1929
*Nov. 5, 6.
1930
*Feb. 4.

IN THE MATTER OF THE ESTATE OF ALEXANDER ZOTIQUE PETER PIGEON, DECEASED

MARIE FELICITE LEFEBVRE, JOSEPH LEFEBVRE AND ZOEL CYR, EXECUTORS AND EXECUTRIX OF AN ALLEGED WILL OF THE SAID DECEASED (PLAINTIFFS)..... APPELLANTS;

AND

HENRI MAJOR AND WILLIAM MAJOR, REPRESENTING THEMSELVES AND ALL OTHER NEPHEWS AND NIECES OF SAID DECEASED, AND MARIE FELICITE LEFEBVRE (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Will—Alleged will not forthcoming after death—Sufficiency of proof of execution and contents—Rebuttal of presumption of destruction animo revocandi—Destruction of one will on assumption of replacement by later will—Dependent relative revocation.

The judgment of the Appellate Division, Ont., 64 Ont. L.R. 43, holding that the alleged will in question should not be admitted to probate, was reversed.

There was evidence as to the making of a will by the alleged testator in November, 1923, and of its contents, and of correction of the testator's name as written therein, either by a new will or by correction and re-execution of the old one, in February, 1924, the contents, except for said correction, being unchanged. The alleged will was deposited in a bank in Vancouver, B.C., for safe keeping. Later the testator came to reside in Ontario. In May, 1925, in response to a letter from the testator, the bank in Vancouver sent the will to him and got his receipt for it. The testator died in May, 1928. Upon a search made after his death no will was found.

Held (1) As to execution of the will of 1923, while the evidence failed to shew fully observance of the statutory formalities, it was a reasonable assumption from the evidence that they had been duly observed, having regard to all the circumstances and especially to the fact that the will was prepared by a competent solicitor and executed in his office (*Harris* v. *Knight*, 15 P.D. 170, at pp. 179-180; *In re Thomas*, 1 Sw. & Tr. 255, cited); and its due execution should be held to have been established. As to the will of 1924, the question of its due execution was not very material, as, its contents being proved to be the same as those of the earlier will, it did not matter which document was admitted to probate. If its due execution

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

should be held to be established, the will of 1924 was the one to be admitted to probate; if not, the will of 1923 would remain effective, even though it had been physically destroyed on the assumption that it had been duly replaced by the later will; the doctrine of dependent relative revocation applied. The contents were clearly established.

(2) The presumption of destruction of the will by the testator *animo revocandi*, arising from its being traced to his possession and not being forthcoming after his death, must be held, on all the facts and circumstances, to have been rebutted, taking into consideration that the will as made was eminently reasonable in view of the testator's affectionate feelings towards the beneficiary (his only surviving sister), that there was no change in those feelings (as held established on the evidence), statements by the testator shortly before his death to independent and trustworthy witnesses (*Whitely* v. *King*, 17 C.B.N.S. 756), the simple character of the testator, the fact (to be inferred from the evidence) that he regarded his will as of the highest importance, and (there being no evidence of its deposit for safe keeping elsewhere) would likely have kept it near his person, and the fact that after his death certain of his clothing and bedding were burned without any search thereof and before any search for a will was made.

Sugden v. *Lord St. Leonards*, 1 P.D. 154, at pp. 217. 202-3; *Stewart* v. *Walker*, 6 Ont. L.R. 495, referred to. *Allan* v. *Morrison*, 17 N.Z.R. 678; [1900] A.C. 605, and *Eckersley* v. *Platt*, L.R. 1 P. & D. 281, distinguished on the facts.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which held, reversing the judgment of His Honour, Judge O'Reilly, Judge of the Surrogate Court of the United Counties of Stormont, Dundas and Glengarry, that the alleged will in question of Alexander Zotique Peter Pigeon, deceased, should not be admitted to probate.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal was allowed with costs.

