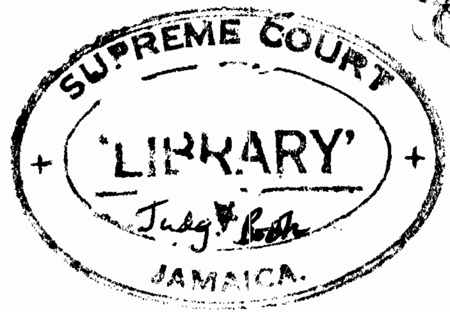
SUPREME COURT
'LIBRARY'
JAMAICA.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN PROBATE AND ADMINISTRATION

SUIT NO. P123/77

IN THE MATTER OF THE ESTATE OF LOUIS PATRICK DELAPENHA LATE OF MANDEVILLE IN THE PARISH OF MANCHESTER, ATTORNEY-at-LAW, DECEASED.

AND Donald Allen — Plaintiffs
Rema May Heron
Faith Findlay

AND Hilda Vaz
May Prendegast
Doris Delapenha
Vernon Delapenha
Beryl Steiner
Keith Delapenha — Defendants
Hazel Vendrges
Neil Delapenha
Karl Delapenha
Patrick Manley Delapenha
June Shearer
Douglas Delapenha
Monica Johnson
Lindberg Delapenha
Harry E. Delapenha
Leslie Delapenha
Ernest Delapenha
Claudette Hall
Trevor Evans-Young
Richard Delapenha (an infant)
Cisilyn Delapenha
Robert Allen (an infant)
Denise Beasley
Mrs. Vaughan Iver
Dr. Hame Persaud

Emil George Q.C. and John Graham instructed by Myers, Fletcher and Gordon, Manton and Hart for the Plaintiffs.

Winston Frankson Q.C. for first, third, fifth, sixth, seventh, eighth, twelvth, thirteenth, fifteenth, eighteenth named Defendants.

Winston Frankson Q.C. instructed by Judah Desnoes, Lake, Nunes, Scholefield and Company for ninth, tenth and eleventh Defendants.

Arthur Scholefield instructed by Judah, Desnoes, Lake, Nunes, Scholefield and Company for twentieth and twenty-first Defendants.

R. Codlin instructed by E. Hall of R. Codlin and Company for fourteenth, sixteenth and nineteenth Defendants.

Hearing on: 1st, 2nd, 3rd, 4th and 5th February, 1982

Delivered : 25th February, 1982

Judgment

Bingham J:

The deceased Louis Patrick Delapenha died on 15th January, 1975 at his home Monticello, Mandeville in the parish of Manchester. He had been an Attorney-at-Law for over forty years during which period he practiced his profession mainly in the Parish of Manchester. He has been described as being a fastidious gentleman of a private nature and he lived alone in magnificient and exquisite surroundings on a twelve (12) acre estate named Monticello. He was a man of culture and refinement and a patron of the Arts, as well as something of a philanthropist. He served his country in a number of capacities and was rewarded at his death with a state funeral.

The deceased was I am told a very careful man where money was concerned and made shrewd investments mostly in Real Estate and these served him well. By his death he had amassed considerable wealth. It seems somewhat odd therefore that although the deceased enjoyed a life devoid of complications and controversy that controversy has continued to haunt his memory more than seven years after his death. That this is so, however, has been due in no small measure to the fact that the deceased died leaving behind a sizable Estate. The deceased enjoyed from all appearances a reasonably healthy life, but during the last few years of his life he was dogged somewhat by ill-health.

In the early part of 1974 the deceased became seriously ill and was admitted into the Hargreaves Memorial Hospital, a private institution in Mandeville. He was confined there for a period of around six weeks from 9th February and into March 1974. During this period he was being attended to among others by his private nurse one Miss Patricia Arscott.

As a prudent man and an Attorney-at-Law of some experience in human affairs he was minded to make a Will in event of his death. He did not, however, confide in any of the members of his immediate family, but choose his nurse Miss Arscott to undertake the task of writing out his Will.

He requested her to prepare a Will for him, which she did on 13th February, 1974. She wrote out the Will in her own handwriting as he dictated it to her on four sheets of foolscap paper and when she was finished she handed them to him and after he had perused them through he made certain corrections. This document was signed by the deceased as his Last Will and Testament in the presence of two Doctors, Leigh Lord and Delroy McPherson who also witnessed it.

