Hall, the solicitor for the executors of the will of 1900, said:—"I had a conversation with Mollison on 25th October 1904. I said, 'Taylor told me he signed his will in the presence of yourself and another witness in December 1900, just before he went to New Zealand.' He said, 'Yes; I witnessed his will with Dr. Gray.' I saw Mollison on 2nd July 1908. I said, 'We have not got the original will executed by Taylor in 1900, and it is necessary now for us to have evidence of witnesses as to the signing of the will. I want you now to tell me what you recollect about it.' He said, 'It is a long time ago and I have signed a lot of papers for Taylor. I cannot recollect exactly.' I said, 'No one would expect you after a lapse of time to give all details, but I want you to tell me as nearly as you can what took place.' He said, 'Dr. Gray was at Mr. Taylor's, and I was called in and signed with him.' I said, 'Do you recollect who signed first or any of the particulars?' He said, 'No, I could not recollect that.' I said, 'Do you recollect my speaking with you in 1904 outside the Rialto?' He said, 'Yes; you spoke to me and I then told you I witnessed the will with Dr. Gray, and I gave you my name and address.' I said, 'Well, you will have to think this matter over, and if you can think of anything further tell me, but don't venture to say anything you cannot recollect, because after a lapse of time it is not wonderful if you forget something.' I said, 'This is the attestation clause in the document I left with Taylor.' (I read the clause to him.) 'You do not usually sign documents along with doctors, and as this clause was there that was probably what you did. However, you think it over and I will see you again.' He said, 'When I spoke in 1904 you forgot the name of the doctor, and I then told you it was Dr. Gray.' I

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said. 'Is he alive now?' He said, 'No, he died a little while ago.' I said, 'Where did he practice?' He gave me the address 'top of Collins Street,' and told me that a few months after the will was witnessed, at the Eye and Ear Hospital he had a conversation with Gray, who had inquired after Taylor's health, and said 'Well, if anything happens, it will be all right because that was his will that we witnessed.'"

That conversation was on 2nd July, and on 4th July the affidavit to which I have referred was sworn by Mollison. Now, what was the state of Mollison's mind at the time when he made that affidavit? According to Mr Hall's version of what he said at that time, all Mollison knew of his own knowledge was that he had signed a document, and he only knew it was a will from what Dr. Gray told him afterwards. He did not know whether it was signed by the testator or was attested. That being the state of Mollison's memory on 4th July, Mr. Hall saw him again on 8th August, and this is Mr. Hall's account of the interview:—"On 8th August he told me Gair had written to him but he took no notice of the letter, but Gair came to see him, and that he, Mollison, said he was positive he did not see Taylor sign and he did not know it was a will, and he should not have made the affidavit. I said, 'You had time to think over the matter. I read the affidavit over to you and you said it was all correct before you signed the affidavit.' He said, 'My wife and brother told me I should not have signed any paper, and I want to get the affidavit back.'" The affidavit was, however, used, as I have said, for the purpose of the application for probate.

The other evidence relied upon was an interview between Pitcher, the clerk to the solicitor, and Mollison when Mollison made a statement, a note of which was taken by Pitcher and was put in evidence. I need only refer to what happened on 2nd July. "Mr. Hall asked me about the will and whether I saw Mr. Taylor or Dr. Gray sign it. I said, 'Well, it is a long time ago and I cannot remember, but I did not see Mr. Taylor or Dr. Gray sign the will in my presence.' I said, 'I remember Mr. Taylor going to New Zealand in December 1900, and just before he went he called me into his office. Dr. Gray was there. Mr. Taylor got me to sign a paper.' I said, 'Dr. Gray died recently.' I said,

'I cannot now say absolutely it was Mr. Taylor's will I signed, but I believe it was, but after this lapse of time I cannot recollect what took place or that I recollected Mr. Taylor or Dr. Gray signing the paper in my presence.'"

