1896.
February 27.

In the Matter of the Last Will of the late GAMAGE DON SAMUEL and his wife TIBBOTUWAWEGAMAGE BABAHAMI.

GAMAGE DON SIMAN and others, Petitioners, Respondents.

GAMAGE PUNCHIBABA and eleven others, Respondents.

GAMAGE LOKUHAMY, Respondent, Appellant.

D. C., Matara, 1,039.

Last will—Application for probate upon copy of a lost last will—Presumption of destruction by testator—Grant of administration as in case of intestacy—Ordinance No. 7 of 1840, s. 6—Notaries Ordinance, 1877, s. 26, sub-section 12.

Where a husband and wife made a joint will in 1877 and, upon the death of the wife in 1888, her husband, not being able to find the lost will, averred that his wife had died intestate and applied for and obtained letters to administer her estate, and he himself died in 1892, *held*, that it was not open to their children to apply for probate upon a copy of the alleged last will, unless they rebutted the presumption of law (arising from the circumstance that, after the execution of the said will, it was in the possession of the testators but was not forthcoming) that such testators had destroyed it with the intention of revoking it.

Held further, that in such a case administration shall be granted as in a case of intestacy.

BONSER, C.J.—It is the duty of a notary who attests a last will to preserve a draft minute or copy thereof, under Ordinance No. 2 of 1877, section 26, sub-section 12.

THIS was an appeal from an order of the District Judge of Matara whereby he directed that a copy of the alleged last will of Gamage Don Samuel and his wife be admitted to probate. The facts of the case are fully stated in the judgment of the Chief Justice.

Wendt, for objector.

Dornhorst (with *Morgan de Saram*), for petitioner, respondent.

27th February, 1896. BONSER, C.J.—

In this case a man called Don Samuel, who was the husband of one Babahami, is alleged, jointly with his said wife, to have made a will as far back as 1877, by which their property was given to a friend and the rest of the property was divided among their eight children named. Babahami died in 1888 and, upon her death, Don Samuel took out administration to her estate on the footing that she had died intestate. Don Samuel himself died in 1892.

Certain of the children of Don Samuel presented a petition to the District Court of Matara asking to have the alleged will of 1877 proved. Mr. Wendt's client, Lokuhamy, was a respondent to that petition and opposed the application.

The will itself was not forthcoming, but what was said to have been a copy of it was produced. It does not appear from whose possession this document came, but it was stated that it was given

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to Don Samuel in his lifetime on his representation that he had lost the original; but the evidence on this point is by no means satisfactory. The notary who is alleged to have attested the will was called, but it appeared that it was not he who gave the copy, but that it was given by his clerk, who was not called, and I am not altogether satisfied that the document produced was the copy of the will. I may here mention that it was stated in the course of the argument that it was not the practice of notaries to observe the 12th rule contained in section 26 of the Notaries' Ordinance, 1877, which requires a notary to preserve a draft minute or copy of every deed or instrument executed or acknowledged before him. It was stated that the rule was observed only so far as deeds were concerned; but it seems to me unfortunate that such should be the case, for a record of a will, signed in duplicate by the testator and the attesting witnesses, would be most valuable in many cases. If the document here produced had been a document preserved under the 12th rule I have mentioned, no question would have arisen as to the fact of Don Samuel having executed a will or as to its contents. Notaries should take notice that by neglecting their duty in this respect they may render themselves liable to punishment and dismissal from office. But whether Don Samuel really executed that will or not, these facts are established—firstly, that Don Samuel executed a will; secondly, that the will was in the testator's possession; and thirdly, that it was not forthcoming; and these facts raise a presumption of law that the will was destroyed by the testator with the intention of revoking it. That presumption is one which is open to be rebutted by evidence, but in the present case there is no such evidence, and therefore full weight must be given to the presumption. That being so, I cannot agree with the District Judge in holding that the document ought to be admitted to probate as being a copy of the last will of Don Samuel. I hold, therefore, that the testator died intestate.