The deceased kept this Will in his possession until the evening before his discharge from the hospital when he handed it over to Nurse Arscott and instructed her to place it in the pocket of his dressing gown which she did. The Will had been placed by the deceased into a white envelope which was sealed.

The deceased then took the Will home with him from the hospital. Before the deceased left for Texas some weeks later he placed the sealed envelope into another airmail envelope and it was placed into one of the chifferobe drawers in his bedroom by Doris Delapenha on

his instructions. Following his discharge from hospital the deceased had remained at Monticello for some weeks and then left Jamaica for Texas in the United States of America. He returned to Jamaica from the United States of America around November 1974. On his return he requested Nurse Patricia Arscott to again attend on him at his home. She continued to nurse the deceased up to the time of his death.

The deceased died on 15th January, 1975 around 9.20 a.m. Following his death there was a gathering of some of the members of his family at his home. These included Doris Delapenha the deceased sister who had lived at Monticello following the deceased illness, Rema Heron his neice who had been attached to the deceased law offices for over forty (40) years, her husband, Mr. Heron, her mother and Cisilyn Delapenha his neice-in-law. In addition to these persons, also present during that day were Nurse Patricia Arscott and some members of the Findlay family which included Easton Findlay and his son Tony Findlay. There was a conversation touching on the question as to what type of funeral to have for the deceased. The family was also considering whether to accept an offer made by the Government of Jamaica to accord the deceased an official burial. Easton Findlay who is not a relative of the deceased but from all appearances was very intimately connected to him, was asked by Mrs. Heron "whether he knew what the deceased wishes were as to what type of funeral he wanted?" He was not able to be of much assistance.

Later on in the evening there was an incident in the deceased bedroom in which Easton Findlay had gone and was apparently going through some of the deceased personal and private papers in the chifferobe drawers when he was asked by Rema Heron for the deceased Will. He

pointed to a drawer and after some hesitation he handed over to Rema Heron an unsealed Airmail envelope which contained the white sealed envelope with the Will. This envelope was marked "Last Will and Testament of Louis Patrick Delapenha." Rema Heron then took out the sealed white envelope and enquired from both Easton Findlay and Nurse Arscott as to whether they knew whose handwriting it was on the envelope and obtained negative answers. The Will was then examined by Rema Heron and she again confronted Nurse Arscott with it enquiring as to "how she could say that she did not know whose handwriting it was and she had written it." Nurse Arscott thereupon admitted to having written the Will.

The Will of 13th February, 1974 was read that evening by Rema Heron and Cisilyn Delapenha and also later was read to two of the deceased sisters.

This Will is not being challenged as to its validity. It reads as follows:-

> "This is the Last Will and Testament of me Louis Patrick Delapenha of Mandeville, Manchester, Attorney-at-Law.
>
> I hereby revoke all former Wills and Testamentary dispositions heretofore made by me and declare this to be my Last Will and Testament.
>
> I hereby appoint my neice Rema May Heron, Faith Findlay and Donald Allen, Attorney-at-Law to be the executors and trustees of this my Last Will and Testament, with all the powers of the trustee law and the land settlement Act and direct payment of my just debts, funeral and testamentor expences out of my estate real and personal and also authorise suitable tomb stone to be erected over my grave.
>
> I give and bequeath my premises at Number 9 Patrick Road, Manchester known as Monticello together with approximately twelve (12) acres of ground surrounding to the Sisters of Mercy of Jamaica to be used by them at all times as a rest home with the right nevertheless to open the house and grounds at anytime if they

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"so desire to the general public but within their absolute discression to close the same to the public whenever they may deem fit so to do. It is to be clearly understood that all the articles contained in the house including Silver, China, flatware, furniture, musical equipment - sterogram - T.V.'s and valuable china and ten of my herd of Shetland Ponies $7,000 should be invested by my trustees and the proceeds used to purchase feed for the animals and birds. Such income to be turned over to the Sisters of Mercy for this purpose.

I wish the boundaries of Montichello be as follows:-

Starting from McKinley Road fence now dividing premises generally called Church House and running along McKenley Road to boundary with Mrs. Ricketts line where it meets the lands of the Hon. W.H. Coke and then turning North to another junction of walls and then East to include 1½ acres of lands purchased by me from the Hon. W.H. Coke and then to follow the line wall as erected to Patrick Road.

