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opposed to him. I do not overlook the evidence as to agistment, but that covers a very small part of the time. There are some unsworn statements by and on behalf of the appellant—and therefore as admissions legally equivalent to sworn testimony—which, under some circumstances, might support the inference necessary for the respondent's case.

But looking at all that is favourable to the respondent in relation to the rest of the evidence, it is by no means sufficiently clear, cogent or decisive as to actually existing facts to be capable, in opposition to other and differing statements and to the direct testimony to the contrary, of sustaining his burden of proof. In the result therefore the jury had no evidence upon which they could reasonably find the verdict at which they arrived, and therefore as the time had not arrived to pay for the plant the appeal must be allowed.

Appeal allowed.

Solicitor, for appellant, *L. B. Bertram.*

Solicitors, for respondent, *Minter, Simpson & Co.*

C. E. W.

Appl *Lippe v Hedderwick* (1922) 31 CLR 148

[HIGH COURT OF AUSTRALIA.]

DANIEL McCAULEY . . . . . APPELLANT;
DEFENDANT,

AND

FREDERICK JAMES McCAULEY (PLAINTIFF) AND DESMOND CHARLES McCAULEY (DEFENDANT) . . . RESPONDENTS.

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SYDNEY, *May*, 2, 3, 4, 5, 6, 10.

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

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Evidence of execution—Lost will—Presumption of revocation—Evidence to rebut presumption—Onus of proof—Probate suit—Costs out of estate—Wills Probate and Administration Act 1898 (*N.S. W.*) (*No.* 13 *of* 1898), *sec.* 153.

Where a will duly executed, and last seen in the testator's possession, is not forthcoming at his death, the presumption is that it was destroyed by the testator *animo revocandi*. This presumption may be rebutted by proof by the propounder of the will of circumstances which raise a higher degree of probability to the contrary. The nature of the provisions of the will itself, the nature of the custody in which it was kept, the opportunities the testator had for losing the will, and a statement by the testator to the medical attendant shortly before his death that his affairs were all "fixed up," are all material in determining between the presumptions of revocation and loss of the will.

The costs in a probate suit are in the discretion of the Judge, and in the absence of any error in principle, or any misapprehension of fact on his part, the High Court will not interfere.

Decision of *Street* J. affirmed.

APPEAL from the decision of *Street* J. in a probate suit by which it was ordered that administration with the will annexed of the estate of George Henry McCauley should be granted to the plaintiff, upon the grounds (1) that his Honor was in error in accepting the evidence of the witness Alderton as sufficient to satisfy the Court that the will propounded was executed, and that it was the last will of a capable testator; (2) that the circumstances attending the alleged execution of the will and the subsequent conduct of the plaintiff were of such a suspicious nature as to disentitle the plaintiff to the relief granted; (3) that there was not sufficient evidence to rebut the presumption of revocation: and (4) that the appellant was entitled to costs out of the estate.

With regard to the costs of the suit *Street* J. held that the defendant had raised an issue of incapacity which he must have known he could not substantiate, and had also attempted to make out a case of fraud and conspiracy which there was nothing in the evidence to warrant. He therefore ordered that the defendant should pay his own costs.

The effect of the evidence sufficiently appears in the judgment of *Griffith* C.J.

Loxton K.C. and *Clive Teece*, for the appellant Daniel McCauley. The evidence of Alderton as to the execution and contents of the will should not be regarded as sufficient, in view of the suspicious circumstance created by the plaintiff's subsequent conduct and his

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statement after the testator's death that he could produce the will. Where a will propounded is not produced the Court will scrutinise the evidence of its execution with the utmost jealousy: *Tyrrell* v. *Painton* (*No.* 1) (1). Assuming that the evidence of execution is sufficient, as the will has not been produced, the presumption arises that it was destroyed by the testator *animo revocandi*: *Podmore* v. *Whatton* (2).

[ISAACS J. referred to *Finch* v. *Finch* (3)].

There was not sufficient evidence to rebut this presumption: *Allan* v. *Morrison* (4). The facts must raise a higher degree of probability to the contrary: *Welch* v. *Phillips* (5); *In re Sykes*; *Drake* v. *Sykes* (6). The most that can be suggested is that the will was lost at the Palace Hotel or the hospital. The evidence shows that after the testator left for Brisbane he was on much better terms with his father. He knew that if he died intestate his property would go to his father. His statement to the doctor, that he had got everything fixed up, at the best is ambiguous. It might very well mean that he had arranged that his father should take his property. The possibility of the will having been lost is very remote as all the testator's belongings were collected and placed in safe custody as soon as he left the hotel. He carried the will about with him safely from October 1907 to May 1908 at a time when if he was careless in his habits he would probably have lost it, and the theory of accidental loss after that date is difficult to establish. No inference can be drawn from the alleged loss of the sleeve links and promissory note.

