42

IN THE WILL of HERBERT JOHN WASHINGTON.

JUDGMENT of Phillips J. delivered on 9th December, 1946. (at Port Moresby).

MOTION.

By this Motion, application has been made for the grant of probate in respect of a paper purporting to be a reproduction of the original Will, (said to have been lost because of the Japanese invasion of Rabaul in 1942), of the deceased, Herbert John WASHINGTON, who, while in the hands of the enemy, went missing and has been presumed to have lost his life when the "Montevideo Maru" was sunk on the 1st July, 1942.

As I have to leave Port Moresby in a matter of hours to go on circuit in the Territory of New Guinea and may not be back until after the Court vacation has commenced, I propose to announce my decision in regard to the present application at once: reasons for that decision will be briefly stated and I reserve to myself the liberty of amplifying and re-stating them later on, if need be.

On the evidence before me, I am satisfied that the deceased made a Will on 1st August, 1930, which was kept in the office of Mr. McLennan, Solicitor, at Rabaul and taken over with other documents by Mr. Cromie, Solicitor, when he took over Mr. McLennan's practice in March, 1937. Mr. Cromie has deposed that he inspected the Will, but cannot now recall its contents; that he did not hand the Will (i.e. the original Will) to deceased or any one else; and that the Will (together with other documents and papers at the office) was destroyed or lost as a result of the Japanese occupation of Rabaul and cannot now be found. Mr. Cromie has said at the hearing that this Will had an attestation clause.

The contents of a lost Will may be proved by secondary evidence: Sugden v. Lord St. Leonards; 1876, I.P.D., 154

That case is still authority (despite comments in Woodward v. Goulstone 1886, 11 A.C. 469) for the proposition that declarations, whether written or oral, made by a testator, both before and after the execution of his Will, are, in the event of its loss, admissible as secondary evidence of its contents. On the other hand, the post-testamentary declarations of a testator as to the due execution of his Will have been held not to be admissible: see Barkwell v. Barkwell (1928. pp. 91), where it is said that "Inasmuch as the Wills Act 1851 denies all effect to any Will unless it shall be made in writing executed in the prescribed manner, that statute plainly ought not to be evaded by the admission of parol statements made after the event to make out execution."

Now in this case there are affidavits by two of the testator's sons and by his widow as to what the testator said about his Will or a copy of it. The copy, by the way, has been sworn to have been also lost as the result of the Japanese invasion: see affidavit of George Washington, sworn on 8th December, 1946, as to his fruitless search for it during his visit to KABAIRA Plantation in September and October of 1945.

Thus one son, William Alder Washington, has deposed, in an affidavit of 12th October, 1946, that in 1937 at KABAIRA Plantation, his father (the testator) handed him a document which ~~XXX~~ testator told him to read and become familiar with: the testator also said that "the original was lodged for safekeeping in Rabaul." William Alder Washington read the document and saw that it had been signed by his father in the presence of two witnesses, one of whom was Alexander Strathearn, Clerk of the Supreme Court at Rabaul, the other witness being someone whose name deponent could not recall. (In a later affidavit sworn on 29th October, 1946, the deponent said that the document had been signed by his father in his own handwriting, in ink, and that that signature appeared opposite a clause stating that the document was his Will and that it had been executed in the presence of witnesses. Under that clause

281

275

appeared the signature, in ink, of Alexander Strathern (whose signature was known to deponent) and the signature, also in ink, of another person whose name deponent had forgotten. Deponent, in his affidavit of 12th October, 1946, said that the contents of the copy Will were as follows:-

(i) the executors appointed were himself and his brother George Washington:

(ii) His mother was left a life interest in the whole of the estate:

(iii) after the death of his mother or in the event of her marrying again the estate was to be divided and left as follows:

(a) Interest in USEWIT Plantation to go to the said George Washington who is part owner thereof:

(b) Panda Panda and that part of KABAIRA Plantation planted by deponent to go to deponent:

(c) Area planted with cocoa, known as LEEM and part of KABAIRA Plantation, to go to testator's daughter Jessie Irene; (area on northern boundary):

(d) Remainder of KABAIRA Plantation to go to testator's son Desmond John Washington and to testator's daughter Marjorie Joan Washington in equal shares:

(iv) there were no other bequests of any description whatsoever.

If the deponent is correct in saying there were no other bequests, that means there was no residuary clause and consequently (as appears from the affidavit of George Washington and William Alder Washington jointly sworn on 12th October, 1946 for succession duty purposes, out of an estate of a gross value of £44,285 there would be an intestacy as to £2,970.

William Alder Washington also deposed, in his affidavit of 12th October, 1946, "as to execution and contents of (the) Will," that the witness Strathearn was a personal friend of the family and was also lost on the "Montevideo Maru."

Then there is an affidavit by the widow, Marjorie Ann Washington, sworn on 25th June, 1946, stating that in 1939 the testator informed her that he had a copy of his Will in a strong-bo

at KABAIRA Plantation and suggested to her that she should read it. This she did. She deposed that she was unable to give its precise terms but could give its effect, which she has stated in exactally similar terms (as to appointment of executors and the various gifts) to those set out in William Alder Washington's abovementionod affidavit on the same subject. In a later affidavit sworn on 18th November, 1946, she has deposed that, in the copy Will seen by her, she noticed that the copy signatures of the testator and the two witnesses were written in ink.