O. Sauvé and *J. Sauvé* for the appellants.

H. H. Davis K.C. for the respondents.

The judgment of the court was delivered by

ANGLIN C.J.C.—This issue in this case is as to the admissibility to probate of an alleged will made by the late Alexander Zotique (Peter) Pigeon who died, at the town of Alexandria in the county of Glengarry, between the 15th

(1) (1929) 64 Ont. L.R. 43.

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and 29th of May, 1928. The facts as disclosed by the evidence are very fully stated in the judgment of Latchford C.J. in the Appellate Divisional Court (1). That court, by a majority of three to two, reversed the decision of the late Judge O'Reilly, Surrogate Judge of the United Counties of Stormont, Dundas and Glengarry (who admitted the will to probate), holding that the presumption of revocation, arising from the will having been traced to the testator's possession and not having been found amongst his papers after his death, had not been rebutted by the evidence adduced at the trial on behalf of the executors propounding it for probate.

Three questions are presented on the present appeal:

First—Was due execution of the alleged will established;

Second—Were its contents satisfactorily proved; and

Third—Does the evidence rebut the presumption of destruction by the testator *animo revocandi?*

The trial judge found that the evidence sufficiently established the due execution of the will; and upon this point the Appellate Division unanimously assumed the correctness of his conclusion, although the majority of the judges of that court did not pass upon it. At bar in this court, however, this was made a principal subject of contest.

The evidence established that the deceased, Alexander Zotique Pigeon, owned some property in British Columbia, which was acquired by the British Columbia Electric Company. Being desirous of investing the money derived from the property, he consulted a banker in Vancouver upon whose advice he invested most of it in Dominion bonds. This banker at the same time urged him to have a will made, and suggested that he should consult for that purpose, Messrs. Bourne & DesBrisay, a well-known and reputable firm of solicitors in Vancouver. Acting on this advice he called on Mr. Bourne and had a will drawn by him. He was accompanied at the banker's and at Mr. Bourne's by one Zoel Cyr, who appears to have been an intimate friend and who remained with him throughout the proceedings in the solicitor's office.

The will, having been drawn, was read to the testator in Cyr's presence and he tells us what its contents were.

(1) (1929) 64 Ont. L.R. 43, at p. 52.

Then, according to Cyr's evidence, Mr. DesBrisay, the partner of Mr. Bourne, was called in to act, with Mr. Cyr, as a witness to the will and, as Cyr says, Pigeon signed the will and he and DesBrisay witnessed it. He is not asked where Pigeon placed his signature on the paper, nor whether DesBrisay was present and saw him sign it as well as himself, nor whether he and DesBrisay actually signed the will as witnesses, nor whether, if they signed it, they did so in the presence of the testator. In ordinary parlance, however, a man who says he witnessed the execution of a document means that he attested such execution by his signature; and that, I think, is a fair inference from this evidence. As to the observance of the statutory formalities, to which Cyr's attention was not specifically called, it is, I think, a reasonable assumption that they were duly observed, having regard to all the circumstances and especially to the fact that the will was carefully prepared by a competent solicitor and was executed in his office. *Harris* v. *Knight* (1); *In re Thomas* (2). While neither Mr. Bourne nor Mr. DesBrisay had any recollection of the circumstances, a charge is made in the books of the solicitors for the drawing of a will of Mr. Pigeon on the 22nd of November, 1923. We have no hesitation in finding the due execution of the will of November 22, 1923, to have been established.

After this will was executed it was taken by Pigeon, accompanied by Cyr, to the banker's office and left with him for safekeeping. The banker corroborates Cyr's story both as to the sending of Pigeon to Bourne and DesBrisay and as to the return of the will to him for safekeeping.

It would appear that Pigeon advised his sister, resident in Williamstown, Glengarry county, Ontario, by letter of December, 1923, of the making of this will and that she then noticed that he had described himself as "Peter Pigeon," whereas his correct name was Alexander Zotique Pigeon, "Peter" being a nickname which he had acquired in the West. She replied informing him of this error. Having some doubt as to the sufficiency of the will containing this misnomer, it would seem (although there is no direct evidence to that effect) that Pigeon went back to

(1) (1890) 15 P.D. 170, at pp. 179-80.