The defendant should have been allowed costs out of the estate. This litigation was caused by the testator's negligent habits and the plaintiff's improper conduct: *Orton* v. *Smith* (7); *Spiers* v. *English* (8); *Mitchell* v. *Gard* (9). In any case costs should be allowed except so far as they were increased by the issue of incapacity.

Knox K.C. and *Peden*, for the respondent Frederick James

(1) (1894) P., 151.
(2) 3 Sw. & Tr., 449.
(3) L.R. 1 P. & M., 371.
(4) (1900) A.C., 604.
(5) 1 Moo. P.C.C., 209.
(6) 23 T.L.R., 747.
(7) L.R. 3 P. & M., 23.
(8) (1907) P., 122.
(9) 3 Sw. & Tr., 275.

McCauley. In this case there was a conflict of evidence on several points, and the Court is bound by the findings of the Judge of first instance who saw the witnesses and heard the evidence: *Dearman* v. *Dearman* (1). *Street* J. found that the defendant's evidence was unworthy of credit, but accepted the evidence of Alderton and the plaintiff. It is inconceivable that he could have found for the plaintiff if he had suspected the plaintiff of suppressing the will. If the Judge had thought that Mayne should have been called he would have said so. The presumption that a will has been destroyed by the testator, when it is not produced, can be rebutted by any evidence that satisfies the Court that it is more probable the testator did not so destroy it: *Patten* v. *Poulton* (2); *Saunders* v. *Saunders* (3).

[ISAACS J. referred to *Colvin* v. *Fraser* (4); *Lillie* v. *Lillie* (5).]

The relevant facts to rebut the presumption are the testator's attachment to his godson Desmond, the fact that he was not on good terms with his father, the fact that he had no safe deposit for the will, and that he was careless in his habits, his statement to the doctor that his affairs were fixed up, and the evidence that the will was in existence in May. [They also referred to *Sugden* v. *Lord St. Leonards* (6); *Woodward* v. *Goulstone* (7).] The costs were in the discretion of the Judge, which was properly exercised: *Wills, Probate and Administration Act* 1898, No. 13, sec. 153; *Davies* v. *Gregory* (8).

McNaughton, for the infant respondent Desmond Charles McCauley, submitted to any order the Court might make.

Clive Teece, in reply.

Cur. adv. vult.

The following judgments were read:—

May 10.

GRIFFITH C.J. This was a suit brought by the respondent, Frederick Charles McCauley, against the appellant, who is his father, and Desmond McCauley, who is his son, to establish the will of George Henry McCauley, who was his brother, and

(1) 7 C.L.R., 549.
(2) 1 Sw. & Tr., 55.
(3) 6 N.C., 518.
(4) 2 Hag. Ecc, 266, at p. 325.
(5) 3 Hag. Ecc., 184.
(6) 1 P.D., 154.
(7) 11 App. Cas., 469.
(8) L.R. 3 P. & M., 28.

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who died in the Brisbane Hospital on 18th June 1908. The will propounded was not forthcoming. The case was heard, partly on oral evidence and partly on evidence taken on commission, at Brisbane, before *Street* J., who was satisfied of the due execution of the will, and that it had not been revoked by the testator. The evidence as to the execution and contents of the will was given by one Alderton, and his evidence, if accepted, was clear and satisfactory to establish both points. The learned Judge who heard his evidence accepted it as not only accurate, but trustworthy, and under these circumstances this Court must also accept it unless some doubt is thrown upon it from some other and independent source. The rule as to the establishment of wills that are not forthcoming is laid down by Lord *Wensleydale* in the case of *Welch* v. *Phillips* (1):—"The rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is this: that if a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable, that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the contrary. The onus of proof of such circumstances is undoubtedly on the party propounding the will." That rule has often been applied and has never been departed from or varied. The probability that a will not forthcoming has been destroyed *animo revocandi* and not lost obviously depends upon circumstances. One important element to be considered is the nature of the custody in which it is kept. All the facts of the case must be considered, and amongst them the nature of the provisions of the will itself is very material. I

(1) 1 Moo. P.C.C., 299, at p. 302.