Then there is the affidavit of George Washington, another son of the testator (and on account, by the way), sworn on 12th October, 1946, in which he says that when he was at KABAIRA Plantation on holidays in July-August 1941, his father told him that he and his brother William Alder were executors of their father's Will. He had never seen this Will but his father told him of its provisions, which deponent has given and which are virtually word for word the same as the accounts given by William Alder Washington and the widow in their affidavits on this matter. This marked similarity, I suspect, was due to the fact that the three affidavits were prepared in the same solicitor's office: and it is not suggested that the similarity casts doubt on the veracity of the three deponents.

The question arises, whether the documents referred to by two of the three deponents abovementioned was a copy of testator's Will; of his last and unrevoked Will? As the testator himself described it as a copy of his Will which was lodged for safekeeping at Rabaul, and as those who say they saw it described it in a way in which one would normally describe a copy Will (with attestation clause and signatures of testator and two witnesses), I am of the opinion that the reasonable probabilities are (despite the fact that the oponents said nothing of the date of the document they saw) that it was a copy of testator's Will of 1st August, 1930, which was, in fact, lodged for safekeeping at Rabaul in the office of Mr. McLennan, later taken over by Mr. Cromie; and I so find. But had the testator revoked the Will

of 1st August, 1930? There is no evidence suggesting this. On the contrary, Mr. Cromie has sworn it was still at the office and had never been handed by him to the testator or anyone else before Mr. Cromie was compelled to leave Rabaul in 1942 because of the Japanese invasion. The testator in 1937, 1939 and 1941 had spoken to his wife and two sons about his Will, the last occasion being only a few months before the Japanese arrived. The probabilities are all in favour of non-revocation and I find that the Will of 1st August, 1930 had not been revoked or destroyed animo revocandi. Its loss or destruction was not the fault of anyone whose duty it was to preserve it, but due to enemy action.

Was that Will duly executed? Presumably it had been drawn up by a solicitor, as it was at Mr. McLennon's office: and Mr. Cromie's inspection gave him the impression that it was a Will which had a proper attestation clause. The copy had some such clause and was signed by the testator and by one of the witnesses in their own handwriting: whether the second witness' apparent signature was in his own handwriting is not known. The first witness was a Clerk of the Supreme Court. A passage from the Judgment of Lindley, L.J. in Harris v. Knight 1890 15 P.D. 170, at p. 181, is apposite, I think:- "What is the reasonable probability from these facts? Is it that the deceased did what he intended effectually or ineffectually? The presence of two witnesses is significant. Why two? Because two were necessary. Why have them at all - except to render the instrument valid? And there being no reason whatever to doubt the genuineness of the unproved signature, is it not a reasonable inference to infer its genuineness? If that is so, and there is no reason to suppose that anything was done irregularly or improperly, may it not reasonably be inferred that all was done properly, although there is no attestation clause to say so?" That is this very case, except that in this case I believe there was an attestation clause also. I propose to apply the maxim - "omnia praesumuntur rite esse acta" in this case: and that maxim has been referred to by Lord Lindley

case just cited, (at p. 179), as "an expression, in a short form, of a reasonable probability, and of the propriety in point of law in acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved." The reasonable probabilities in the present case are such that I find that the Will of the testator was duly executed.

As to the contents of that Will, the only evidence available is that of the widow and two of the sons of the testator: the widow and one son say what they remember of what they saw in the copy of the Will that the testator gave them to read: the other son has deposed to what the testator told him, in 1941, of the contents of his Will. All may be described as "interested parties" and Lord Herschell L.C., has said in Woodward v. Goulstone, (above cited, at p. 474):- "Nothing can be more dangerous, I think, than to accept as any evidence, to carry with it weight, of the contents of a Will the evidence of persons of statements made to them of bounties which they are to receive after the death of the person who made those statements ...": and (at p. 475):- "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 really is before one substantially the testamentary intentions of the testator." But Lord Herschell also said that he did not dissent from the view expressed in Surdon v. Lord St. Leonards (abovecited) in which case it was held that the contents of a lost Will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. In Harris v. Knight (above cited) Lord Lindley said (at p. 179):- "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 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 Sugden v. Lord St. Leonards. But 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."

Let us therefore test the evidence of these interested deponents, as far as is practicable.