Under those circumstances the Court was invited to believe that the affidavit of Mollison was true and that his oral sworn testimony was incorrect. The only other evidence relied upon in support of the execution of the will was a statement made by the testator about 19th December 1900 to Mr. Hall, which, if admissible, would be very strong evidence that the will was executed. He told Hall that he had duly executed the will on the previous Monday in the presence of Dr. Gray and his driver. But since the case of *Atkinson* v. *Morris* (1) it is settled that such evidence is not admissible, and the learned Judge did not act upon it.

Under those circumstances is there any evidence at all of the due execution of the will or is it all conjecture? The onus is upon the proponents. If the oral evidence is rejected and the affidavit of Morrison is relied upon, what is its weight? On an examination of the affidavit, it appears that it only contains statements made upon information and belief—information by Dr. Gray and belief impressed upon Mollison by the argument of Mr. Hall. In my opinion that does not stand in any better position than evidence on information and belief, and evidence on information and belief is not admissible on a trial. The Rules of the Supreme Court, indeed, provide to that effect. There is no evidence of presumption, for there is nothing upon which to base the presumption. I therefore come—and I confess reluctantly—to the conclusion that there is nothing more than conjecture to support this will, and that the Order of 22nd February 1909, upon which probate was granted, cannot be supported.

The next question is whether, that will being out of the way, the will of 1890 has been revoked. Mr. *Cohen's* client, setting up an intestatcy, says that it was revoked by a third will executed in 1901. Without referring to the evidence in detail, there is evidence, to my mind very strong, of the due execution of a will at a time fixed by circumstantial evidence as being about the end

(1) (1897) P., 40.

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of March 1901. But there is no evidence of what that will contained. Evidence was tendered to show that shortly before that time the testator had obtained from a friend a blank form of a will on blue paper, and it was sought to put in evidence a similar form with the view of asking the Court to draw the inference that the will the testator executed was in that form. That form contained a clause of revocation. The evidence was rejected. I am disposed to think it might have been received in evidence, but, if it had been admitted, it would not have shown that the clause of revocation was in the will when the will was executed. There is, therefore, no evidence of the contents of that will. The fact of the execution of a will even beginning with the words "This is my last will and testament" is not of itself evidence of the revocation of a former will. That cannot be disputed since the case of *Cutto* v. *Gilbert* (1).

The result is that there is no evidence of the revocation of the will of 1890 by a later will. If the document is in existence it must be produced. So that, as the case stands, the will of 1890 is entitled to probate.

I should refer briefly to an argument put forward by Mr. *Cohen* as to the revocation of the will of 1900 by the testator. That depends upon the validity of the will of 1900, if the execution of that will had been proved. I think there was evidence of its revocation by destruction. It remained in the testator's custody, if it ever was executed, and when in August 1901 his health became broken, a search was made in his safe and in other places where a will was likely to be kept but it was not found. That was after March 1901 when probably another will was executed, and I think a fair inference might have been drawn that the testator destroyed the will of 1890 about the same time as the execution of the will of March 1901. But the execution of the will of 1900 has never been proved, which was necessary in order to get rid of the will of 1890. The result, therefore, is that there is a will established, and there is no evidence that it was revoked, and no evidence of the execution of the second will, or of the contents of a third will which might or

(1) 9 Moo. P.C.C., 131.

might not have revoked the first will. Under these circumstances it appears to me the first will is entitled to probate.