will refer briefly to the relevant facts established in the case. The testator was a bachelor about 35 years of age, of somewhat dissipated habits, living with his parents in Sydney. His only property was a reversionary interest in lands of considerable value, of which his mother was tenant for life, with remainder to her children in equal shares. He was aware that if he died intestate his share would go to his father, and he did not desire that that should happen, fearing that his father would waste it. As early as 1906 he expressed the intention of making a will in favour of his nephew and godson, Desmond, of whom he was very fond. If Alderton's story is correct, testator made a will in October 1907 in favour of the plaintiff for life, with remainder to Desmond. The plaintiff says that the testator afterwards told him that he had made a will to that effect and showed it to him. A witness named Shepherd says that the testator told him the same thing. The testator left Sydney in May 1908, apparently to escape from some trouble that threatened him, and, desiring concealment, he went to the Richmond River in the northern part of New South Wales, where he stayed a few days, and then went on to Brisbane. He was on very affectionate terms with Desmond McCauley up to the very night of his departure, and they had a very affectionate parting. These are the relevant facts as to the probability of the testator changing his mind, and allowing the property of which he was possessed to go to his father as on an intestacy, instead of to his brother and nephew. Now as to the nature of the custody in which the will was kept. On that point there is very little evidence. The testator had no regular repository for documents. He had a chest of drawers in his mother's house, and that is all we know of any place of safe custody. A witness named Nock, who was examined on commission at Brisbane, stated that he saw the testator at Lismore about 17th May, and was with him in his bedroom when he was undressing at night. Some documents fell out of his coat pocket while he was taking off his coat. Nock went to pick them up, and testator said, " Be careful of that, my will is there." He added that the will was in favour of the plaintiff. If he said that, it was not strictly correct, and yet was not inaccurate, because the will was in favour of his brother with remainder to Desmond. From Lismore testator went to South

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Brisbane, where he stayed at the Palace Hotel, and was attended by Dr. Connolly from 20th May to 26th May for an affection of the heart. He got better, but Dr. Connolly was again sent for on 11th June. Testator was ordered to the hospital on 15th June, and died there on the 18th. He took nothing with him to the hospital. A housemaid at the Palace Hotel, Mary O'Halloran, who was examined on commission, and appears to have given her evidence in a very intelligent manner, said that when the testator was taken to the hospital she cleared up his bedroom, packing into his portmanteaux his papers and books, and everything she found lying about. She noticed letters lying on his table, and put them into a portmanteau, and removed the portmanteaux into another room. There were also coats and other clothing which she also removed into that room, putting them behind the back of a safe for greater security. After the testator's death his sister, who had gone to Brisbane from Sydney, brought back with her to Sydney all the goods of the testator that had been so packed, and they were searched by her, and, the plaintiff says, by him also, but they found no will. Some sleeve-links which the testator had had given to him immediately before leaving Sydney and a promissory note for £5 were also missing. It is very improbable, in my opinion, that the will should have been stolen from his bedroom in the hotel. The reasonable inference is that the will was not there when he was taken to the hospital. If so, it must have been either lost or destroyed before 15th June. If the probabilities of loss or destruction are equal, the presumption of destruction must prevail. But there is an incident deposed to, also by the same witness, which throws a good deal of light on that point. The testator had no regular repository for documents, and apparently kept his will in his pocket. On Sunday, 7th June, he went with a team of football players to a picnic resort, and did not return on that day or that night, but returned home early on the morning of Monday, when he remained in bed and looked very unwell. The natural inference, in the case of a man of known loose habits, is that he spent the intervening time in such a way that it is not at all improbable that during that time the will was lost cut of his pocket, and very likely the promissory note and sleeve-links also. A day or

so before he died, Dr. Connolly said something to him about settling his affairs, and he replied to the effect that everything was "fixed up." Putting together all these facts—his affection for Desmond McCauley, his unwillingness to die intestate, the improbability of his changing his intention, his careless custody of documents, the probability of loss before 15th June, and his statement to Dr. Connolly—I come to the conclusion that there is a higher degree of probability that the will was lost before that date than that it was destroyed by the testator with the intention of revoking it.

If it was neither lost nor destroyed, it must have been amongst his effects, and under these circumstances might have come into the custody of the plaintiff. On that point we have not the advantage of the learned Judge's opinion. It is said that it was raised during the trial, but, if it was, it clearly was not brought prominently under his notice. It appears, however, that on 21st October an interview took place between the plaintiff and his father and mother at the office of Messrs. Makinson and Plunkett, at which he stated, according to his own account, that his father asked him—"Have you got a will made by George?" and that he replied, "I have not got the will, but I can produce it." His mother, referring to the same interview, said she thought the plaintiff said, "George made a will, and I have got it." The appellant says—"What the plaintiff said was, 'George left a will, and I have got it'; and I replied, 'If you have it, show it, and that settles it.'" Plaintiff replied—"I have the will, and will produce it." There is some doubt as to the exact words used, but the impression left in the mind of Mr. Plunkett was that the will could be produced by the plaintiff. The plaintiff was not cross-examined as to these statements, and their discrepancy with his sworn statement that he did not find the will. It appears further that the appellant called several times at Messrs. Makinson and Plunkett's office about the will. The fact that it was lost was not announced until 16th December, and then in a letter in reply to one from the appellant's solicitors asking to be allowed to inspect it. On the other hand, it appears that in October plaintiff went to Brisbane and made a search at the hotel where the testator had stayed. Such a search was