I give devise and bequeath 21 McKinley Road (called Church Home) to my adopted son Easton Findlay and his wife Faith absolutely.

I give devise and bequeath my premises known as Caledonia Great House with all its furniture, linen and fixtures to my neice Rena Heron. Whatever monies I have invested with my nephew, Patrick Manley Delapenha, of Manchester Court I give devise and bequeath absolutely.

I direct that my executors and trustees will sell and dispose of 100 odd acres at Gut River, Manchester and divide the proceeds as follows equally. To Neville Delapenha $2,000. To Roman Catholic Church, Mandeville Pashionist Order $5,000. Mandeville Public Hospital to build a suitable kitchen $8,000. Anglican Church, Mandeville $5,000. To my nephew, Sigismund Vaz $10,000. To my sisters Doris, May and Hilda $10,000 each.

I direct that all these pecuniary legacies should be paid out of my half interest in business premises owned my me and Allan Blake known as the Manchester Shopping Centre, suitable valuation should be made of the value of the premises and my half interest in the venture should first be offered to Allan Blake before offering the same to the public for sale.

To my dear friend and Doctor Horace Henriques $5,000. To my good nurse Patricia Arscott $1,000.

"My trustees to call in and convert into cash all investments standing in my name for the purpose of payment of legacies including my insurance policies.

I direct my trustees to pay the following legacies out of my estate:-

To Harold Vaughan Iver the sum of $5,000.

To Josephine Delapenha my sister-in-law $5,000.

To Harvey Delapenha of Mandeville the illegitimate son of my brother Ralph $2,000.

I direct that my little dog, Dandy be given to my nephew Patrick Manley Delapenha.

All the rest and residue of my estate both real and personal whatsoever nature and wheresoever situate I give devise and bequeath to my trustees and my adopted son Easton Findlay absolutely.

In witness whereof I have set my hand the 13th of February, 1974.

Signed by the said Testator in the presence of us both present at the same time who at his request and in the presence of each other have subscribed our names as witnesses."

Sgd. Leigh Lord

Sgd. L.P. Delapenha

Sgd. Delroy McPherson

According to the tenor of this Will it is common ground that the bulk of the deceased estate would go to objects outside the reach of the immediate family. The two largest beneficiaries being the Order of the Sisters of Mercy of the Catholic Church of Jamaica and the Findlay family, that is, unless something intervened to prevent such an eventuality taking place. Within the next twenty-four hours things started to happen. The sequence of events is very important not only to put matters into their right perspective but equally important when it comes to evaluating and assessing the evidence.

It will be recalled that Cisilyn Delapenha was one of the persons ~~who was~~ present at the deceased homewhen the Will was read.

On the afternoon of the 16th January, 1975, the day following the deceased death Rema Heron, received a telephone call from Cisilyn Delapenha to the effect that she had a most important disclosure to make to her. Along with her husband Patrick Bunny Delapenha, Cisilyn Delapenha went to Rema Heron's home arriving there about twenty minutes after the telephone call. At the home Cisilyn Delapenha then told Rema Heron of an alleged conversation which she had with one Millicent Dennison the then Matron of the Hargreaves Hospital who was alleged to have told her of having prepared and witnessed a Will for the deceased while he was a patient in the Hospital.

Rema Heron further states that when Cisilyn Delapenha came to see her she told her that "the Will Easton Findlay had given to her was apparently not Mr. Delapenha's Last Will and Testament." Not only was Rema Heron present when this conversation took place but also Donald Allen. Both of these persons are named as Executors and Trustees in the Will of 13th February, 1974. Although there was no mention by Cisilyn Delapenha of the date of the execution of the alleged Will and although Miss Dennison apparently did not tell her of any date when this alleged incident at the Hospital with the deceased took place, it was immediately assumed by her Cisilyn Delapenha that the Will of 13th February, 1974 "could not have been the Last Will and Testament of the deceased."

A thorough and diligent search was then made of the deceased home to see if this alleged Will could be located but the search proved futile.

