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books arising from the manner in which they are kept, and the presence or absence of suspicious circumstances in connection with them, and upon its inherent probability. When these circumstances concur in the plaintiff's favour, a heavy *onus* is thrown upon the defendant which can only be met by a perfectly truthful and harmonious statement which the Court feels able to rely upon with confidence. In the absence of this, the ordinary presumption laid down in section 118 of the Negotiable Instruments Act must prevail: "Until the contrary is proved ..... the presumption shall be made that every negotiable instrument was made for consideration." We do not lay down the above propositions as rules of law, but we state them as the guides which we have placed before us in examining the evidence which has been recorded. [His Lordship then examined the evidence at length, and the appellate Court varied the decree and gave judgment for the plaintiff for the amount claimed.]

Decree varied.

Attorneys for the appellant (plaintiff):—Messrs. *Nanu and Hormasji.*

Attorneys for the defendant (respondent):—Messrs. *Roughton and Byrne.*

TESTAMENTARY JURISDICTION.

Before Mr. Justice Starling.

1895. *October* 14.

A. M. KER, PLAINTIFF, *v.* A. MEAKIN AND OTHERS, DEFENDANTS.*

Probate—Will—New page of will not duly executed substituted by testator after execution of will—Dependent relative—Revocation.

After the death of the testator (H. G. Meakin) his will was found among his private papers in a sealed envelope with the words "H. G. Meakin's will, not to be opened until after death" written in his handwriting on the face of the envelope. The will was wholly in his writing and was written on four separate sheets of paper pinned together. The first, third and fourth pages were of blue paper and of the same size, and each of them was signed at the bottom by the testator and by two witnesses. The fourth page stated the date of the will (28th November, 1892) and was signed by the testator and was duly attested by the said two witnesses. The actual execution of the will took place (as was proved by

* Suit No. 20 of 1895.

evidence) in March or April, 1894. The second page, however, was of a different kind of paper from the other pages and of smaller size and was signed by the testator, but not by witnesses. This second page contained a bequest to a child who was born in May, 1894, *i. e.* some months after the will was executed. The executor propounded the will.

Held, that probate must be refused.

APPLICATION for probate. This was an application by an executor for the probate of the will of one Henry George Meakin, of Poona, who died on the 10th June, 1895, at Carlsbad in Austria, leaving a large amount of property in India.

The will in question was wholly in the testator's handwriting and was written on four separate pages of foolscap paper pinned together. The first, third and fourth pages were of blue paper and of the same size, and each of them was signed at the bottom by the testator, and each page also bore the signature of two witnesses, *viz.*, S. Armstrong and R. W. Hughes. The fourth and last page stated the date of the will as the 28th November, 1892, and bore the signature of the testator, and the attestation clause signed by the above two witnesses.

The second page, however, was of white paper and of smaller size than the others, and was headed "Sheet No. 2," the other papers having no such headings. It was signed by the testator at the bottom like the others, but it did not bear the names of any witnesses. There were no corrections in the will, nor any break of sentence between the first and second pages or between the second page and the third.

The whole document was found, all the pages being pinned together, after the testator's death among his private papers in a sealed envelope with the words "H. G. Meakin's will, not to be opened until after death," written on the face of the envelope in the testator's writing.

As above stated, the date of the will on the fourth and last page was the 28th November, 1892. The attesting witnesses, however, deposed that they saw the testator sign the several pages of the will at the end of March or beginning of April, 1894, and that they, on that occasion, wrote their names at the foot of the attestation clause at the end of the will, and also on several preceding pages. Neither of them, however, could say how many pages of the will were signed by the testator or by themselves, nor could they say what was

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written on any of the pages, as they saw nothing but the blank space at the bottom of each page where they signed their names, and the attestation clause at the end of the will.

At the time of the execution of the will, the testator's family consisted of his wife, two sons and three daughters, all of whom survived him.

From the evidence it appeared that, immediately after the will had been thus executed in March or April, 1894, the testator (on the 12th April, 1894) went from Poona to Ootacamund, where he stayed for some time, and there in May, 1894, his wife gave birth to a daughter who was afterwards named Doris May. This child died a few weeks after the testator, *viz.*, on the 13th July, 1895. The second page of the will contained a bequest to Doris May.

Lowndes appeared for the executor.