The widow, in an affidavit sworn on 18th November, 1946, has deposed that the only children of the testator (all of whom survived him) were George, William Alder, Jessie Irene (now Mrs. Green), Desmond John, and Marjorie Joan; and she has given the dates of their births, - from which it appears that Marjorie Joan (now 18) is the only minor. The widow and these children comprise all who would be interested if there had been a complete intestacy. Yet provision is made for each and every one of them in the alleged Will of the Testator, if the account of the widow and two sons of the contents of the Will is correct. Further, if the contents of the Will were as stated by them, the testator, (as a study of the alleged contents shows, and it being borne in mind that almost the whole of his estate consisted of interests in plantations and gear for plantation work) made what seems a fair, equitable and wise disposition of his property. As Jessel M.R. said in Sugden v. Lord St. Leonards (above cited, at. p. 245), which was a case in which one witness, an interested party, gave parol evidence about the contents of a lost Will:- "Now, I must say that in taking the unsupported testimony of a witness, especially of an interested witness, the position of the testator and the probability of the dispositions which he is said to have made, appear to me to be important elements." In the present case, the alleged dispositions seem

to me to be very probable indeed, and it will be noted that they cover not all, but substantially the whole, of his estate. The accounts given by the three deponents as to the contents of the Will, knowledge of which came to them in 1937, 1939 and 1941 respectively, tally and corroborate each other. I therefore accept their evidence as to the alleged contents of testator's Will, so far as it goes.

Further, I consider that probate may be granted for the administration of the deceased's estate in accordance with the substance of the Will as set out in the affidavits of those three deponents (i.e. that of William Alder Washington sworn on 12th October, 1946, that of George Washington sworn on the same date, and that of the widow, Marjorie Ann Washington sworn on the 25th June, 1946.) But the grant of Probate must be limited to the substance of the Will as set out in those affidavits. In particular, it may not extend to a number of paragraphs in what purports to be a "reconstruction" or "reproduction" of the original Will and which is annexed and marked "A" to the joint affidavit of George Washington and William Alder Washington sworn on the 12th October, 1946 (which is to be distinguished from their individual affidavits sworn separately on that date). That "reproduction" contains matter which was not, in my opinion, adequately or satisfactorily supported by evidence or necessarily supported by legitimate inferences from the evidence. What evidence is there to support the express revocation clause? Or to support the appointment of George and William Alder Washington as "trustees" as well as executors? Or to support the words "devise and bequeath" in addition to "give"? Or to support the "trust to sell call in and convert the same into money (with power in their absolute discretion to postpone such sale calling in and conversion) and after payment thereout of my debts and funeral and testamentary expenses to invest the residue of such monbys in their names in any of the investments authorised by law and to stand possessed of such investments and of all parts of my estate for the time being unsold as follows"? Or to support

the words "as tenants in common," which appear at the end of the gift to the son Desmond John Washington and daughter Marjorie Joan Washington? None that I can see, and there certainly is none in the affidavits of George, William Alder, and Marjorie Ann Washington which are described, on the backs of them, as affidavits "as to execution and to contents of Will." The solicitor who has appeared for George, William Alder, Marjorie Ann, and Desmond John Washington and for Mrs. Green has frankly and fairly informed the Court that the abovementioned "reproduction" was drafted by him on what was said in the three last mentioned affidavits and on what he assumed the solicitor who drafted the original Will would put into such a Will. But this, in my opinion, is carrying the maxim "omnia praesumuntur rite esse acta" much too far and is something which might easily have led one to question the veracity of the deponents but for the solicitor's frank admission. It will be accepted that the procedure adopted by the solicitor, in this instance, was not adopted in bad faith but it must not be repeated.

One matter should be mentioned in case it may be thought that I have overlooked it; and that is the fact that one of the next-of-kin, the testator's daughter Marjorie Joan Washington, who is also named in the Will, is a minor. The remaining next-of-kin (who also are the only other persons who benefit under the Will of the testator) are sui juris and have either made, or consented to, this application - the consents being on the file. There is no consent filed on behalf of Marjorie Joan Washington. It is, of course, desirable and proper, when any of the persons interested are not sui juris, that a proceeding of this kind should be in solemn form. But I do not feel disposed to put the parties or the estate to that expense in this case, for the following reasons. Even if Marjorie Joan were represented, I think it exceedingly improbable that I should arrive at a different finding from the one I have reached, viz., that the substantial testamentary dispositions of the testator by his duly

executed and unrevoked Will are known. Those dispositions seem to me to have great probability and included a gift of the remainder of KABAIRA Plantation to the two youngest children, Desmond John and Marjorie Joan, in equal shares. Incidentally, Desmond John, who is sui juris, appears satisfied with this disposition for he has consented to this application. Marjorie Joan, according to the affidavit of her mother, is living with her mother. In all these circumstances, a direction for proof in solemn form seems to me unwarrented in this case and would entail much expense without, as far as can be seen, affecting the matter in the slightest.

For the reasons given in this judgment, I therefore direct and order that the Registrar may grant probate to George Washington and William Alder Washington, sons of the deceased, to administer the real and personal estate of the deceased in accordance with the substance of the Will of the deceased as set out in the affidavits of George Washington, William Alder Washington, and Marjorie Ann Washington, respectively sworn on the 12th October, 1946, the 12th October, 1946, and the 25th June, 1946 and all described as affidavits "as to execution and to contents of Will," limited until such time as the Will, or more authenticated evidence of it, be brought into the Registry.

(As already mentioned there appears to be an intestacy as to about £2,970. )