1954 *Present :* **Gratiaen A.C.J. and Gunasekara J.**

RALIYA UMMA, Appellant, *and* MOHAMED *et al.*, Respondents

S. C. 133—D. C. Galle (Testy.) 8,454

Will—Loss of original document—Presumption of destruction by testator—Protocol—Not a duplicate—Prevention of Frauds Ordinance, s. 6—Evidence Ordinance, s. 114.

If a will is shown to have been in the testator's possession, and is not forthcoming at his death, it is presumed to have been destroyed by him *animo revocandi*. The presumption is applicable even where the missing document is a joint will.

The protocol preserved by the attesting Notary under the provisions of the Notaries Ordinance cannot be regarded as an original document capable as such of being propounded.

APPEAL from a judgment of the District Court, Galle.

H. V. Perera, Q.C., with *M. I. M. Haniffa*, for the appellant.

S. Nadesan, with *M. Rafeek*, for the respondent.

Cur. adv. vult.

February 19, 1954. GRATIAEN A.C.J.—

Abdul Mohamed Kafee died on 2nd October, 1951, and the appellant, who is his widow, made an application to administer his estate under the terms of a notarially-attested joint will which they had admittedly executed on 21st May, 1949. The original of the will could not be produced, and the deceased's brother objected to probate. He relied on the presumption that the will had been destroyed *animo revocandi*, and asked instead for letters of administration on the footing of an intestacy.

It is common ground that after the will had been executed and attested, it was handed to the deceased and placed by him in an iron safe which was in his bedroom. He kept the key of the safe, although it may be accepted as true that the appellant herself had access to it from time to time.

If a will is shown to have been in the testator's possession, and is not forthcoming at his death, it is presumed to have been destroyed by him *animo revocandi*.—*Atapattu v. Jayawardena*[1]. "Whether this should be called a presumption of law or of fact does not seem material"—*per* Lord Davey in *Allen v. Morrison*[2]. In Ceylon, the correct view, I should imagine, is that it is a presumption based on the provisions of section 114 of the Evidence Ordinance.

[1] *(1921) 22 N. L. R. 497.*

[2] *(1900) A. C. 604.*

2——J. N. B 35993-1,590 (5/54)

The learned Judge expressly rejected that part of the appellant's evidence, which, if true, would have established that the disappearance of the will did not take place until after her husband's death. I see no reason for disturbing this finding of fact, and am therefore satisfied that the learned Judge properly applied the presumption relied on by the respondent, because the allegation that the respondent was given the key of the safe in connection with the funeral arrangements has been disbelieved. As the appellant herself did not destroy the will, the only person who could have done so during the testator's lifetime was the testator himself. The alternative theory of a fraudulent abstraction by the respondent after the testator died must be ruled out. I also accept the conclusion that the appellant has failed to rebut this presumption. No general rule can be laid down as to the nature of the evidence required to rebut such a presumption, and each particular case must be determined on the strength of the evidence laid before the Court which (whenever the presumption applies) must refuse probate unless it is "morally convinced that the will was not destroyed by the testator *animo cancellendi*"—*ex parte Slade*[1].

It has been suggested for our consideration (1) that there is no room for applying the presumption where the missing document is a *joint* will and (2) that in any event the protocol preserved by the attesting notary under the provisions of the Notaries Ordinance ought to be regarded as an original document capable as such of being propounded. I am unable to accept either proposition. A joint will, although it is contained in a single document, operates in truth as the separate wills of both executants (unless it purports to be the will of the first-dying only)—*Steyn on Wills p. 11.* It can be revoked unilaterally by either executant, *in so far as his own part of the will is concerned*, by any mode of revocation (including destruction *animo revocandi*) recognised by section 6 of the Prevention of Frauds Ordinance. If, therefore, the original joint will was traced to the possession of the first-dying executant during his lifetime but cannot be discovered after his death, there is room for applying the presumption that he was the person responsible for its destruction.

As to the argument concerning the protocol, I concede that a testator may, for greater security, execute his will in duplicate—either retaining both instruments himself, or retaining one and committing the other to the custody of someone else. In such cases, the disappearance of the duplicate retained by the testator would give rise to "various gradations of presumption" according to the circumstances of the particular case—*Jarman on Wills (8th Ed.) pp. 168–169.* But a protocol is not a duplicate in that sense, for it is intended only to serve as a formal authenticated record of the transaction in which the notary concerned had been professionally employed. Under our law, it is not an original document but only a copy of one.

I would dismiss the appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

[1] *(1922) T. P. D. 220.*