Russell for the testator's children.

Inverarity for the testator's widow.

The following issues were raised:—

1. Whether the document propounded by the executor, or any and what part thereof, is the last will and testament of H. G. Meakin, deceased?

2. Whether the same, or any part thereof, is entitled to probate?

Inverarity for the widow:—We wish, if possible, that probate should be granted of the will as it stands, but if that cannot be done, then we say there is no will at all of which probate can be granted, and there is an intestacy. The second page is not duly executed and was evidently written by the testator after the birth of Doris May, and substituted for a page which he destroyed. The new page is probably identical with the old, except that it contains the legacy to the recently born daughter Doris May. But we say that the testator although he removed and destroyed the old second page, did not intend to revoke it except in the belief that the new page which he substituted for it would form part of his will. But the new page is not duly executed, and cannot, therefore, form part of the will. The result is that there was no effectual revocation of the old page, and, therefore, although it is not forthcoming it still forms part of

the will. It is, however, not propounded, and there is no evidence of what it contained.

The matter then stands thus. The executor is asking for probate of a will a substantial part of which he cannot prove. Probate, therefore, cannot be granted. It is a case of dependent relative revocation—Williams on Executors (9th Ed.), p. 126 *et seq.*; *In the Goods of McCabe*(1). The document now before the Court cannot be said to be the last will of the testator, or, if it is, there is an important part of it missing and of which there is no evidence. It is as if the will had been lost, and the Court was asked to grant probate of such parts of it as could be remembered. The Court cannot grant probate of a part even by agreement—*In the Goods of Pearse*(2); *Woodward* v. *Goulstone*(3).

Russell (for the testator's children):—We ask that probate should be granted of the will as it stands. The Court will struggle against an intestacy—Succession Act (X of 1865), sec. 25; *Cooper* v. *Bockett*(4); *Greville* v. *Tyler*(5); *In re Gaussen*(6); *Singleton* v. *Tomlinson*(7); *In the Goods of Pearse*(2).

6th November, 1895. STARLING, J.:—In this case, the plaintiff, as one of the executors, propounds in solemn form a paper alleged to be the last will of H. G. Meakin, and asks for probate thereof. All the parties are willing that probate should go of the will as it now stands if the Court can see its way to follow that course. Although, as at present advised, assuming this to be a "suit," a compromise between the parties thereto would be admissible—see *Norman* v. *Strains*(8)—yet no compromise has apparently been come to, and counsel do not suggest that such is the case, but simply that the parties are willing that the Court should grant probate of the will as it stands, if in law that can be done. A compromise to that effect would raise different considerations, because I should have to consider, amongst other things, whether it was for the benefit of the infant children that that course should be pursued, and it seems to me, at first sight, that such a compromise would not be for the benefit of the infant daughter at any rate. I must, therefore, decide the case on the merits.

(1) L. R. 3 P. and M., 94.
(2) L. R., 1 P. and M., 382.
(3) 11 App. Cas., 469, at pp. 477, 485.
(4) 4 Moo. P. C., 419.
(5) 7 Moo. P. C., 320.
(6) 16 W. R., 212.
(7) 3 App. Cas., 404.
(8) 6 P. D., 219.

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The will is wholly in the handwriting of the testator, and is written on three half-sheets of foolscap and the first page of another whole sheet. It, therefore, consists of four pages. The first page is headed "The will of H. G. Meakin;" the second, "sheet No. 2;" and the third and fourth pages have no heading. It is properly executed and attested at the end, and the first and third pages bear at the foot the signatures of the testator and the two attesting witnesses. These three pages are of blue foolscap. The second page at the foot bears only the signature of the testator, is slightly smaller than the others, and is of white foolscap. The whole document was found, all the pages being tied together, after the testator's death, amongst his private papers, in a sealed envelope, with the words "H. G. Meakin's will, not to be opened until after death" on the front in the testator's handwriting.

The attesting witnesses deposed to having, in Poona, seen the testator sign the will at the end, and also some preceding sheets in the presence of both of them, and to having themselves subsequently signed at the end of the will, and on certain preceding sheets, but neither of them can say how many preceding sheets were so signed by the testator or by them, nor can they say what was on any of the sheets, as they saw nothing but the blank spaces where they were to sign, and the attestation clause at the end.