(2) (1859) 1 Sw. & Tr. 255.

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the banker and withdrew the will temporarily for the purpose of having the correction made. At all events, as Cyr deposes, he attended for that purpose at the office of Mr. Bourne in the month of February; and in the latter's books there occurs an entry of February 21, 1924, where a charge is made for drawing (or re-drawing) the will of Pigeon. Whether the will was re-drawn on that date, or the existing will was merely corrected and the changes initialled and republication made in due form (*Hindmarsh Charlton* (1)) does not appear. Once more Mr. Bourne has no recollection of the circumstances except that derived from his books; nor is there any evidence given by Cyr as to what occurred on the occasion of the second visit except that it took place and that the contents of the will as "re-drawn" on that date were precisely the same as those of the earlier will, the name of the testator only being changed from "Peter Pigeon" to "Alexander Zotique Pigeon, better known as Peter Pigeon." The new will, or re-executed (?) will, was again taken and deposited in the bank for safekeeping. There is no evidence whatever as to who witnessed the new will or as to the formalities prescribed by the statute having been complied with.

Shortly afterwards, Cyr, by direction of the testator, who could not do more than write his name, wrote a letter to Mrs. Lefebvre, the testator's sister, informing her of the alteration of his name in the will and stating the substance of its contents and that he had re-deposited his will in the bank at Vancouver. Cyr says he wrote this letter exactly as dictated by Pigeon. The letter itself was produced and is in evidence.

While it would be more satisfactory had the circumstances of the making of the will of February 21, 1924, been adequately probed, it would seem to be not very material whether due execution of that will should or should not be regarded as having been established. Either it was or it was not duly executed. If it was, its contents, having been proved to be the same as those of the earlier will, are sufficiently established by proof of the contents of that will and the document to be admitted to probate would in that case be the will of February 21, 1924. If, on the other hand, the due execution and attestation of that

(1) (1861) 8 H.L.C. 160.

document should be held not to have been sufficiently established, the will of November 22, 1923, would remain effective, even though it had been physically destroyed on the assumption that it had been duly replaced by the later will. Under such circumstances the doctrine of dependent relative revocation applies. Jarman on Wills, 6th Ed., pp. 148 *et seq.*

It, therefore, seems to us not vital which document should be regarded as the last will of the testator. Either that of the 22nd of November, 1923, or that of the 21st of February, 1924, was a duly executed will; or perhaps both were so executed; and, the contents being identical except for the change in the testator's name, it does not seem to be very material which document should be admitted to probate.

As to the proof of contents, the evidence is absolutely clear and dependable. Not only are the contents stated by Zoel Cyr, who heard the will read, but they are also set forth in the testator's letter of the 2nd of March, 1924, to his sister; and this evidence is corroborated by the statements made by him to the witnesses Pelletier and Lalonde shortly before his death. *Barkwell* v. *Barkwell* (1).

There remains, therefore, only the difficulty presented by the presumption of revocation arising from the will, traced to the possession of the testator, not being forthcoming. *Welch* v. *Phillips* (2). This is said by Cockburn C.J., in *Sugden* v. *Lord St. Leonards* (3) to be "*presumptio juris,* but not *de jure,* more or less strong" according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction on the part of the testator. The material circumstances on those points are the following:

The testator, a simple and uneducated man, left Vancouver and went to Williamstown to reside with his sister in the month of August, 1924. He remained with her until the following March, when he went to the hospital for some treatment, and after a few weeks' absence, returned to her house. About the end of April or beginning of May,

(1) (1928) P. 91. (2) (1836) 1 Moore P.C. 299.
(3) (1876) 1 P.D. 154, at p. 217.

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1925, having acquired a property in Alexandria, a nearby town, he went there to live. In November, 1925, his sister also moved to Alexandria with her family; and the evidence discloses an exchange of visits there, from time to time, between the testator and his sister. There is no suggestion whatever that the testator at any time ceased to entertain for his sister the same affectionate feelings which he appears to have had for her when making his will in Vancouver. On the contrary, the only evidence in the record is that he remained on good terms with her throughout.