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obviously futile, but he says that he went. It also appears that he made inquiries of Alderton and obtained details from him of the execution of the will, and advertised for the other attesting witness. If it could be clearly inferred from these facts that the plaintiff had had the will in his possession, and had suppressed it, probate of the will would, of course, be refused. Another matter incidentally referred to was a letter said to have been written by the testator to the plaintiff saying that he had made a will. The plaintiff says that this letter was lost on or about the same 21st October at his place of business. The accounts given by the plaintiff of the circumstances of that loss, and by a witness who was called on the point, are quite irreconcilable. The only person who could have cleared up the difficulty was not called, although available. But the only evidence of the contents of the letter was that of the plaintiff himself. The substance of it was that the testator wrote saying that he could not get some money that he wanted to repay a debt to the plaintiff, but had fixed up his will as he had already told plaintiff, and that Alderton knew all about it. That letter, then, assuming its contents to have been correctly stated, would not if produced have been of much, if any, consequence. On the whole I am unable to find on these facts sufficient grounds for believing that the plaintiff found and suppressed the will. The balance of probability must therefore prevail, and, as I have already said, I think there is a higher degree of probability that the will was lost than that it was destroyed *animo revocandi* by the testator. I cannot, however, refrain from remarking that the conclusion is somewhat unsatisfactory. Several points arose on the evidence which might have been and were not cleared up. Still I cannot see any sufficient grounds for disagreeing with the conclusion at which the learned Judge arrived. The appeal must therefore be dismissed.

I see no reason for interfering with the manner in which the learned Judge exercised his discretion in regard to costs, which by the law of New South Wales were entirely within his discretion.

O'CONNOR J. No question has been raised in this case as to

the principles of law upon which the learned Judge in the Court below based his decision, nor as to the method in which he applied them to the determination of the issues. In substance the appeal turns upon the matters of fact. On the argument before this Court the testator's competency was not seriously questioned, and the controversy between the parties resolved itself into two questions: First, whether the learned Judge ought to have found that the will propounded was the last will of the testator and had been duly executed. Secondly, whether he was right in deciding that the will had not been destroyed by the testator *animo revocandi*.

As to the former of these issues the learned Judge had first to find the preliminary fact that since the testator's death the will had not been, and could not be found, and, secondly, that there was satisfactory proof of its contents and of its due execution. As to all these matters the view expressed by *Herschell* L.C. in *Woodward* v. *Goulstone* (1) must be kept in mind. "I think, therefore," he says, "that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator." It is apparent from the terms of the judgment in this case that the learned Probate Judge in considering the evidence advanced in support of the will as propounded had that principle in view. As to the fact of execution by the testator, and as to the mode of execution, there seems to be no reason to doubt the credibility of Alderton. As to the contents of the will his account is strongly corroborated by the expressions of testamentary intention on the part of the testator to benefit his godson, sworn to by the plaintiff's mother and his wife. The credibility of these witnesses is not disputed, and I have no hesitation in coming to the conclusion that the will propounded is in substance just that which one would expect the testator to have made, judging by his proved expressions of testamentary intention up to that time. The plaintiff sought to corroborate Alderton's testimony by evidence of the contents of a letter from which as he says he first

(1) 11 App. Cas., 469, at p. 475.

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heard from the testator of the making of the will. The evidence in support of the loss of that letter was fairly open to adverse comment, and the proof of search for it was incomplete and to a certain extent unsatisfactory by reason of the plaintiff's failure to call Bert Mayne as a witness or to explain his absence. The learned Judge however deemed the proof sufficient, and his conclusion on that point must have been largely influenced by his view as to the plaintiff's credibility generally—a matter to which I shall refer later on.

As to the preliminary issue, namely, whether the plaintiff's failure to produce the will was satisfactorily accounted for, there are circumstances unexplained on the evidence which have caused me some hesitation in adopting his Honor's findings. It was at Mr. Plunkett's office on 21st October 1908 that the existence and whereabouts of the will were first discussed by the family. The plaintiff admits that on that occasion he said in answer to his father "I haven't got the will, but I can produce it." From that time until 16th December following, when his solicitor informed the defendant's solicitor that the will had been lost, the plaintiff seems to have persisted in that attitude. At the trial he swore explicitly that he had searched for the will and had been unable to find it. But no explanation was given, nor indeed was any asked for by the learned Judge or counsel on either side, as to why the plaintiff made that statement after the family search through the testator's effects had failed to disclose the existence of the will, and why he persisted in it without further discussion with his mother and sister, and without enlisting their aid or knowledge in his further searches. Judging only by what is before this Court it is difficult to draw any other inference from the plaintiff's conduct than that he then acted in that way so as to induce the belief that he could produce the will. Had he really any such belief? If he had what were the grounds of his belief? Was he speaking merely recklessly, or was his object to deceive his father by a show of confidence which had no foundation in fact? On the evidence as noted these questions must be left unanswered and unexplained. Notwithstanding however these considerations, which we are told were brought under his notice, the learned Judge must be taken to have found that the