O'CONNOR J. The starting point in the history of the testator's disposal of his property is the will of June 1890. As far as that will is concerned, as it appears to have been duly executed, the only question now raised is whether it was revoked by either of the two later wills in respect of which evidence has been given. If the will of December 1900, propounded by Mr. *Duffy's* clients is proved, then the will of 1890 is, of course, revoked. But assuming the will of December 1900 to be proved, then there is a further question raised by the next of kin. On their behalf Mr. *Cohen* alleges that there is a will subsequent to that of December 1900, the purport of which is unknown except that it is alleged to have contained a revocation of all previous wills. If that is so it would effect a revocation of the will of December 1900. As far, therefore, as the issues we have to deal with are concerned, they turn principally upon whether the will of 1900 was duly executed, and whether there was a will executed after that which had the effect of revoking all previous wills. Now, in the establishment of the due execution of the will of December 1900 the proponents rely, first, upon the affidavit of Mollison sworn on 4th July 1908. If there were nothing in the case but that, the affidavit on its face establishes that the will was duly executed. But under the procedure allowed by the *Administration and Probate Act* 1890, the affidavit having been put in evidence, Mollison was cross-examined. He gave direct evidence of what he knew about the execution of the will of 1900. His evidence as to its execution amounts to this: —He had been an old and confidential employé of the testator and on many occasions, between 20 and 30, the testator had called him in to witness documents; that on this occasion the testator called him in to witness a document the nature of which he did not know; that he saw Dr. Gray there; that he did not see the testator sign; that he did not see Dr. Gray sign; and that he did not know that the document was a will until six months afterwards when Dr. Gray told him the document he had witnessed was a will. After that his attention is not called to the

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matter so far as we know until 25th October 1904, when he meets Mr. Hall and tells him he had witnessed this will and that Dr. Gray was the other witness. His attention is not again called to the circumstances until 2nd July 1908 when Mr. Hall sees him again and the conversation takes place to which the learned Chief Justice has referred. There can be no doubt that at the time of that last conversation all that Mollison remembered was that he had signed his name as witness to a document. As to whether he had seen the testator or the other witness sign his mind was evidently a perfect blank. After that lapse of time Mr. Hall was right in calling his attention to what must have been done by reading the attestation clause over to him. Two days afterwards Mollison went into Mr. Hall's office and signed the affidavit prepared for him. The affidavit follows the usual and somewhat technical form as to the execution of a will in the presence of two witnesses and their attestation in the presence of each other. It is quite likely, in my opinion, that a person, who is not used to the examination of documents or the bearing of words towards one another, would miss the point of the paragraph in the affidavit as to the witnesses having attested the will in the presence of each other and as to their having seen the testator sign it. However that may be, Mollison made the affidavit. Some short time afterwards his attention was called to the matter by Mr. Gair, who threw doubt upon the correctness of the affidavit. Mollison then came into Court and gave evidence. He was cross-examined and, in order to show that his evidence in the witness box as opposed to his evidence on affidavit is not to be relied upon, several conversations with Mr. Hall and one or two with Mr. Pitcher were given in evidence. Those conversations cannot have any materiality as evidence of what took place at the time of the alleged execution of the will. They can only affect Mollison's credibility. No doubt there are in the books many cases in which a will regular in form on being produced, showing an attestation clause signed by two witnesses, has been held to have been duly proved, notwithstanding the direct evidence of the witnesses that the statement in the attestation clause is incorrect. In these cases the Court has found that the recollection of the witnesses was not to be relied upon,

and that the will had in fact been properly executed. So much weight is given to the presumption that a will, which contains an ordinary form of attestation and which is signed by the testator and by the witnesses apparently in regular form, has been duly executed, that it has been allowed to outweigh the testimony of the witnesses swearing to the facts many years afterwards when the real circumstances had passed from their recollection.

In regard to the presumption of which I have spoken the foundation fact is the actual existence of the document at which the Court is able to look, which it is able to judge by its appearance. That is a solid foundation upon which to base the inferences which the Court draws in such cases. It is true there are cases in which the presumption is made where the will has not been produced, but in those cases the existence of the will and the signing of it by the testator and two witnesses are proved beyond question, and a picture of the document as it were is clearly brought before the Court. All that class of evidence is absolutely wanting here because, if Mollison's story is to be believed, he did not see that there were two signatures upon the document, and he did not see the testator's signature upon it. All he can prove is that he himself signed a document as witness. So that under the circumstances there is in this case no ground upon which any inference can be drawn against the very positive evidence of Mollison. I have no doubt that, if this matter could be determined by conjecture, the learned Judge below has come to a right conclusion. I think it is highly probable that the will was executed duly and in the presence of witnesses according to Mollison's affidavit. But a question such as the learned Judge had to try cannot be determined on conjecture. All the parties representing the other will and the next of kin are entitled to have a question of that kind determined only upon legal evidence.