Towards the end of April, 1928, about three or four weeks before his death, he had a conversation with an intimate friend named Lalonde, to whom he said that all his money had been willed to his sister; and, between the first and fifth of May following, probably about a fortnight before his death, he also had a conversation to the like effect with Louis Pelletier, a contractor, who resides in Ottawa and who knew Pigeon well. This contractor, having business in Alexandria, saw Pigeon there about the beginning of May at his (Pigeon's) house where he had called for a friendly chat and smoke. Pigeon then said to him, "I don't have to work any more. I have money to live on the interest." Upon Pelletier asking him, "What are you going to do with that money," he said, "I got my affairs fixed up when I die. I only have one sister living" * * * "he told, if he die, if anything happen to him all his papers was made," and again, "all my papers is fixed up so if anything happen to me, I have only one sister, everything goes to her." (*Whitely* v. *King et al* (1)). This was between the first and fifth of May, 1928, and that was the last this witness saw of the testator.

What is mainly relied upon as casting doubt upon the sufficiency of this evidence to rebut the presumption of revocation is a letter written by the testator from Alexandria to the bank manager at Vancouver, from which it is sought to draw the inference that there had been some friction between the testator and his sister, sufficient to afford a reason for his wishing to destroy the will in her favour. This letter bears date the 3rd of May, 1925, and was written immedi-

(1) (1864) 17 C.B. N.S. 756.

ately upon, or shortly after, his arrival at Alexandria. It is in the following terms:

ALEXANDRIA, ONT.,
May 3, 1925.

BANK OF MONTREAL,
Carrel Street,
Vancouver, B.C.

DEAR SIRS,—Any paper that comes to the name Mr. Lefebvre and Peter Pigeon don't give any money. Any paper that come to the Bank Except Peter Pigeon alone no other name is no good. Will you send my testament that is in your safe to Mr. Peter Pigeon,

Alexandria,
Ontario.

Acting upon this letter, the bank manager, on May 11, 1925, sent what had been deposited with the bank as the testator's will, to Alexandria, enclosed in the following letter:

May 11, 1925.

Registered.

PETER PIGEON, Esq.,
Alexandria, Ont.

DEAR SIR,—Referring to your letter of the 2nd inst., we beg to enclose herewith one sealed envelope said to contain your last will and testament and shall be obliged if you will kindly sign the enclosed receipt and return it at your earliest convenience.

Yours faithfully,
Manager.

The receipt is also produced, signed by Peter Pigeon as of the 21st of May.

There can be no question upon this evidence that the document deposited with the bank in Vancouver in February, 1924, was forwarded to and was received by Peter Pigeon at Alexandria in May, 1925. It is this fact, coupled with the other fact that the will was not found amongst his papers, that gives rise to the presumption of destruction by the testator *animo revocandi.*

Reverting for a moment to the letter of the 3rd of May, 1925, the prohibition which it contains to the banker to pay money upon any paper bearing the signature of Mr. Lefebvre as well as Mr. Pigeon, is relied upon as suggestive of unpleasantness having arisen between him and the Lefebvre family. Whether any such inference would be open upon the document if standing alone, or whether the proper view is that taken by the learned trial judge, viz., that the testator, an ignorant and unlearned man, feared that the fact that he had named Lefebvre as one of his

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executors might give that gentleman some present control of, or voice in, the disposition of moneys left by him with the bank and that he wished to guard against anything of the kind happening, is, perhaps, doubtful. But, however that may be, any inference that could otherwise be drawn adverse to Mrs. Lefebvre, the testator's sister, is entirely overcome by the direct evidence in the record that there was at no time any interruption whatever of the friendly and affectionate relations subsisting between her and the testator. Moreover, to infer from this letter that the testator had destroyed his will *animo revocandi* at any time after its receipt by him on the 21st of May, 1925, is so utterly inconsistent with his statements made in April and May of 1928 to the independent witnesses, Lalonde and Pelletier, that it may safely be disregarded.