plaintiff had spoken the truth in swearing that he had fully searched for the will after the testator's death, and had failed to find it. That finding must necessarily be involved in the judgment, although the learned Judge makes no reference to the circumstances to which I have alluded. There could hardly be a stronger reason against granting probate of a will sought to be established by secondary evidence than the existence in the Judge's mind of a suspicion reasonably founded that the original will was being kept back, or had been fraudulently destroyed by the person propounding it. No judge, however, would be justified in refusing probate for that reason without definite grounds of suspicion. An all important factor in determining such a question must always be the view which the Judge may take of the character, conduct, and general credibility of the person propounding the will. In the investigation of that issue in this case the plaintiff's conduct at the trial as party and as witness would afford the Judge at the trial a safe guide as to his credibility, and in reviewing the decision it must be remembered that the learned Judge at the trial had the invaluable advantage of that guidance. Sitting in this Court without that advantage I find it impossible to say that the learned Judge did not find in the demeanour of the plaintiff, the defendant and other members of the family at the trial, a satisfactory explanation of those circumstances in the plaintiff's conduct to which I have called attention. In a case such as this, involving as it must have done some discord in the family, the temperament and disposition of the various members of the family and the nature of their relations to each other must always be an important factor in determining issues as to their credibility. The right view to take of the circumstances to which I have been referring would depend largely upon the opinion which the learned Judge formed as to the credibility not only of the plaintiff, but of the other members of the family. In my opinion he must be taken to have found, after considering all these matters, that the plaintiff's explanation of why the will was not forthcoming at the trial was true and honest. Under these circumstances, applying the principle acted upon by this Court in *Dearman* v. *Dearman* (1) to all the

(1) 7 C.L.R., 549.

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facts of the case, I find it impossible to say that the learned Judge of first instance came to a wrong conclusion in determining that the plaintiff satisfactorily accounted for failing to produce the will at the trial. I turn now to the remaining question, whether, assuming the will to have been duly executed, it was afterwards destroyed by the testator *animo revocandi.* In this part of the case also there is no dispute as to the general principle of law which ought to be applied. It is clearly and comprehensively stated by Lord *Wensleydale,* then Mr. *Baron Parke,* in *Welch* v. *Phillips* (1) in the following terms:—"Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Courts, is this: that if a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable, that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the contrary." He adds that the onus of proof of circumstances sufficient to rebut the presumption is on the person propounding the will. A question was raised during the argument as to the weight of evidence required for that purpose. There is no want of authority on the point. In *Allan* v. *Morrison* (2) Lord *Davey,* in delivering the judgment of the Privy Council, quotes with approval the following passage from the judgment of the New Zealand Supreme Court in applying the principle to the facts of that case:—"In order to find for the will we must be morally satisfied that it was not destroyed by the testator *animo revocandi.* We are not so satisfied." In *Colvin* v. *Fraser* (3) *Sir John Nicholl,* in dealing with the case of a will

(1) 1 Moo. P.C.C., 299, at p. 302. (2) (1900) A.C., 604, at p. 609.
(3) 2 Hag. Ecc., 266, at p. 325.

not produced at the trial, says:—"The force of the presumption and the weight of the onus may be different according to circumstances; but the Court, in order to pronounce for a draft or a duplicate, or a cancelled will, must be judicially convinced, that the absence or cancellation of the paper once in, and not traced out of, the deceased's own possession, was not attributable to the deceased. This negative may be established by a strong combination of circumstances leading to a moral conviction that the deceased did not do the act, or it may be established by direct positive evidence in different ways." He then goes on to illustrate the different ways he is referring to. In *Sir John Nicholl's* judgment in *Lillie* v. *Lillie* (1) he puts the matter in this way:—"The fact that the deceased executed such a will is proved; but, as it is not forthcoming, the party setting it up must satisfy the Court that it was not destroyed *animo revocandi*, by the deceased." To that Mr. *Haggard* adds a note:—"Not by evidence amounting to positive certainty, but only such as reasonably produces moral conviction: *Davis* v. *Davis* (2); *Colvin* v. *Fraser* (3)." The expression "morally convinced" or "morally satisfied" is apparently used with special reference to circumstantial evidence. The adverb adds nothing to the exactness of the statement. In most cases the only evidence available to rebut the *primâ facie* presumption of loss is circumstantial evidence, and in such cases it seems to me that nothing more can be demanded of the party seeking to rebut the presumption than that he should establish such a state of facts and probabilities as will leave no reasonable doubt in the Judge's mind that the testator did not destroy the will, or did not destroy it *animo revocandi*. If the facts and probabilities do leave a reasonable doubt in the Judge's mind as to whether the testator did or did not destroy his will or destroy it *animo revocandi*, the presumption must prevail. The learned Judge, applying this principle to all the facts and circumstances material to be considered on that issue, held that the circumstances raised a higher degree of probability that the will was accidentally lost or destroyed, than that it was intentionally destroyed, and so was convinced that the will had not been des-

(1) 3 Hag. Ecc., 184. (2) 2 Add., 226.
(3) 2 Hag. Ecc., 266, at p. 325.

