1961 *Present:* **Sansoni, J., and H. N. G. Fernando, J.**

A. A. ROSALINE NONA, Appellant, *and* V. P. K. MANGO NONA *et al.*, Respondents

S. C. 21/60 (Inty.)—D. C. Gampaha, 537/T

Administration of estates—Will—Allegation that it was found destroyed or mutilated by testator—Burden of proof.

Where a will is found destroyed or mutilated, in a place in which the testator would have naturally put it, the presumption is that the testator destroyed it, and that the destruction was done *animo revocandi.*

APPEAL from an order of the District Court, Gampaha.

C. D. S. Siriwardene, for the Petitioner-Appellant.

A. C. M. Uvais, for the 6th Respondent-Respondent.

Cur. adv. vult.

April 28, 1961. SANSONI, J.—

The deceased Oderis Singho, whose estate is being administered in these proceedings, died on 22nd March, 1959. He executed a last will No. 525 dated 22nd July, 1954, by which he devised and bequeathed certain lands and movables to the 6th respondent, whom he appointed executor, and left the rest of his estate to all his children, including the 6th respondent. His widow (the petitioner) applied for letters of administration to his estate on the footing of an intestacy, making her six children (1st to 6th respondents) and the children of her deceased son Jinadasa, respondents to her application. The 6th respondent alone objected to the grant of letters to her, pleading that the last will was operative. He did not, however, apply to have the will proved and to have probate issued to him, but contented himself with asking that the application of the petitioner be dismissed. When the matter came up for inquiry, evidence was led on both sides but no issues were framed as required by section 533 of the Code.

On behalf of the petitioner the case put forward was that the testator had revoked his will by cutting out his signature and that of the two attesting witnesses with some sharp instrument, and by making an endorsement on it which reads " I have revoked the last will in favour of (the 6th respondent) because of his wayward conduct and I have cut off the signatures." The endorsement purports to have been signed by the testator. The 6th respondent at the inquiry attacked the endorsement as a forgery, and alleged that the cutting out of the signatures was the work of the other members of the family and not of the testator.

To rebut the first allegation the petitioner called a hand-writing expert who said that he had compared the signature on the endorsement with proved signatures of the testator, and it was his opinion that the endorsement was signed by Oderis Singho. The only other evidence led with regard to the hand-writing on the endorsement was that of the 5th and 6th respondents who respectively asserted and denied that it was that of the testator.

These two respondents also gave evidence with regard to the finding of the will after Oderis Singho's death. The 5th respondent said that two days after his father's death he found the will in his father's locked drawer of which his mother had the key. The 6th respondent was present when he found it, and read the endorsement. He denied that either he or his brothers or sisters forged the signature on the endorsement or cut out any portions of the will. The 6th respondent said that about three days after his father's death he searched for the will with the other members of the family and he found the will in question in his father's drawer. He immediately corrected himself and said that it was his eldest sister, the 2nd respondent, who found the will lying in a drawer, inside an envelope. He contradicted himself as to whether the will was taken out of the envelope or not, but under cross-examination he

admitted that the will never came into his hands, was never seen by him, and he could not say whether any portions of it had been cut out or not. These admissions are important, because they flatly contradict his evidence in chief where he said that he saw the will and saw that portions had not been cut out of it. His evidence is altogether unsatisfactory because he has made so many inconsistent statements, whereas that of the 5th respondent suffers from no such defect.

The learned District Judge dismissed the application for letters of administration on the ground that the allegations in the petition had been rebutted by the 6th respondent. He seems to have arrived at this conclusion by declining to act on the evidence of the hand-writing expert, but he has not dealt with the evidence relating to the finding of the will and its condition at the time it was found. He does not say what he thinks of the evidence given by the 5th and 6th respondents respectively on this aspect of the case. He has overlooked the contradictions in the evidence of the 6th respondent which throw considerable doubt on his position that the will had been mutilated after it was found in the drawer. If he had directed himself properly and considered the evidence carefully, I think he would have come to the conclusion that the will was in its present condition when it was first found in the testator's drawer after his death. "Where a will is found destroyed or mutilated, in a place in which the testator would naturally put it, the presumption is that the testator destroyed it, and that the destruction was done *animo revocandi* . . . . but this presumption is only *prima facie* and may be rebutted " —see 34 Halsbury (2nd edition) para. 124. The hand-writing expert's evidence supports the evidence of the 5th respondent, and in view of the unsatisfactory evidence of the 6th respondent it cannot be said that the presumption has been rebutted.

One point which emerged from the evidence of the 6th respondent was that his mother opposed his marriage. He was charged for assaulting his mother, and in that case he was asked to pay Rs. 20 as Crown costs. His wife did not live with him in his father's house. These admissions made by him in evidence lend weight to the 5th respondent's evidence that the 6th respondent married against his father's wishes and was not permitted to bring his wife to his father's house. These circumstances may account for the revocation of the will.

I would set aside the judgment under appeal and direct that the order *nisi* declaring the petitioner entitled to letters of administration on the footing of an intestacy be made absolute. The 6th respondent will pay the petitioner her costs in this Court and in the lower Court.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.