No apparent attempt was made by either Donald Allen or Rema Heron, two of the Executors, to contact Millicent Dennison and enquire from her as to circumstances under which this alleged Will had come into existence. There was also no apparent attempt made by them to get in touch with the other Executor named in the Will of 13th February, 1974, Faith Findlay, but then, it does seem to appear that given the contents of that Will, there at that time seemed to have been little or no apparent communication passing between the immediate family of the deceased and the Findlay's. Despite the obvious importance of this alleged disclosure made by Cisilyn Delapenha to Rema Heron and Donald Allen there was no attempt made by them to collect a Statement from Millicent Dennison before another seven weeks had passed and when they did. Miss Dennison was only too willing to oblige them. She was able, despite the fact that she had prepared the alleged Will sometime in March 1974, to recount the incident one year later in very precise detail. Mr. Frankson has described her recollection of the contents of the alleged Will of March 1974 as extraordinary and remarkable and as doing her credit. Mr. George on the other hand has said that although Miss Dennison did not keep a copy of this alleged Will she stated she prepared in March 1974 yet she is able in her Statement to give an almost verbatim account of the contents of the Will with bits of conversation thrown in for good measure concerning matters in which she is not personally involved. He submitted that there is no way that she could remember the details of an alleged Will to the extent that she has recounted in her Statement.

The Statement in question is very lengthy and takes up some

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some twelve foolscap pages of typescript. There is no evidence before me to indicate the circumstances under which this Statement was prepared. Given the importance of the task which now confronts me, and the seriousness of the matter, one has to bear in mind that Millicent Dennison, the person who it is said was the source from which the story of a second Will came, was permitted seven weeks after the account of the second Will was related to Cisilyn Delapenha and then to Rena Heron, Donald Allen and others, to formulate from her memory an event which allegedly took place in March 1974. Was her recollection one that was unaided? Was she assisted by certain members of the deceased family to prepare her Statement? Did she have the assistance of the contents of the Will of 13th February, 1974 in so doing? All these are very pertinent questions which have to be considered in weighing the evidence of this person for on a close examination of the almost twelve pages of the evidence contained in the Statement which she gave dated 5th March, 1975, it is inconceivable to believe that although she was a virtual stranger not closely and intimately connected to the deceased, and had no draft or copy of the alleged Will to refer to, that her mind would have been able to retain in such exactitude as her Statement tends to suggest the contents of this alleged Will. As though against the natural process of things her memory was not diminished by the passage of time but even tended to get better.

On or around the date of Miss Dennison's Statement and to be more precise on 7th March, 1975 a Statement was taken from one Gwendolyn Spencer a Ward Maid at the Hargreaves Hospital. Miss Spencer in her Statement recalled an incident at the Hospital on an evening in early March, 1974 when she was summoned by Miss Dennison to the deceased

room and there she saw the deceased and Matron Dennison sign a document which she also signed. She corroborates Miss Dennison as to the execution of this alleged Will.

If the accounts of Millicent Dennison and Gwendolyn Spencer were true then this gave rise to the fact of the existence of a later Will and having regard to the contents of this Will as related by Miss Dennison the effect would be that the Will of 13th February, 1974 was thereby revoked.

A search for this alleged Will having proved futile, steps were then taken by the Executors to obtain some documentary proof in support of Matron Dennison's story. Miss Dennison had told Rena Heron that on enquiring from "her friend" who had typed the Will in Kingston, she had told her that she had kept a copy which she would endeavour to obtain. Miss Dennison was, however, very reluctant to give the name or the whereabouts of this friend.

A continous search was now begun to try and locate the friend or the copy of the alleged Will and when this was not successful, the Attorneys-at-Law for the Executors were left with no other alternative but to take the extreme course of compelling Miss Dennison to come to this Court to testify as to the truth concerning her knowledge of the whereabouts of a copy of the alleged second Will.

Acting in pursuance of an Order made by Mr. Justice Melville made on 15th January, 1976, Miss Dennison was duly summoned before Mr. Justice Chambers on 4th March, 1976. Her depositions were taken on oath and she gave the name of her friend. This information was "Maiden name Susan Mae Jackson. Married name Susan Mae Phillips (first marriage) Susan Mae Evans (second marriage)." She further stated that she did

not know the whereabouts of this person but one Fay Summers of Golden Spring did.

When this information was enquired into by two of the Attorneys for the Executors, Mr. Richard Evans and Mr. Cedric Barton it lead no where. There was no one who could be traced by these names and Fay Summers turned out to be really one Fay Simons who was Miss Dennison's own sister, who also said that she knew no one by the names which Miss Dennison gave to the Court.

