CAREW v. CAREW and ROLLINGS

West African Court of Appeal (Deane, C.J. (G.C.), Webber, C.J. (Sierra Leone) and Butler-Lloyd, J. (Nig.)): October 10th, 1934

[1] **Evidence — burden of proof — standard of proof — proof in solemn form — lost will may be proved by parol evidence only — court to be satisfied beyond reasonable doubt of existence, execution and contents:** A lost will may be proved by parol evidence only, but such evidence must satisfy the court beyond all reasonable doubt of the existence of the will, of its due execution and of its contents; and where the evidence is limited to that of one witness who has not seen the will for seven years, whose memory of its contents is incomplete and who failed in his obvious duty as alleged executor to obtain probate of the will, it is insufficient to establish the will (page 369, lines 10—37).

[2] **Succession — probate and letters of administration — proof in solemn form — evidence — lost will may be proved by parol evidence only — court to be satisfied beyond reasonable doubt of existence, execution and contents:** See [1] above.

The appellant brought an action in the Supreme Court against the respondents claiming to be the sole devisee under a lost will relating to property held by them.

The property had belonged to a person who had died leaving a widow but no children. No letters of administration in respect of his estate were granted. His widow died a few years later; his next of kin were the two respondents, his nieces; the appellant was the sole surviving son of the first respondent. The appellant alleged that a will was drawn up by the deceased in the year before he died making him the sole devisee of the property, subject to prior life interests to the widow and to the appellant's brother. The respondents submitted that the appellant should prove the alleged will in solemn form, whereupon the present proceedings were instituted in the Supreme Court. In his evidence the appellant alleged that he saw a draft of the will and that he handed it to the deceased, but that he did not know whether it was ever executed. The alleged executor of the will gave evidence on the appellant's behalf stating that the will was given to him by the widow of the deceased in the year after his death; that he saw and recognised the testator's signature; that there were signatures of two witnesses whose names he could not recollect; that he read the will and found its contents as propounded by the appellant; that the will remained in his possession for eight years at the end of which he handed it to the first respondent, since when he had not seen it.

No attempt had been made during those eight years to obtain probate of the will. The Supreme Court found that the appellant had failed to establish the will and dismissed the action.

On appeal to the West African Court of Appeal no further witnesses were called and no further evidence was adduced.

The appeal was dismissed.

Cases referred to:

(1) *In re Phibbs*, [1917] P. 93; (1917), 116 L.T. 575, distinguished.

(2) *Woodward v. Goulstone* (1886), 11 App. Cas. 469; 55 L.T. 790, *dictum* of Lord Herschell, L.C. applied.

Davies for the appellant;
C.E. Wright for the respondent.

BUTLER-LLOYD, J. (Nig.).:

Matthew John died on May 10th, 1918. He left a widow who died in 1925, but no children. Apart from the widow his next of kin were two nieces, the present respondents. The first respondent had two sons, James Carew who died in 1928, and the present appellant. Matthew John died possessed of property at No. 10 Mountain Cut, Freetown. No letters of administration in respect of his estate were granted. On January 2nd, 1933 the appellant took out a writ claiming to be the sole devisee of the property under a will alleged to have been made by the deceased in 1917, subject to prior life interests to the widow and James Carew. The respondents entered an appearance to the writ, but merely insisted on the appellant proving the alleged will in solemn form.

On the case coming up for hearing evidence was called on behalf of the appellant, and after hearing argument the learned trial judge gave judgment on November 13th, 1933 dismissing the action; and it is from this judgment that the present appeal is taken.

The evidence called for the appellant was that of himself and Mr. R.C.P. Barlatt, alleged to have been named as executor, together with one Fergusson, now deceased, in the will propounded. A note of evidence given by the first respondent on an inquiry held in May, 1933, and certain letters written by her were also put in. The appellant's evidence was to the effect that he saw the draft of a will which was prepared in Mr. S.J.S. Barlatt's office, and that he handed it to the deceased but did not know whether it was ever executed.