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troyed *animo revocandi*. In taking that view he arrived, in my opinion, at a right conclusion. The testator's affection for his godson and desire to benefit him by his will goes back to 1906. It was frequently expressed to members of the family from that time until it resulted in the execution of the will propounded, and the evidence satisfies me that that was his frame of mind when he left Sydney for Lismore. If Nock's evidence is to be believed, and I see no reason to doubt it, his feeling for the plaintiff had in no way altered by the 18th or 19th May when Nock met him in Lismore. The testator, it was urged, was aware that if he died intestate his father would get his share. Some reliance was placed by the plaintiff on the strained relations between the testator and his father, which had existed for some time before the departure of the former for Lismore. I attach small importance to whatever ill-feeling may have existed between father and son up to that time, There is not sufficient evidence to satisfy me that it in any way affected the son's testamentary intentions. The renewal of affectionate intercourse between them in the letters which the testator wrote from Lismore and from Brisbane is clearly enough established. But that is, I think, immaterial. The governing motive in the plaintiff's mind was in my opinion his affection for the plaintiff and the plaintiff's son, and his desire to benefit both of them. That intention is established satisfactorily to my mind, and there is besides express evidence of its continuance until a day or so before he arrived in Brisbane. After that we have no more light on the testator's testamentary intentions. But it seems to me extremely improbable that in the short period that elapsed between then and his entry into the Brisbane Hospital he should suddenly, and apparently without reason, have abandoned the intention to benefit the plaintiff and his son, founded on such reasonable grounds and held up to that time so persistently.

Turning now to the probabilities of loss other than by some deliberate act of destruction on the testator's part, I take it as established that he had the will in his possession at Lismore. He was evidently a man of careless, probably of dissipated habits. At the time when Nock spoke to him he was carrying the will in his pocket. Leaving, as I think we must, criminal abstraction of the document by some third party out of the question, there were

many possibilities of accidental loss from his person, from his clothes, out of his portmanteau, or in the clearing up of his room from the time Nock saw him in Lismore until he entered the Brisbane Hospital. After his entry into the hospital loss by accident was also possible, but it was not in my opinion likely to have occurred. Under all the circumstances I agree with the learned Judge of first instance, that the probability of the will being lost accidentally strongly outweighs the probability of such an alteration in the testator's feelings for the plaintiff and for his godson as the deliberate destruction of his will *animo revocandi* would involve. It follows that, in my opinion, the learned Judge's finding for the plaintiff must be upheld on all points.

As to costs, I agree that this Court ought not under the circumstances to interfere with the manner in which the learned Judge has exercised his discretion. The rule which should guide a Judge in dealing with costs in such cases is clearly stated by *Sir Gorell Barnes* in *Spiers* v. *English* (1). Applied to the facts of this case, and the learned Judge's finding on them, the order as to costs is amply justified. There are very good grounds on the whole of the case for releasing the defendant from paying costs, but there are no grounds in my opinion for giving him his costs out of the estate. For these reasons I am of opinion that the judgment appealed against should be in no way disturbed, and that the appeal must be dismissed.

ISAACS J. With regard to the first question, which I may call the execution of the will, I cannot do better than state the rule which guides the Court in the words of Lord *Lindley* (then L.J.) in *Harris* v. *Knight* (2). That learned Judge said :—"A person who propounds for probate an alleged will, and who is unable to produce it, or any copy or draft of it, or any written evidence of its contents, is bound to prove its contents and its due execution and attestation, by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable doubts on these points. If he can do this, he is entitled to probate, as is shown by the case of *Sugden* v. *St. Leonards* (3)." But, further observed

(1) (1907) P., 122, at p. 123. (2) 15 P.D., 170, at p. 179.
(3) 1 P.D., 154.

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the learned Lord Justice, "it is obvious that any laxity or want of vigilance on the part of the Court in a case of this kind would encourage the fabrication of wills, and lead to perjury, which it would be extremely difficult to detect."

This language is in accord with what fell from Lord *Herschell* L.C. four years before in *Woodward* v. *Goulstone* (1). After recalling the precautions insisted on by the legislature to safeguard the interests and rights of testators, by requiring a specified manner of authentication, and after stating the dangers of accepting loose statements of recollection in substitution for the primary evidence of a will, his Lordship says:—"I think, therefore, that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator."