It only remains at this stage to mention that following the Court proceedings in which Miss Dennison had deponed, she disappeared and her whereabouts are now unknown. Following the disappearance of Miss Dennison and close upon its heels in August 1977 the other alleged attesting witness Gwendolyn Spencer was contacted by a Mr. Owen Crosbie, an Attorney-at-Law who took a statement from her by way of a sworn Affidavit. He had with him, a Justice of the Peace, one Mr. Stewart as well as a copy of the Statement made by Miss Spencer dated 7th March, 1975. When this Statement was read over to Miss Spencer she denied that any such incident had taken place. She in effect retracted her earlier Statement. Miss Spencer was later visited by Mr. Ernest Delapenha on 6th October, 1977 and admitted to him that the earlier Statement that she had given to Mrs. Rena Heron was not true and that what she had told the gentleman was really what happened.

It was bearing in mind this state of affairs and against this background that the Executors through their Attorneys on 8th December, 1977 almost three years after the deceased death took out an Originating Summons seeking Probate of the Will dated 13th February, 1974 in Solemn Form.

The Pleadings

On the Claim and Defence filed in this matter there is no issue arising as to the existence and validity of the Will of 13th February, 1974 for which Probate is now being sought. There is no challenge as to the validity of that Will.

The defendants on the other hand in their Defence filed, while not challenging the validity of the Will of 13th February, 1974 have contended:-

1. "That there was a later Will properly executed by the deceased in the manner prescribed by Law which come into being on or around the first Thursday in March 1974.

2. That this Will by its contents which were substantially different in nature to the earlier Will of 13th February, 1974 revoked that earlier Will.

3. That the Will of March 1974 had been handed over into the custody of the deceased and was in his custody up to the time of his death, and now cannot be found despite a diligent search to locate same.

4. That this fact raises up to the presumption that it was destroyed by the Testator animo revocandi

5. That as a result of this the deceased died not testate but intestate."

The defence ends with a prayer requesting the Court to declare and pronounce for an intestacy.

The Will of 13th February, 1974 not being challenged as to its validity the issues which arose on the pleadings were:-

1. Was there a Will executed by the deceased in March 1974?

2. If so what were the contents of that Will in so far as the dispositions contained therein; and in particular did that Will revoke the Will of 13th February, 1974 with respect to which Probate is now sought?

On the evidence the only two possible findings in this matter ought to be either in favour of or against the Will in Court.

The Evidence

The evidence in this matter consisted in the main of Statements and Affidavits obtained from ten persons. In addition the Court heard viva voce evidence from Gwendolyn Spencer and Dr. Leigh Lord which touched upon the attestation of the alleged Will of March 1974 and the Will of 13th February, 1974 respectively.

In so far as the Court had the distinct advantage of seeing and hearing from Miss Spencer and Dr. Lord and observing how they reacted to questions put to them by the Attorneys in this matter as well as by the Court, the same was not true when it came to an examination of the written Statements and Affidavits taken and given in circumstances where the maker may have had to rely upon memories that might have been faulty to say the least.

Given the seriousness of the task which confronts me I am fully mindful of the great care that is most essential in setting about the job of examining, assessing and evaluating the evidence contained in these Statements and Affidavits where necessary.

One has however to take the evidence contained in these documents as one finds it. There is no room allowed for reading into any of them words which they do not contain. I make this observation for the simple reason that learned Attorneys for the defendants have on more than one occasion during the heraing of this matter sought to put their interpretation on the contents of Statements and Affidavits of certain witnesses in so far as that interpretation tends to favour their case.

In my view where what the deponent or the maker of the Statement is saying is clear then there is no room for any inference or surmise for that matter. The document must be taken as one finds it and to mean what it says.

The onus of proof arising out the issues raised upon the pleadings rested squarely upon the propounders of the alleged Will of March 1974. They had to establish by adducing evidence of a standard required in cases of this nature to satisfy me of the existence and contents of this alleged Will. Even if they can get over the hurdle of establishing the fact of a second or later Will as well as its contents their task is not yet ended. They still have to go on to establish as well that this Will was properly executed and as such was therefore a validly binding testamentary document in accordance with Section 6 of the Wills Act.

The defendants have sought to rely in the main on the evidence of three witnesses to prove their case. They are:-

1. Gloria Millicent Dennison
2. Gwendolyn Spencer
3. Delroy McPherson

It may be convenient at this stage to make one or two passing comments on the role played by Dr. McPherson in this whole senario. It will be recalled that he was one of the two witnesses to the Will in Court for which Probate is now sought dated 13th February, 1974. Following the witnessing of that Will he seemed to have left the stage and remained in the background but came back into the limelight in September 1977 when he swore to an Affidavit in which he deponed to having actual

knowledge of the existence of a later Will made by the deceased.