The will is dated the 28th November, 1892, but was signed and attested at the end of March or beginning of April, 1894; and on the 12th April, H. G. Meakin went from Poona to Ootacamund, where he remained several months, and there on the 25th or 28th May, 1894, his wife gave birth to a daughter, who was subsequently named Doris May. The testator died on the 1st June, 1895.

Now looking at sheet No. 2, it is evident that it could not have been part of the will of the testator which was executed by him and signed by the attesting witnesses in March or April, 1894, because there is in it a legacy to Doris May, who was not then born. That and the facts that the sheet is of a different colour and size, and is signed at the foot by the testator only, point to the conclusion that it must have been inserted by him subsequently to the execution of the rest of the will, and consequently it cannot be admitted to pro-

bate. Looking further to the fact that the clauses at the top of sheet No. 2 run on naturally and sensibly from those at the bottom of page 1, and that those at the bottom of sheet No. 2 run on naturally and sensibly to those at the top of page 3, the natural inference to be drawn is that the testator removed the original page 2, and substituted for it the present "sheet No. 2," in which he inserted the name of Doris May as a legatee, but whether he made any other and what alterations therein cannot be determined, as there is no evidence forthcoming as to what were the contents of the original page 2.

Looking at the facts disclosed in this case, this seems to me to be a case of dependent relative revocation, and that the testator removed the original page 2, and substituted the present one under the impression that he was thereby making a substitution which was good in law, and that he would not have revoked what was on the original page except under that belief; consequently, if there had been any evidence as to what the contents of the original page were, I should have granted probate of the will as it originally stood, as was done in the case of *Duncan* v. *Crabb*[1] and in the goods of *McCabe*[2]. If there had been such evidence, this case would have been on all fours with the former of those just cited. There being no such evidence, what remains of the original will consists of a legacy to Mrs. Meakin of the testator's plate and household effects and stores, the appointment of trustees, and a bequest to them of his real and personal estate not otherwise disposed of, directions for the management of such estate, a residuary clause distributing the residue among his sons and daughters, the appointment of his wife and the trustees as executrix and executors, and a bequest to each of the trustees who should act as executors. We have, therefore, little more left than the appointment of trustees and executors and the residuary clause, while there is evidence in the document as propounded that there were in the original will legacies to the sons and daughters at any rate, and no provision is now made for the maintenance of the testator's widow, although he and his wife lived together on affectionate terms up to the time of his death. Can I, then, grant probate of the will as it would stand after removing sheet No. 2? Mr. Inverarity argued that I could

(1) L. R., 3 P. and D., 98. (2) L. R., 3 P. and M., 94.

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not, relying on the *dicta* of Lords Herschell and Fitzgerald in *Woodward* v. *Goulstone*(1). The *dicta* in that case seem to have been referred to in the case of *Treloar* v. *Lean*(2), the facts of which were very similar to those of the present one, except that three sheets had been substituted in an already executed will instead of one. In that case, Butt, J., refused to grant probate of the will or any part of it. Since then there seems to have been no other case on this point.

Acting upon the opinion of Lords Herschell and Fitzgerald in the House of Lords case above cited, and following *Treloar* v. *Lean*, I feel bound to refuse probate of that portion of the will now propounded which remains after removing sheet No. 2. To hold otherwise would be to give effect to a portion only of the testator's last will under a state of circumstances in which the Court would be unable to determine whether the part missing was the most or least important of the whole will, and in many cases the result would be to give the bulk of the testator's property to persons on whom he had intended to bestow only what remained after others had been made partakers of his bounty. This distinguishes this case from *In the goods of Woodward*(3) and *In the goods of Maley*(4), in both of which cases it was apparent that the portions destroyed were small or unimportant so far as the distribution of the testator's property was concerned. Costs of all parties, taxed between attorney and client, to come out of the estate.

Attorneys for the executors and the children :—Messrs. *Crawford, Burder and Bayley.*

Attorneys for Mrs. Meakin :—Messrs. *Craigie, Lynch and Owen.*

Suit dismissed.

(1) 11 App. Ca., 469, at pp. 477 and 485.
(2) 14 P. D., 49 ; 58 L. J. N. S. P. and M., 39.
(3) L. R., 2 P. and M., 206.
(4) 12 P. D., 134.