In *Atkinson* v. *Morris* (1), Lord *Russell of Killowen* C.J. had to deal with a case in which he also formed a very strong opinion as to the probabilities of the case. He said (2):—"I come now to the second point, and I repeat that no one can doubt that this lady intended to revoke her will, and that the Court ought to be

(1) (1897) P., 40.

(2) (1897) P. 40, at p. 45.

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astute to give effect to that intention, if it can do so consistently with the established and settled principles of law. The *Wills Act* has laid down the formalities which are to be observed in order to make an effective and operative will; and, if those formalities are not complied with, the law steps in, and, however clear the intentions of the testator may have been, unless they are expressed conformably to the requirements of the Statute, they are disregarded, and his estate is distributed as upon an intestacy."

Exactly the same reasoning must apply to the evidence by which a case of the due execution of a will is to be established. For these reasons it appears to me that there is no evidence here upon which a jury could legally come to the conclusion that there was due execution of the will as required by law.

Some reliance was placed upon a declaration, made very shortly after the will was supposed to have been executed, by the testator himself to Mr. Hall. Whatever doubt as to the law may have been raised in *Sudgen* v. *Lord St. Leonards* (1), there is no question now, after the considered judgment in *Atkinson* v. *Morris* (2), that a declaration of due execution of his will made by a testator cannot be allowed to establish due execution.

I pass on now to the next question, that is to say, whether the will supposed to have been executed at some time between January and April 1901 was duly executed. I agree with the learned Chief Justice that there is very strong evidence given by Farr of the due execution of some will by the testacor, but it is clear that there is no evidence of its contents. Mr. *Cohen* endeavoured to put in evidence one of the forms which had been given to the testator by his friend Cosham some little time before the date of the alleged execution of the will. It may be that, strictly speaking, that document could have been put in evidence, but, if it had been put in evidence, it would not have carried the case any further, because, according to the evidence of the witness Farr, he could not have said more than that he believed the paper was something like the document tendered in evidence in form and colour. His evidence is that the will itself was folded up in such a way that he could not see any of its con-

(1) 1 P.D., 154. (2) (1897) P., 40.

tents. If the Judge had admitted the form, it is clear it would not have carried the matter any further. Mr. *Cohen's* client has therefore suffered no prejudice by reason of its rejection. Since the case of *Cutto* v. *Gilbert* (1) it must be taken as established that the only way in which a will can be revoked by a subsequent will is either by showing that the will itself contained a clause expressly revoking the former will, or that it contained a disposition which is inconsistent with the prior dispositions. Nothing of that sort has been proved with respect to the will of 1901. Under those circumstances it seems to me that both the attempts to prove revocation of the will of 1890 must fail, and the persons therefore propounding the will of 1890 are, subject to any other caveat which may be lodged, entitled to probate. Under these circumstances I think the judgment below must be set aside and the appeal allowed.

ISAACS J. read the following judgment:—As to the alleged will of December 1900, there is no document in existence which *ex facie* appears to have been regularly executed and therefore gives effect to the maxim *omnia presumuntur solemniter esse acta*, upon which the Privy Council proceeded in *Lloyd* v. *Roberts* (2). The proponents therefore have the initial burden of establishing its execution and regularity by substantive testimony.

I agree with what has already been said as to the declarations of the alleged testator. Putting those aside, the whole case of the proponents rests upon the affidavit of Mollison sworn 4th July 1908, seven years and a half after the events deposed to. Unless that affidavit can stand as regular and reliable considered as a piece of ordinary direct testimony, the proponents must fail.