The alleged executor, Mr. R.C.P. Barlatt, gave evidence that the

will was given to him in 1919 by the widow, that he saw and recognised the testator's signature, that there were signatures of two witnesses whose names he could not recollect, and that he read the will, and that the contents were as propounded by the appellant and finally that he handed the will to the first respondent in 1927, since when he had not seen it.

On this evidence the learned trial judge came to the conclusion that the appellant had failed to establish the will to his satisfaction, and dismissed the action.

The proof of a lost will is always a difficult matter, and the difficulty is considerably increased where no draft or copy is available. In *Woodward* v. *Goulstone* (2) (11 App. Cas. at 475; 55 L.T. at 791) Lord Herschell said:

> "Now I cannot but be alive to the extreme danger of establishing a will merely by parol evidence of its contents. The legislature has endeavoured to safeguard the interests and rights of testators by requiring that the expression of their testamentary intentions shall be authenticated in such a manner as to leave no doubt, if possible, that the Court has before it that which really expresses the will and intention of the testator. It is not enough that it is in his own handwriting; it must, even if in his own handwriting, be authenticated by witnesses who must be present and see the testator sign, and must sign in each other's presence . . . 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 is really before one substantially the testamentary intentions of the testator."

In the present case the direct evidence as to the due execution of the will and as to its contents is limited to the evidence of one witness who first saw it in 1919 and has not seen it since 1927, and whose memory of the contents is so incomplete that he cannot even recall the names of the attesting witnesses. It is impossible also not to discount his evidence to some extent on account of his failure in his obvious duty to obtain probate of the will, which he says was in his possession for eight years. It is true that the fact that the names of the attesting witnesses are unknown is not an insuperable difficulty as is shown by *Phibbs's* case (1). Nor did Mr. Justice Low, who tried that case, consider that the absence of assent on the part of those entitled on an intestacy

would be a fatal obstacle where the contents of the will and its due execution were satisfactorily proved. The present case differs, however, *toto caelo* from *Phibbs's* case in that in that case there was reliable evidence that there was a proper attestation clause duly signed by the witnesses and, further, that a letter written by the testator to his executor confirming the contents of the will was before the court.

I am satisfied that the learned trial judge was right in coming to the conclusion that the evidence adduced before him in this case was insufficient to establish the will propounded to his satisfaction and that the appeal ought to be dismissed.

DEANE, C.J. (G.C.) and WEBBER, C.J. (Sierra Leone) concurred.

Appeal dismissed.

YANNI v. BARLATT

West African Court of Appeal (Deane, C.J. (G.C.), Butler-Lloyd, J. (Nig.) and Macquarrie, J. (Sierra Leone)): October 10th, 1934

[1] **Civil Procedure — costs — taxation — costs incurred outside Sierra Leone — Supreme Court cannot order taxation of bill of costs for work done in foreign courts — consent of parties immaterial:** The Supreme Court of Sierra Leone has no jurisdiction to order taxation by its taxing master of a solicitor's costs for work done in the courts of the Gambia, and the consent of the parties cannot confer on the court a jurisdiction which it lacks (page 373, lines 15–19).

[2] **Civil Procedure — costs — taxation — Supreme Court cannot order bill of costs for work done in West African Court of Appeal sitting in Sierra Leone to be taxed according to law of the Gambia in which case tried in first instance — consent of parties immaterial:** The Supreme Court of Sierra Leone has no jurisdiction to order that a solicitor's costs for work done in the West African Court of Appeal sitting in Sierra Leone, on an appeal from the Gambia, should be taxed in accordance with the laws of the Gambia, and the consent of the parties cannot confer upon it the power to tax otherwise than in accordance with the laws of Sierra Leone (page 373, lines 19–24).

[3] **Courts — Supreme Court — jurisdiction — taxation of costs — Supreme Court cannot order bill of costs for work done in West African Court of Appeal sitting in Sierra Leone to be taxed according to law of the Gambia in which case tried in first instance — consent of parties immaterial:** See [2] above.

[4] **Courts — Supreme Court — jurisdiction — taxation of costs — Supreme Court cannot order taxation in Sierra Leone of bill of costs for work done in the Gambian courts though appeal subsequently heard by West**