ATTAPATTU *v.* JAYAWARDENE *et al.* 1921.

Present : Bertram C.J. and Ennis J.

5—D. C. Colombo, 67.

Last will—Will not forthcoming at death of testator—Presumption that will was destroyed animo revocandi.

If a will is made by a testator and is shown to have been in his possession and is not forthcoming at his death, it is presumed to have been destroyed *animo revocandi.*

It is a necessary condition to the coming into effect of the presumption that the Court should be satisfied that the will was not in existence at the time of the death. The onus of this is on those who assert it. It must be borne in mind in this connection that there is a presumption against the hypothesis of a fraudulent abstraction.

Even in the absence of positive evidence, the Court may presume that the will was in the actual custody of the deceased.

Where a will was executed by a notary who was dead, the Court, in the circumstances of the case, drew the inference that the original was handed over to the custody of the testator.

THE facts appear from the judgment of the District Judge (W. Wadsworth, Esq.) :—

This is an application for letters of administration to the estate of one Don David Simon by his widow, the petitioner. The respondents are the children of the deceased by his first wife. The first respondent, the eldest daughter of the deceased, consents to letters to the petitioner. The objection is by some of the other children, mainly by the seventh and fifth respondents. The seventh respondent is the eldest son of the deceased. Deceased married the petitioner on November 18, 1915. He had no children by the petitioner.

Application was made for letters on the footing that the deceased died intestate. The opposing respondents say that deceased left a will, dated November 19, 1915, a day after his marriage with petitioner. The original of the will is not produced. It is missing. The will is said to have been executed in duplicate. The witness called is not sure whether it was executed in one, two, or three copies. However, the duplicate is produced from the Registrar-General's Office. The notary

1921.

Attapattu v. Jayawardene

who attested the will is dead. It is not seriously contested that the duplicate was signed by the deceased and attested by the notary and two witnesses. In fact, the notary was a proctor of this Court for many years, and all those who know him well cannot fail to identify his well-known signature. There appears to be some question as to where and when this duplicate was signed. The Court is not called upon to adjudicate on this point, but it is to be noted that the date "seventeenth" had been altered to "nineteenth," and "Hultsdorf" altered to "Wellawatte"; and towards the end, in the blank space for date, the word "nineteenth" is inserted. The alterations are unfortunately not initialled, either by the deceased or by the notary, and it is not clear when or by whom the alterations were made, or whether the alterations were made on purpose or not. It is not necessary to state anything further about it, as the issue whether the deceased died leaving a will can be decided without going into the question of the alterations or the validity or otherwise of the document.

The original of the will is not forthcoming. There was a very vague suggestion that the deceased had the original, but that the petitioner had made away with it, and in support the seventh respondent, who practically had the conduct of the case as a last resort, put forward his little brother at the end of the case to say that this little boy saw the step-mother (the petitioner) taking the deceased's things, including some papers, and sent them away through her brother. I have no hesitation in finding that this belated attempt on the part of the seventh respondent to rebut a presumption created by law is a false move.

His experience, though short, in the police force of this Island, however, was helpful to him when he conducted his case in person, and he produced the evidence which he thought was necessary to meet the case. I reject this little boy's evidence altogether. It is very strange that this little fellow, after the evidence was led by his brother the first day, and when his brother was waiting in Court after the Court adjourned, went to his brother and gave him just the evidence which was wanting. I am of opinion that this little boy was well schooled by the seventh respondent.

I accept the evidence of the petitioner that she did not know of the existence of any will till after her husband's death, when she was informed by the seventh respondent, and that she did not take any papers of her husband.

It is well settled law that if a will was executed in duplicate, and the testator had the custody of one part and it cannot be found after his death, the presumption of law is that he destroyed it *animo revocandi*, and both parts are consequently to be considered to be revoked unless such presumption is rebutted. There is no evidence to rebut that presumption which the law creates. It is possible that deceased felt that the devises in the original will were not equitable or just, as he had disposed of some of the properties originally mentioned in the will, and left some of the children without anything at all. Whatever that may be, I find that the presumption of law as to the revocation has not been rebutted. The deceased died intestate, and the petitioner, as the widow, is entitled to letters of administration. As to costs of this inquiry, I order that the costs, both of the petitioner and of the respondents, be paid out of the estate.

Samarawickreme, for the appellants.

Drieberg, K. C. (with him *Croos-Dabrera*), for respondents.

July 4, 1921. BERTRAM C.J.— 1921.