Nothing appears in the case to reflect upon the personal or professional honour of Mr. Hall who prepared this affidavit for Mollison to swear to. He has very frankly placed the whole of the circumstances before the Court. But those circumstances very distinctly disclose the fact that the form of Mollison's affidavit was quite wrong; and that, though it would naturally lead to the belief that the deponent was swearing to all the

(1) 9 Moo. P.C.C., 131. (2) 12 Moo. P.C.C., 158.

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allegations of paragraph 4 of his own independent knowledge and unaided recollection, he was really going beyond anything he remembered, and beyond all he had ever stated he remembered, and that when he said he ought not to have made it he was perfectly right. And this is quite consistent with his honestly thinking at the time that it represented in technical form what he believed.

First of all, as the proponents have to establish by evidence the very existence of a will, and are therefore unaided by what has been called *evidentia rei*, they must prove compliance with the requirements of the Statute. Taking the affidavit of Mollison as it stands it does not identify, even as to belief, the document propounded as the document said by him to have been signed as a will, nor does it state where the signature of Taylor was placed upon the will, and, therefore, even accepting Mollison's affidavit as an accurate statement of facts as far as it goes, it still, in my opinion, falls short of verifying the due execution as required by the *Wills Act* of a will not produced. See the form of affidavit in *Tristram & Coote's Probate Practice*, 14th ed., p. 769, which states that the testator signed his name "at the foot or end thereof."

But it is quite clear that Mollison at the time he made his affidavit never pretended to have such accurate and complete knowledge and such precise recollection as his affidavit would make him appear to have. Only two days before he was hazy and uncertain, though willing to assist Hall as far as he honestly could. How he came so soon afterwards to admit the accuracy of the affidavit as drawn is not clear unless the attestation clause, which he had never seen or heard of before, and the probabilities as put to him, had overcome his doubts. But the evidence completely satisfies my mind that Mollison, who is admittedly honest, never intended to represent himself as positively swearing in the terms of his affidavit, and to regard that document as a definite statement on oath of then actual remembrance is to prefer form to substance. I feel no hesitation in setting it aside in favour of the actual facts sworn to by him, which are quite consistent with everything he said in October 1904, and on 2nd July 1908, and in February 1909. It is his in-

termediate statement upon affidavit—not really his own words—which is to be distrusted for want of accuracy.

As to his oral testimony it was pressed upon us by Mr. *Agg* that Mollison's evidence raised an inference that the will was signed by Taylor, and if signed at all there was a presumption it was duly executed. But all that Mollison says on that point is this:—"I saw no signature of Taylor's that I know of. About the time Taylor went to New Zealand he called me into his office and asked me to sign a paper. I did so and walked out. Dr. Gray was in the room. That was all, and nothing was said. I noticed no name on the will. Taylor did not say what the paper was."

In cross-examination he said:—"I put my name down and walked away. He never said what I was to do except to sign my name. On this occasion the paper was not one of our forms."

It is clear from many cases of high authority that that is not enough: *Ilott* v. *Genge* (1); *Pearson* v. *Pearson* (2); *Blake* v. *Blake* (3); *Daintree* v. *Butcher & Fasula* (4).

I therefore concur in thinking that the alleged will of December 1900 is not proved.

As to Mr. *Cohen's* will—there are in my view serious difficulties in the way of establishing due execution of this will also. But in any case its contents are quite imaginary, even if the paper rejected had been admitted, and, unless it revoked expressly or by necessary implication the will of 1890, it would not assist Mr. *Cohen's* case. The requirements of the law as to proof of revocation have been stated by Lord *Macnaghten* speaking for the Privy Council in these terms:—"It is well settled that a will duly executed is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later will contained either words of revocation, or dispositions so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to shew that the will which is not forthcoming differed from the earlier will, if it cannot be shewn in what the difference consisted. It is also

(1) 4 Moo. P.C.C., 265.
(2) L.R. 2 P. & M., 451.
(3) 7 P.D., 102.
(4) 13 P.D., 102.