In the present case the will propounded depends for proof of execution, contents, and attestation entirely on parol evidence. One of the witnesses is absent, undiscoverable, and almost unknown. He has not been traced, is apparently untraceable, and has disappeared completely. There is not a scrap of writing in support of the proponent's case. It is therefore eminently an instance where the keenest scrutiny is necessary, and I must admit my attitude throughout has been that of a severe critic, particularly in face of the respondent's undertaking on 21st October to produce the will. Had I been acting as primary Judge it is quite possible that, before accepting the plaintiff's sworn statements regarding the non-existence of the will, and the fate of the letter of October 1907, I should have desired fuller information, including the reason why Bert Mayne was not called. But as to that letter there is this to be said which influences me: if written at all, it was written after the execution of the will. It could not, therefore, be admitted to prove the execution of the will (*Atkinson* v. *Morris* (2)), and even as to its being admissible to prove the contents of the will, I am not prepared to base my judgment upon that in view of the criticism by the House of Lords in *Woodward* v. *Goulstone* (3) upon *Sugden* v. *Lord St.*

(1) 11 App. Cas., 469, at p. 475.
(2) (1897) P., 40.
(3) 11 App. Cas., 469.

Leonards (1), and in view of the observations in *Atkinson* v. *Morris* (2).

As bearing on the credibility of the plaintiff, and the continuance of intention as showing the improbability of revocation, the letter might have been useful. I would not, however, be justified in permitting that circumstance to outweigh the primary Judge's opinion as to the credit to be given to the plaintiff; and as to the revocation, having regard to the time it was written, it would have only a comparatively small and remote effect. I therefore feel bound, on the whole, to put aside the question of the non-elucidation of that letter. And putting that aside, I find nothing that can warrant me in displacing the credit given by the learned Judge to Alderton and the plaintiff. Once that position is reached, there is an end of the first branch of the case. Alderton's evidence is clear and distinct. The will is short and uncomplicated. There is little if any probability of mistake. True, a year elapsed between the execution of the will and the request to Alderton to state its contents. But assuming him to be an intelligent man, disinterested in the result, fair in his intentions, clear in giving his testimony—all matter for the observation of the primary tribunal in the absence of some convincing circumstance to the contrary—then the will has been proved. Taking his evidence as truthful, the maxim *omnia præsumuntur rite esse acta* comes into play, and so far as the first point is concerned the proponent is entitled to probate.

With respect to the issue of revocation, we start with the presumption of fact, namely, that the will was destroyed by the testator himself *animo revocandi*, a presumption which the law implies from the mere circumstance that the will, having been traced to the testator's possession, and last seen there, was not forthcoming at his death. That circumstance, however, is accompanied by others, some or all of which may on examination tend to fortify or repel the presumption, and it is upon a proper consideration of the combined circumstances appearing that the Court is called upon to declare whether the will was or was not destroyed by the testator. I should first observe that nothing as to this part of the case depends upon demeanour or credibility,

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

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except the question whether the plaintiff had possession or power of the will after his brother's death. Having assumed for the purposes of the first branch that the learned primary Judge has found, and properly found, that he did not obtain such possession or power, the rest is evidentiary material upon which this Court can and ought to exercise its own judgment.

Applying the words of Lord *Wensleydale* in *Welch* v. *Phillips* (1), the question is:—"Has then the respondent in this case satisfied the exigencies of the law, by giving such evidence as ought to raise in our minds a stronger presumption that the will . . . . was not purposely destroyed?"

In *Colvin* v. *Fraser* (2), referred to by the Privy Council in the last-mentioned case, *Sir John Nicholl* says:—"The force of the presumption and the weight of the onus may be different according to circumstances; but the Court, in order to pronounce for a draft or a duplicate, or a cancelled will" (I add so of course as to a lost will), "must be judicially *convinced*, that the absence or cancellation of the paper once in, and not traced out of, the deceased's own possession, was not attributable to the deceased. This negative may be established by a strong combination of circumstances leading to a moral conviction that the deceased did not do the act, or it may be established by direct positive evidence in different ways." Here there is no direct positive evidence, and the whole result must depend upon whether the combination of circumstances is such as to produce the moral conviction in the mind of the Court, that the primary presumption is wrong, or in other words, to raise a stronger presumption that the will was not purposely destroyed? See also *Allan* v. *Morrison* (3).

The respondent's case is that from October 1907 to May 1908 and about the 19th of that month—that is for about 7 months—and notwithstanding changes of residence, the testator still had the will in his possession, and was anxiously preserving it. Nock's evidence is accepted by the learned primary Judge, and I see no judicial reason for doubting it.

