Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Allan v. *Morrison and Others, from the Court of Appeal of New Zealand; delivered* 11*th July* 1900.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR HENRY DE VILLIERS.
SIR FORD NORTH.

[*Delivered by Lord Davey.*]

This is an Appeal from a judgment of the Court of Appeal of New Zealand dated the 25th of May 1899 affirming the judgment of Mr. Justice Denniston dated the 11th of April 1899 whereby the Plaintiff's action was dismissed.

The Plaintiff and present Appellant sued as the executor of the last will, dated the 22nd March 1893 of one Strong Work Morrison who died at Timaru on the 5th of February 1897. By his statement of claim the Appellant propounded the draft of the will in question and claimed probate in solemn form until the original will should be found. The first Defendant and Respondent was the widow of the deceased and she alone defended the action. By the statement of Defence she admitted the execution of the said will but alleged that it was revoked by the testator. The other Defendants and Respondents were the next-of-kin. They did not put in any statements of defence or defend the action and they do not appear on this Appeal.

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For the purpose of this judgment a short outline of the facts of the case will suffice. The testator was a native of Shetland. He had emigrated to the Colony many years ago and had amassed a small fortune which was stated at the trial to amount in value to about 11,000*l*. It was chiefly invested in mortgages on land. He maintained friendly relations with his relatives in Shetland and elsewhere who were in poor circumstances and a brother and sister in Shetland had been assisted by him up to a short time before his death. One nephew James Morrison he had brought with him to New Zealand when a boy of about eight or nine years of age after a visit by the testator to Scotland. He appears to have been much attached to this nephew. The testator's brother-in-law James Laurenson with his five children had also emigrated to the Colony at the testator's suggestion.

The testator was only once married viz. in the year 1884 to the Respondent Lavinia Morrison and there was no issue of his marriage. The Respondent was at the time of her marriage to the testator a widow with three children. Her daughters Emma Jane Hudson and Alice Maud Mary Hudson lived with the testator and his wife. On his marriage the testator settled a sum of 1,200*l*. upon his wife for her life or widowhood and afterwards in trust for himself and his executors &c. This sum seems to have been lost or was supposed to be lost through the bankruptcy of the trustee in 1892 and the testator thereupon re-settled 1,150*l*. in trust for his wife during her life or widowhood and subject thereto for her three children in equal shares.

On the 22nd March 1893 the testator made the will in question. He thereby gave the use of his freehold house to his wife during her life

or widowhood and his furniture and articles of domestic use to her absolutely and he gave a small section of land with a cottage to his nephew James Morrison. He also gave his wife the income of 1,800*l.* during widowhood and gave various legacies to members of his family including 100*l.* to each of his step-daughters and 600*l.* to his nephew James Morrison and gave the residue to his wife and surviving nephews and nieces. Altogether it appears to have been such a will as a man in the testator's circumstances might have been expected to make.

From the month of October 1893 the testator was a confirmed invalid. His eyesight was weak and he suffered from palsy. He could not feed himself or get into or out of his bed without assistance. His step-daughter Miss Emma Jane Hudson principally attended to him with occasional assistance from her sister. He was however able to leave his room and he appears to have usually sat up in an armchair in his dining-room. In this room there was an iron safe which contained three tin boxes. The testator in 1894 or 1895 sent for his will and in Miss Emma Hudson's presence placed it in one of these boxes in a sealed envelope. This seems to have been the last time it was seen. After his death the envelope was found in the tin box with some deeds but the will had disappeared. The testator kept the keys of the safe and tin box on one bunch in his own possession. When he was in bed they were in the pocket of his trousers hanging by his bedside. When the testator required to go to the safe Miss Emma Hudson usually unlocked it for him "as it was such an "exertion for him." But he appears from her evidence to have been able to unlock and lock the tin boxes for himself, and to have been in the habit of doing so. In the afternoon of the 21st January 1897 the whole family were absent attending some fête and the testator was

left alone in the house with a little servant girl named Annie Allen. The testator was in the dining room. By his direction Annie Allen unlocked the safe and left the room. He called her in again and she then by his direction shut the safe. Miss Emma Hudson says he always had a fire burning in the dining room. On Saturday the 23rd of January he became much worse and sent two several messages for Mr. Perry his lawyer but when he came on the following Monday the testator was too ill or unwilling to talk to him on business.