The sequence of events leading up to this Affidavit sworn to by Dr. McPherson will be of vital importance in weighing and assessing his evidence as the Affidavit was obtained from Dr. McPherson following the sudden and mysterious disappearance of Millicent Dennison and also after Gwendolyn Spencer had sworn to an Affidavit in August 1977 retracting her Statement given in March 1975 to Rena Heron that she had witnessed a Will of the deceased in March 1974 at the Hargreaves Hospital. At that time with the combined effect of Miss Dennison's disappearance and Miss Spencer's retraction, the cause of those who were alleging there was a later Will seemed then not to hold out much hope and so it was against that background that Dr. McPherson's Affidavit was sought and obtained, no doubt with the main purpose of bolstering up their case.

It is further of particular note that his Affidavit was sworn to more than three and a half years after the facts to which he purports to have had actual knowledge.

I have been greatly assisted in this matter by a number of authorities referred to by Counsel on both sides.

The attention of the Court was drawn to the following cases:-

1. Cutto vs Gilbert, Volume 9 Moores Privy Council Reports 1854 - 1855 pg. 131.

2. William Brown vs Amelia Brown 1859 8 Ellis and Blackburn's Report at page 876. Volume 120 English Reports at page 327.

3. Re Estate of Hampshire 1851 Weekly Notes at page 174.

4. Hellier vs Hellier 1884 9 Probate Division Law Reports page 237 at page 239.

5. Sugden vs Lord St. Leonards Probate Law Reports 1875 - 1876 at page 154.

6. Re Wright 1952 1 A.E.R. at page 1013

7. Wood vs Wood 1865 - 1869 Probate Law Reports at page 309.

8. Atkinson vs Morris 1897 Probate Law Reports at page 40.

9. Barkwell vs Barkwell 1927 Probate Law Division at page 91.

10. Lillie vs Lillie Volume 62 English Reports at page 162.

The principles of Law to be extracted from these cases briefly summarised were:-

1. That the onus of proof lies upon the propounders of a subsequent testamentary document which is not forthcoming to prove not merely its existence but also its contents.

2. That there must be evidence adduced which establishes that this subsequent Will revoked the earlier Will and it will work a revocation where:-

   (a) There is a change of Executors.

   (b) There is a revocation clause in the later Will.

   (c) The dispositions in the latter Will are substantially different from those in the earlier Will.

3. Where there is proof of the existence of a later Will which has revoked an earlier Will and that Will has been in the custody of the deceased testator up to the time of his death and cannot be found thereafter despite a diligent search to locate same, the presumption of law arises that the deceased destroyed same animo revocandi and the result of this is that the deceased died intestate.

4. That where the revocation of an existing Will is sought to be established by proof of the execution of a subsequent Will not forthcoming and where there is no draft or instructions in writing, when such fact is to be proved by oral evidence only, such evidence ought to be clear and precise.

5. That to revoke an existing Will by parol evidence alone that another Will has been executed, is though the Law may admit of it, a course of proceeding not unattended with danger and consequently that such oral evidence ought to be stringent and conclusive.

In addition the Court was also referred by Mr. George to Cross on Evidence 3rd Edition at page 422 - 423 in which the Learned Author

deals with the subject of Post Testamentary Statements of Testators concerning the contents of their Wills.

Mr. Codlin also referred to Gibson on Probate 17th Edition at page 63 on the question of Presumptions as relating to lost or destroyed Wills.

Mr. George further submitted that:-

1. Before a later Will can be said to have revoked another and previously properly executed Will, execution of the later Will must be proved strictly.

2. Proof of the second or later Will cannot be done by statements made by the Testator after the later Will saying that he revoked the previous Will. This applies in particular with regards to the Affidavit of Dr. McPherson in so far as it seeks to offer corrobation of Miss Dennison's evidence as to the existence of a second Will.

3. Even if the proper execution of the second Will can be proved evidence of the revocation of an earlier Will must be stringent and conclusive.