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settled that the burden of proof lies on the person who challenges the will that is in existence. These propositions have been established in this country both in this tribunal and in the House of Lords: *Cutto* v. *Gilbert* (1); *Hitchins* v. *Bassett* (2); *Goodright* v. *Harwood* (3); and as they are founded on reason and good sense they must be regarded as of general application": *Nawab Sahib Mirza* v. *Mussammat Umda Khaanam* (4). These conditions have not been satisfied, and Falconar's case fails. That leaves Mr. *Mitchell's* will with an unimpeded right to probate, and I agree with the order suggested by the learned Chief Justice.

HIGGINS J. read the following judgment:—The main question is, did the deceased Taylor sign the engrossment of which Ex. 1 is the draft, and in the presence of two witnesses as prescribed by the *Wills Act* 1890? If this fact is not proved, the Act obliges us to declare against the alleged will of 1900, whatever we may conjecture or infer the actual wishes of the testator to have been in 1900 or subsequently. We have not to find his wishes; we have to find his last will in writing executed in accordance with the Act (secs. 4 and 7).

The learned Judge has ignored, and in my opinion rightly ignored, evidence as to statements made by the deceased after the alleged execution: *Sudgen* v. *Lord St. Leonards* (5); *Atkinson* v. *Morris* (6).

The alleged will cannot be found. One of the supposed witnesses (Dr. Gray) is dead; and the other (Mollison, a driver employed by the deceased) swears in the box that he signed the paper which Dr. Gray afterwards told him was a will, but that he did not see the testator sign it, and that he saw no name but his own on the paper. This evidence would be conclusive against the will if there were no other evidence. The Court has often held a will to have been duly executed when it contains signatures in due order, and especially when it contains an attestation clause stating the due formalities of execution; and has so held even when the attesting witnesses cannot remember, or

(1) 9 Moo. P.C.C., 131.
(2) 5 Mod., 203.
(3) 2 Bl. W., 937.
(4) L.R. 19 Ind. App., 83, at p. 89.
(5) 1 P.D., 154.
(6) (1897) P., 40.

deny the due execution: *Burgoyne* v. *Showler* (1); *Wright* v. *Sanderson* (2). But this presumption, as his Honor points out, does not apply to a document that is not produced, and as to which the fact of the signature of the deceased is not established *aliunde*. There can be, in short, no *ex facie* regularity where there is no *facies*.

The only evidence that the deceased signed the will is contained in an affidavit made by the witness Mollison, on 4th July 1908—an affidavit prepared by Mr. Hall, the solicitor who had prepared the draft and the engrossment for the deceased to sign. This affidavit is on its face as explicit as can be, that the deceased "in the presence of myself and the said Andrew Sexton Gray signed his name to his will and the said Alexander Sexton Gray and myself in the presence of the abovenamed deceased and of one another wrote our names as witnesses attesting the execution of the same." This affidavit, Hall swears, was read out to Mollison from the draft before Mollison signed it; but Mollison steadfastly asserts that the affidavit is wrong. It was prepared by Hall after a conversation on 2nd of July, in which, according to Hall's own version, Mollison said, as to the execution of the will, "I cannot recollect exactly . . . Dr. Gray was at Mr. Taylor's and I was called in and signed with him;" and he also said he could not recollect who signed first. In this conversation there was no statement whatever that the deceased had signed it; and yet this affidavit, so explicit in its terms, was drawn up and brought to Mollison for signature. Mollison did not read the affidavit before signing it; and his attention was not called to the variance between the account given by him two days before in the conversation, and the account given by him in the affidavit—but Mollison signed. No one, with any experience of the Courts, would attach nearly the same value to affidavit evidence as to oral evidence. The childlike inattention and irresponsibility with which deponents so often swear to whatever a solicitor draws up for them is a curious contradiction in practice of the theoretical distrust of lawyers which is so often professed.