Evidence was given at the trial by the Respondent Mrs. Morrison and her daughters and various members of the Laurenson family and by the testator's doctor his lawyer and the minister of his church and others. This evidence is very fully discussed in the judgment of Mr. Justice Denniston and in that of the Court of Appeal and their Lordships do not think it necessary for them to discuss it further or to notice the various details which are spoken to by the witnesses. Mr. Justice Denniston sums up his judgment in these words :—

"The result in my mind of a consideration of "all the evidence is that while as I have said "there were grounds for a strong presumption "that the will would have been found existing "at the testator's death I am not (to use the "words of one of the judgments cited) morally "convinced that the will was not destroyed by "the testator *animo cancellandi*. That being so "the presumption arising from the fact of its "being traced to the testator's possession and its "non-production at his death that it was so "destroyed has not been rebutted."

The Court of Appeal say :—

"The hypothesis of accidental loss or destruction "is unreasonable. There is a presumptionagainst "the hypothesis of fraudulent abstraction. There "is a reasonable possibility that the deceased

" destroyed the will himself. In order to find for " the will we must be morally satisfied that it " was not destroyed by the testator *animo revo-* " *candi.* We are not so satisfied."

We have thus concurrent judgments of the two Courts below on what is after all a question of fact. It is not the practice of this Board to review concurrent findings of fact though it may of course be done in exceptional circumstances. But Mr. Bargrave Deane on behalf of the Appellant argued that the Courts below had approached the consideration of the case from a wrong point of view. He contended first that the testator had not the actual custody of the will at all and furthermore that there was no proof that the will was not in existence at the time of his death and therefore the presumption that he had destroyed it himself never arose. He further contended that the learned Judges had mistaken and exaggerated the weight of the presumption. The learned Counsel's first argument is based on the admitted fact that Miss Emma Hudson used to be entrusted with the testator's keys for the purpose of opening the safe and bringing one of his tin boxes to him if he required it in his bedroom and on the suggestion that the keys might have been abstracted from the pocket of his trousers either while he slept or during the stupor in which he lay during some hours preceding his death or (of course) after his death. Their Lordships agree with the Court of Appeal that this contention cannot be supported. The will was in the testator's repository the keys of which were in his possession and no access could be obtained to it without either his permission or a fraudulent abstraction of his keys. No doubt the circumstances relied on by the learned Counsel are legitimate matter for consideration in weighing the evidence adduced for the purpose of rebutting

the presumption relied on in the Courts below but they do not prevent the presumption arising. Their Lordships hold that the will was in the testator's custody when last seen. Of course it was not proved not to be in existence at the moment of his death and it is very rarely that such evidence can be given. The possibility of its having been destroyed after his death is again a circumstance to be taken into account in arriving at the result of the evidence.

It was not denied that there is a presumption (to use the language of Lord Wensleydale in *Welch* v. *Phillips*, 1 Moo. P.C. 299) "that if a "will traced to the possession of the deceased "and last seen there is not forthcoming on his "death it is presumed to have been destroyed by "himself: and that presumption must have "effect unless there is sufficient evidence to "rebut it." Whether this should be called a presumption of law or fact does not seem material. It may of course be rebutted and (as said by Lord Chief Justice Cockburn in *Sugden* v. *Lord St. Leonards* L. R. 1 P. and D. 154) "the presumption will be more or less strong "according to the character of the custody "which the testator had over the will." But it was attempted to minimise the force of the presumption and reference was made to the cases of *Harris* v. *Berral*, 1 Sw. and Tr. 153, *Finch* v. *Finch*, L. R., 1 P. and D. 371, *Sprigge* v. *Sprigge*, *ibid.* 608. In two of these cases the question was whether a will which was found mutilated at the death of the testator who had been insane for some time prior to his death was entitled to probate and it was held in the affirmative Lord Penzance holding that the ordinary presumption which he fully recognised did not apply to such a case. It obviously does not as the main question in such a case is whether the mutilation (assuming it to have been made by

the testator) took place before or during the insanity. In *Finch* v. *Finch* the Court inferred from the facts proved that the will was in existence at the date of the testator's death. These cases have therefore nothing to do with the one before their Lordships.

Their Lordships are of opinion that there is no objection to the way in which the law was applied by the learned Judges to the facts before them and that their judgment was correct. Certainly there is no reason why their decision that the presumption was not rebutted should be disturbed. They will therefore humbly advise Her Majesty that the Appeal be dismissed. The Appellant must pay the costs of it.