Mr. Wendt's client, in the course of the proceedings in the Court below, disputed the legitimacy of her brothers and sisters, the other children of Don Samuel, alleging that she herself was alone legitimate; that the others were illegitimate, as not being the children of Don Samuel's wife Babahami, but his children by her sister Dingihami, born in the lifetime of Don Samuel's wife. I do not quite understand how that issue arose on this petition, but all parties agreed to fight that issue, and the District Judge found against Mr. Wendt's client, the present appellant, on that issue. In my opinion the District Judge was right in his finding on that issue. It is clear that they were always regarded and

treated as children of Don Samuel by his wife Babahami, and had that reputation in the village. They were registered as children of Don Samuel and Babahami in the register of births, and it does not appear that until these proceedings any question was ever raised as to their legitimacy. There was, it is true, some evidence of headmen and others that they were the children of the wife's sister, but the evidence did not satisfy the District Judge nor does it satisfy me.

We, therefore, are of opinion that administration should be granted to the estate of Don Samuel as in the case of intestacy, and we remit the case to the District Court in order that the District Judge may decide as to the person or persons to whom such administration should be granted. The appellant has succeeded only to a certain extent, and we therefore give her no costs in appeal. The petition should be formally amended by adding an alternative prayer for grant of administration, so that it will be unnecessary to file any further petition. The order for administration will be made upon the present petition, as amended.

LAWRIE, J.—

I hold it proved that in 1877 the husband and wife made a joint will, and that before 1881 the will was lost, and that in that year the testator applied for and got from the notary who had attested the original paper which purported to be a copy.

The wife died in 1888, the husband in 1892.

This is the case of a lost, and not of a revoked, will.

I am of the opinion that probate of a lost will can be given in our Courts under our Code only of a will lost since the death of the testator. This in some cases might be hard ; for instance, if a testator died in ignorance of the fact of the loss or destruction of his will, it might be very reasonable that the Courts should have jurisdiction to give probate on production of a well-proved copy, but I am not sure that the Code permits this. Anyhow I am satisfied that in the peculiar circumstances of the present case probate cannot be granted. The testator, eleven years before his death, knew that the will was lost.

There was no express or implied revocation by any of the ways specified in the 6th section of the Ordinance No. 7 of 1840. But if a man knows that his last will and testament no longer exists, that it has been accidentally destroyed, say by fire or in a shipwreck, or that it has been stolen from his repositories,—if he, with such knowledge, lives for years without making a new will and dies, then I think he must be treated as having acquiesced in the loss and to have died intestate.

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Intestacy is in accordance with his own knowledge and presumed intention, because he knows that he has no document in his possession which can be given effect to on his death as his last will. If it be suggested that this testator regarded the copy which the notary furnished him with as his will as valid as the original: the first answer to that is, if he so thought he was in error in law; such a mistake does not make him testate, for many a man leaves a writing behind him which he thinks is a valid will, but if it be defective in legal solemnities he is intestate.

Second,—the testator's own act of swearing that his wife died intestate, and in taking administration of her estate in 1888, goes far to prove that he did not regard the copy as a will of which probate could be taken.

Third,—The evidence that the testator kept the copy, while the notary swears that the document produced is the copy which was given to the testator in 1881, but it is not proved what the testator did with it or what became of it. His son says he found it, but he does not say when he got it. He abstains from even saying that it was found in the deceased's repositories, still less that it had been taken such care of as to suggest that the testator thought it was his will. If it had been found carefully preserved in his box or desk with (say) an endorsement "My last will"—if, in short, there was any evidence that the testator had in a mistaken view of the law believed that the document was his last will—then I do not think it would be material whether the copy so preserved was or was not a correct copy of the original. Even if it were incorrect—if it, for instance, omitted bequests which appeared in the original—the retention of the copy, whatever its terms were, would be some evidence that that copy was treated and regarded as the testator's last will, and that he acquiesced and approved of the difference between it and the original. But whatever his intention was, it was not legally his last will, because it was not signed by him. His belief that it was sufficient could not convert an invalid unsigned will into a valid one.

I have treated this throughout as an application for probate of the husband's will.

It seems to me too late to ask for probate of the will of the wife. She died in 1888. Her estate has been administered by her husband on the footing of her intestacy, and this was done with the full knowledge of his next of kin, and his estate has long ago been divided among her heirs.

I would refuse probate to the so-called will. Letters of administration of the estate of the deceased Don Samuel must be issued. I agree that all his children are legitimate, and that they and their descendants are the next of kin.