The affidavit may, however, for present purposes, be treated as

(1) 1 Rob. E., 5. (2) 9 P.D., 149.

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technically evidence, for what it may be worth. It has been treated as evidence throughout the trial. If the Judge of first instance had found that Mollison was not an honest witness when in the box, or if there were any reason for thinking that his memory was better at the date of the affidavit (4th July) than at the conversations of 2nd July and 8th August, it might be difficult to disturb the finding in favour of the will. But his Honor finds that Mollison was saying in the box what he believed to be true, and we are almost, if not altogether, in as good a position as his Honor to decide as to the effect of Mollison's evidence. The affidavit is so conclusively discredited that, as I understand the judgment, the learned Judge proceeds to consider what evidence there is of execution "apart from his (Mollison's) affidavit." Now, apart from the affidavit, there is no evidence of execution by the testator whatever. The conversations of Mollison with Hall and Pitcher were not on oath, were elicited by counsel supporting the will, or by counsel acting *pro hac vice* in the same interest; but these conversations are more damaging to the story contained in the affidavit than to Mollison's story in the box. Not once, from first to last, did Mollison say—even if we accept unreservedly the conversations of Messrs. Hall and Pitcher—that he saw the testator sign. I notice that the learned Judge is under some misapprehension as to two of the conversations, or possibly he is misreported. The judgment says, "Then in 1904 Mollison told Hall that Taylor had signed his will in the presence of Dr. Gray and himself as witnesses, and he repeated this on 2nd July 1908." There is nothing in the printed notes of the evidence to justify any statements so definite or so explicit. His Honor finds sufficient proof of execution in "the probabilities" of the case. For the deceased had got Hall to prepare a will; it was prepared and handed over to the deceased, with an attestation clause, and a verbal explanation of what was to be done; and the deceased was an intelligent business man. But such *a priori* probability of execution does not supply proof of execution. There must be some proof of the *factum*. Our Courts are not Courts of conjecture, but Courts of proof by direct or circumstantial evidence. If a plaintiff had to prove a verbal contract with a deceased person and proved that the deceased was an

intelligent business man, and that commonsense would lead him to say Yes, that is not proof that he said Yes. Such probabilities are often valuable aids where there is other proof, but they cannot be used as substitutes.

In my opinion, even if we treat Mollison's statements not on oath as evidence, there is no proof whatever of execution of the will by the testator, either as prescribed by the *Wills Act* or at all.

The alleged will of 1901 may be dealt with more briefly. That the deceased in or about March 1901 executed some will seems to be sufficiently clear. According to the witness Farr, it was signed first by the deceased, and then by two witnesses who saw him sign, and who signed in his presence; and I do not hold with Mr. *Mitchell's* objection that there is no proof that the signature was at the foot or end of the document. *Primâ facie*, to sign a document is to sign at the foot or end of the document. *Primâ facie*, the order of writing as regards place on the document corresponds with the order in time. But the will is not forthcoming, and there is no evidence of its contents. Mr. *Cohen* sought to show that it at least contained a clause revoking all previous wills. Forms containing words revoking all previous wills were handed to the deceased, at his request, by one Cosham in or about February 1901, and Cosham consented to be an executor. But it is not shown that the will made by the deceased in 1901 was written on such a form. Mr. *Cohen* attempted at the trial to ask Farr, the witness of the 1901 will, whether the will was on paper like to that of the forms; but the question was rejected; and even if it ought to have been admitted, it would not have made any difference. I know of no presumption that a stationer's form, when filled in, is filled in without alteration. Then Mr. *Cohen* relied on a casual conversation of the deceased with Mr. Ebsworth, a solicitor, about January or February 1901, in which the deceased showed a wish to revoke a will, and a wish to know whether a will previously made would stand good. But the fact that a deceased person intended to revoke a will is not *per se* evidence that he did revoke it.

I am therefore of opinion that the alleged will of 1900 has not been proved as to execution, and that the will of 1901 has not