While the view taken by the learned trial judge of the interpretation proper to be placed upon the testator's letter of the 3rd of May to the banker may not be entirely correct, having regard to all the evidence it is at least less improbable than that suggested on behalf of the respondents.

As already stated, the testator died somewhere between the 15th and the 29th of May. He was last seen alive by his sister on the 15th or 16th of May (she is not sure on which day), when he complained of not feeling well. No witness deposes to having seen him alive subsequently. His body was found in his residence on the 29th of May, 1928, by his nephew, Palma Lefebvre. Putrefaction had set in and the body was considerably decomposed, indicating that death had occurred some time before. He was lying upstairs in his bed.

No search for papers was made immediately; but, soon afterwards, by instructions of the undertaker, who had warned them to be very careful and to wear mittens for that purpose, a mattress, a feather bed and blankets, two coats, a pair of overalls, pants and socks, which had been in the testator's room, were thrown out and burned by his two nephews, Josephat and Alcide Lefebvre. No search had been made of the clothing or effects so burned, but, subsequently and for the first time, a search was made of the house by the nephew Palma Lefebvre, who found a

number of documents in different places, but did not find a will.

That the testator regarded his will as of the highest importance and, there being no evidence of its deposit for safekeeping in the bank, or with a solicitor, or trust company, that he would quite likely have kept it near his person, not improbably in the pocket of his coat, or in his bed, is a fair inference from the testimony of the witness Zoel Cyr, who deposes to the great care he took of it in carrying it from the office of the solicitor to that of the banker and adds, very significantly, that he (Pigeon) thought the will a very important document and that it was not likely that he would be careless with it when it came into his possession; that "he wanted the will to be in a safe place." It is obvious that the will may have been inadvertently burned when the testator's personal effects were destroyed after his death. Having regard to this circumstance, and also to the facts that the will, as made, was eminently reasonable in view of the testator's affectionate feelings towards his only surviving sister, that there was no change in those feelings, as the evidence establishes, that the testator's intention to benefit his sister subsisted until within a few weeks of his death, as he declared to two independent and trustworthy witnesses, and lastly, to the simple character of the man himself, it seems highly improbable that he intentionally destroyed his will *animo revocandi.*

The situation in *Allan* v. *Morrison* (1), was entirely different, the facts there affording reason to believe that the testator was dissatisfied with his will and meant to change it, and there being no circumstance, such as the burning of the personal effects of the testator in the present case, to account for a probable inadvertent destruction of the will. The affirmance of that decision in the Privy Council proceeded largely on the fact that the two courts below had concurred in their view of what was regarded as a question of fact (2). *Eckersley* v. *Platt* (3) is likewise clearly distinguishable on the facts and on the nature of the testimony there relied on to rebut the presumption of revocation. The case of *Stewart* v. *Walker* (4), where probate was granted, is much more closely in point.

(1) (1899) 17 N.Z.R. 678.
(2) [1900] A.C. 604, at p. 609.
(3) (1866) L.R. 1 P. & D. 281.
(4) (1903) 6 Ont. L.R. 495.

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On the whole case we are convinced that the presumption of destruction by the testator *animo revocandi* is sufficiently rebutted and that the trial judge reached the correct conclusion when he directed that probate should be granted in accordance with the prayer of the petition of the executors. The observations of Sir James Hannon in the *Sugden* case (1) are much in point.

For these reasons, which do not materially differ from those of Latchford C.J., and Orde J.A., in the Divisional Court, we would allow the appeal with costs in this Court and in the Appellate Division and would restore the judgment of the late learned judge of the Surrogate Court of the United Counties of Stormont, Dundas and Glengarry.

Appeal allowed with costs.

Solicitor for the appellants: *Osias Sauvé.*

Solicitors for the respondents: *Macdonell & Costello.*

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*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

(1) (1876) 1 P.D. 154, at pp. 202-3.