4. Where a properly executed Will was in the possession of a testator at the date of his death and that Will cannot be found after his death, the presumption is that he destroyed that Will, but before that presumption can arise it must be established that the Will was properly executed. The onus of proving execution is on the propounders of that Will. Equally the onus of proving revocation is on the party seeking to prove the revocation.

Bearing in mind these various propositions to which I am grateful to the Attorneys on both sides for their industry, I must from the very outset and before examining the evidence of these persons, refer in particular to Millicent Gloria Dennison whose evidence lies at the heart of this matter. Her statement and deposition will have to be examined with the utmost care bearing in mind her admitted reluctance to volunteer information as to the whereabouts of the friend who typed the Will, her lying to the Court when her depositions were taken, and her unexplained disappearance.

Mr. Frankson has made reference to the fact that it was just by chance that Miss Dennison came into this matter. She had gone to the supermarket operated by Cisilyn and Patrick Manley Delapenha in the afternoon following the deceased death. She went to offer her condolence to Mrs. Delapenha when the question as what sort of funeral the deceased wished came up. It is a matter of concern to me as to how the question of the type of burial to have for the deceased could have entered into the conversation as Miss Dennison was not known to be a close friend of the deceased or intimately connected with the immediate family in any way. It was supposed to have been Cisilyn Delapenha who brought up the matter of the funeral arrangements. Whereas there is some probability that Miss Dennison did go to the supermarket and offered her condolence as might be expected in the circumstances, it is inconceivable that a matter as intimate as the funeral arrangements and the question of the deceased wishes in this regard would have been a subject that would have been touched upon by Mrs. Delapenha and mentioned to a person such as Miss Dennison who was not closely connected to the deceased or his family.

While on this aspect of the matter it is of some importance that the Will in Court for which Probate is now sought makes no mention of the deceased wishes as to what kind of burial he wanted. He however, was very careful to mention that he wished "a suitable tombstone to be erected over my grave." The question of what kind of burial he was to have was clearly left to his immediate family as is the general custom in this country and his Will made adequate provisions for payment of the same. Given the added fact that he had made a substantial disposition to the Sisters of Mercy of "Monticello and all its contents" it was clear

from this that he must have been a devout Catholic and this Order may in all probability have been dear to his heart. There would be no doubt therefore that if his family requested a Requiem Mass to be celebrated at his funeral, that request would have been entertained. There would have been no necessity for the deceased to ask for a Requiem Mass, and it is highly improbable that he made any such request.

Mr. Frankson has said that Miss Dennison in her recall as to the contents of the alleged Will has been precise in the details she has given. In her depositions Miss Dennison has said that "I recall the contents of that Will because Mr. Delapenha repeated them so many times." Could this have been so, if she was as she has stated taking dictation? If the draft was being prepared by her as the deceased spoke what would be the necessity for the deceased to repeat the contents of the Will of March 1974 so often? This also seems highly improbable. Miss Dennison has alluded to this fact in her depositions in order to lend credence to the detailed manner of her recall as to the contents of the alleged Will.

It has been contended by all the Attorneys for the defendants that from the manner of Miss Dennison's recall in her statement as to things, incidents and persons, she could only have had knowledge of them if she had actually experienced them. She ought therefore to be taken to recounting something that actually did take place.

I pause here to make this observation that although that may probably be true, it is also equally probable that given the period of seven weeks following the birth of the rumour of the second Will, and given the assistance that she could easily have got from someone who not

only knew the deceased well, his habits and pecularities, and given further information as to the contents of the Will of 13th February, 1974 which had already been scrutinised by several members of the family including Cisilyn Delapenha and Rena Heron, Miss Dennison had ample time in which to produce a statement in the form of that to which her signature bears testimony. It has further been contended that the statement of Miss Dennison is remarkable and one that does her credit. Coming as it does over one year after the event to which she seeks to recall, it would have been beyond any human comprehension for her to remember in such graphic detail the contents of a document as she sought to do in her statement, about a man she was not intimately associated with and about matters that were no concern of hers.

One finds it difficult to believe that given the fact that the deceased was a very private man, and one whom from all appearances and from the circumstances in which the February Will was prepared, did not confide in his family, the whole narrative of the second Will seems improbable. The deceased had executed a Will just three weeks earlier to the alleged March Will. He confided in Nurse Arscott in getting that Will prepared and executed. Was he going to run the risk of the fact that he had made a Will being published by obtaining the services of a virtual stranger such as Miss Dennison to prepare another Will for him and thereby increasing the risk of the very fact which he was seeking to prevent?