Attapattu v. Jayawardene

The question for consideration in this case is whether a will, a copy of which was produced from a notary's office in protocol, and which was undoubtedly made by the testator, was revoked before his death. The will was said not to be found in the testator's possession or anywhere else at the time of his death, and those who propound the will have to have recourse to the protocol in the notary's office. The question is, therefore, what has become of the will? Now, it is an accepted principle of the law that if a will is made by a testator, and is shown to have been in his possession and is not forthcoming at his death, it is presumed to have been destroyed *animo revocandi*. That is laid down in several cases, of which the following may be cited: *Welsh v. Phillips*,[1] *Allan v. Morrison*,[2] *Sugden v. the Lord of St. Leonards*.[3] Mr. Samarawickreme, who appeared for the appellants, entirely accepts that principle, but contends that in this case it has no application, because there is no positive proof that the will was ever retained in the custody of the deceased.

We must approach this case by stages. The first question is: Is it shown that the will could not be found at the date of the deceased's death? It is a necessary condition to the coming into effect of the presumption that the Court should be satisfied that the will was not in existence at the time of the death (see *Finch v. Finch*[4]). The onus of this is on those who assert it. It must be borne in mind in this connection that there is a presumption against the hypothesis of a fraudulent abstraction (see *Allan v. Morrison*[2]). In *Finch v. Finch*,[4] without positively finding that there was such an abstraction, in view of the suspicious conduct of the defendant and the other circumstances of the case, the Court expressed itself as not satisfied that the will was not in existence at the time of the death. In the present case there is nothing which would justify us in coming to such a conclusion. We must take it, therefore, that at the date of the death of the deceased the will could not be found in his custody.

The next question is: Had the will been in his possession? Mr. Samarawickreme says that it must be shown by positive evidence that the document was in the actual custody of the deceased. There is no express authority for that proposition. There is this to be said, that in all the cases which he has brought before us there was such positive evidence. In this case that positive evidence is wanting, because the professional man who drew the will, and who presumably handed over the will to the testator, has died in the interval, but it is open to the Court to draw an inference from the nature of the case. In this case we have the fact that the will was executed in duplicate, but that one copy was retained by the notary. The only inference in the circumstances of the case is that the other

[1] *(1836) 1 Moore P. C. 299.*
[2] *(1900) 10 A. C. 604.*
[3] *(1876) 1 Probate Div. 154.*
[4] *(1867) 1 Probate and Divorce 371.*

1921.

BERTRAM C.J.

Attanayake v. Silva

was handed over to the custody of the testator. I fail to see that any distinction could logically be drawn between a case in which possession by the testator is positively proved and a case in which such possession is inferred from the circumstances of the case. I take it, therefore, that we must hold that the will, after having been executed, was in the possession of the testator.

Now, if that is held, there follows the presumption above explained. That presumption is, no doubt, not a very strong one. It is weakened by two circumstances, one is that, though the protocol was allowed to remain in the possession of the notary, no intimation appears to have been conveyed to him that the will had been revoked. At any rate, no application appears to have been made for the return of the protocol. It is further weakened by the circumstance that we do not know what was the actual character of the custody of the deceased. But, nevertheless, on the facts above found there undoubtedly is a presumption in favour of a revocation. We must then ask ourselves, has that presumption been rebutted? It is unnecessary to ask whether the will was fraudulently abstracted. That is a matter we have already dealt with. In many of the cases the most important circumstance considered has been the intention of the testator. Was it likely that the intention of the testator had altered? If it is shown that there is every reason to believe that the testator's intention, when he made the will continued to his death, that is a strong circumstance against the hypothesis of revocation, but in this case we have very strong circumstances tending to show that it was likely that deceased revoked the will. When he made the will, he had four properties. When he died, two of these had already been disposed of. It is proved in evidence that he intended to dispose of a third of these properties. His intention was interrupted by his death. Had he carried out that intention, only one property would have been left, and that was the property devised to the seventh respondent. It seems, clear, therefore, that the circumstances of the deceased had wholly altered, and that if the will is upheld it will not give effect to the intention which he had when he first executed it. There was every reason, therefore, for his destroying the will. There is some force in what Mr. Samarawickreme says, that one might have expected a man in his position to make a new will before disposing of the old, but, on the other hand, there is equal force in the suggestion that he may have decided to destroy the will and leave his property to devolve in the ordinary course. The learned District Judge had, in fact, come to this conclusion, and I do not think that sufficient evidence has been led before us to vary this conclusion.

The appeal should be dismissed, with costs.

ENNIS J.—I agree.

Appeal dismissed.