Two circumstances may at this point be alluded to, which have,

(1) 1 Moo. P.C.C., 299, at p. 302. (2) 2 Hag. Ecc., 266, at p. 325.
(3) 1900) A.C., 604.

as it seems to me, considerable importance on the result. One is the circumstance that at Lismore, at the time Nock saw the will, the testator told him that he had £13 or £14 which he said he had received from the plaintiff. The other is a letter (exhibit No. 1) which the appellant received from the testator. It is dated 17th May. It contains grateful and affectionate references by the testator to his father, and has been relied on as indicating such a mental attitude of the writer as supports the presumption. I think that taken by itself it might be fairly so considered. But there is the statement—substantially contemporaneous, perhaps actually later—made by the testator to Nock, "Be careful Jack, my will is there. I am leaving everything to my best friend Diddy"—that is the respondent Desmond. Consequently, and regarding the statement to Nock as evidence of intention only material to this branch, I am unable to give such weight to the letter, and to the recognition of the father's generous anxiety for his son's protection and sustenance, as would otherwise attach to it. The expression referred to is in keeping with the entire absence from the letter of any intimation of altered testamentary wishes. The son's gratitude and affection did not up to that time go so far as to shake his previous determination. And it gives force also to the argument of Mr. *Knox* that the real motive of the testator for not leaving his interest to his father was the probability of its being wasted, and not any feeling of actual and personal hostility. Up to reaching Brisbane then, the will remains, and the intention to preserve it apparently continues, for there is no sufficient reason for the disappearance of the document between Nock's interview and the arrival at the Palace Hotel. But then I come to what has given me some serious consideration. The testator arrived in Brisbane on 20th May, and, as I assume, carrying the will with him. From that time to the 26th he was so ill as to be under Dr. Connolly's care. In the week following Saturday 23rd, that is until the 30th, according to Mary O'Halloran he went out only once or twice. Mr. McMahon tells us he was then in a weak state, not going far. The next week, 31st May to 6th June, he was according to McMahon picking up, and clearly in no condition to engage in any occupation likely to occasion the loss of the document. Next day,

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Sunday, 7th June, he appears to have felt strong enough to venture to the White's Hill picnic with the football team, and did not return to the hotel until very late at night or very early next morning when he was seen in bed between 6 and 7 o'clock. He was sober but ill. From that time the evidence shows that, beyond taking a very short walk to Queen Street, he never left the hotel till he went to the hospital to die. 7th June is the only point of time when in my opinion he could reasonably be taken to have lost the will. Is the evidence sufficient to convince the Court judicially that he lost it then? There are considerations against that supposition. He was sensible until he died, and might be expected to assure himself he still had it.

On 13th June he wrote to his father from the Palace Hotel a letter in which he indicates that he had been very ill, though not then apprehending death. Having regard to Nock's evidence and George's solicitude in the middle of May for the security of the will, one would naturally think he would have seen to its safety while at the Palace Hotel. And still more so after the conversation with Dr. Connolly as to fixing up his affairs. These considerations certainly tend to strengthen the presumption. On the other side, there are also circumstances of importance. (1.) The long-lasting preference for the plaintiff and the undoubted special attachment to Desmond. (2.) According to Nock, he believed down to 19th May or just before that the plaintiff was his best friend, and he continued to that point at all events his determination to benefit him and his child. (3.) No subsequent cause for change of intention. (4.) The opinion, expressed in 1906 but never overtly departed from, that his father might waste the property if he had it. (5.) The statement to Dr. Connolly which, after making all allowances, impresses me eventually as conveying the notion of having made a will, rather than leaving his affairs to be dealt with by the law. (6.) The inherent improbability that, even if he so far altered his mind as to confer some advantage on his father, he would have totally deprived Frederick and Desmond of all benefit. (7.) Testator was not an habitually careful man in any way; while recognizing the importance of the document he did nevertheless carry it in a risky manner and presumably so carried it on 7th June. (8.) The incident of 7th June

though we are not in possession of the testator's actual whereabouts and doings, began with entertainment and ended in a belated and unnoticed return, which remained unexplained by the testator.

Regarding in combination the whole of the relevant circumstances, I bear in mind that, there being no positive evidence of the ultimate fact in dispute, the nearest possible approach to the truth must be by way of inference. And after weighing the facts with all possible care I am driven to what Lord *Wensleydale* calls "a stronger presumption" than that arising from the mere fact of non-appearance of the will, and to what *Sir John Nicholl* has called the "moral conviction," that testator did not purposely disappoint Frederick and cut out Desmond, and substitute his father as the sole and exclusive object of his bounty, and therefore he did not destroy his will *animo revocandi* or at all.

As to costs, these were in the discretion of the Judge, and, in the absence of any error in principle, or manifest misapprehension of fact on his part, this Court will not interfere.

Appeal dismissed.

Solicitors, for appellant, *John Williamson & Sons.*

Solicitors, for respondents, *Makinson & Plunkett*; *F. E. M. Naughton.*

C. E. W.