The circumstances as related by Miss Dennison as to how she states the March Will was prepared needs to be examined with greater scrutiny in so far as they relate in particular to the alleged alteration of a number of the dispositions in the Will of 13th February, 1974.

Given the fact that the deceased was a man of high repute and integrity, there is no evidence brought by the defendants to show any changed attitude on the part of the deceased towards any of the persons or objects which he has sought to benefit by the dispositions in his February Will. There has not been any evidence brought by them to show for example whoat reason or reasons might have existed for the deceased to alter the dispositions made to Easton Findlay whom he has referred to in the Will of 13th February, 1974 as his adopted son. The absence of such evidence is by itself sufficient to excite suspicion and to cast doubt on the veracity of Miss Dennison's recall if such suspicion is not removed. And can it be removed, when she has by her continuing absence left one to ponder the question, could this story be true? While on the subject of Easton Findlay, if Miss Dennison did take dictation from the deceased and prepared a document which was later executed as the deceased Will, could she have failed in her statement to recall the fact that the deceased had referred to Easton Findlay as his adopted son? Could she have forgotten the alteration of the following disposition in the February Will "21 McKinley Road (called Church House) to my adopted son Easton Findlay and his wife Faith Findlay absolutely." It will be recalled that this was the second disposition mentioned in the February Will, which according to Miss Dennison the deceased had in his hand reading over to her and making alterations. Could she have failed to recall the deceased referring to Easton Findlay in that close and intimate way?

As Mr. George has observed there are few designations closer to a man than the word son and when that person as in the case of the deceased is a bachelor and had no children of his own such a reference

takes on an added significance.

The devise of the house at 21 McKinley Road to the Findlays seems to have escaped the memory of Miss Dennison in her statement. In the same breath she remembers the disposition of several other houses to other persons. Had she experienced what she states she did, one would expect her to recall a disposition which was made very early in the Will of February 1974 as the testator read it over and if there was an alteration by way of omitting that disposition any reason for this she would in all probability have also remembered. More especially so when it had to do with someone who the deceased had in the Will of 13th February, 1974 referred to as his adopted son. It is even more remarkable thatthis fact could have escaped her yet she can recall in precise detail other alleged alterations in so far as they relate to certain later dispositions which touch and concern matters such as the Gut River property and the investments in the Manchester Shopping Centre being able in addition to quote the actual words which the deceased is alleged to have used in referring to these properties.

Miss Dennison has said in her statement that in dealing with the Manchester Shopping Centre dispositions (as the original stood, the Findlay's would inherit 50% of his estate). He said "this is not right."

How did she know that the Findlay's stood to inherit 50% of the deceased estate? Had the deceased told her this? or was this something which was introduced by someone with actual knowledge of the contents of the Will of 13th February, 1974 for which Probate is now sought? It must not be forgotten that these words are being attributed to a man who was a person of vast experience. He was also it has been

said a very private person and it cannot be denied that he was someone whose experience and judgment as well as his shewdness in business matters had brought him considerable wealth. One therefore has to assume that he was not someone given to making hasty decisions. When he made a decision it was after careful examination of weighing the pros and cons and after a studied and mature consideration of all the facts. Is one therefore to assume that this same person having made a Will which was executed on 13th February, 1974 which sought to dispose of all his estate thereby ensuring that his affairs were settled, and having determined that the bulk of his estate ought to go to his "adopted son" Easton Findlay and his family, that the deceased would without there being any change in the relationship between the Findlay's and himself, for no rhyme or reason then say to someone, not intimately or closely connected to him as Miss Dennison was, "that is not right?" I regard this as most unlikely. Or was it that some member or members of the deceased family when the Will of 13th February, 1974 was found and examined in the afternoon of 15th January, 1975 at Monticello, and later discussed as it would naturally have been amongst the immediate family, saw the contents as rendering an injustice to the family and then decided upon a course of action which eventually lead to the conception and eventual birth of what Mr. Codlin has chosen to refer to as the Dennison Will?

Miss Dennison's account in her statement as to the circumstances in which she had the draft of the March Will dictated to her by the deceased is contradicted by the evidence of Nurse Patricia Arscott. In her statement Miss Dennison recalls an incident in which according

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to her "he (meaning the deceased) did not wish to offered Nurse Arscott so he did not want her to know initially that he was rewriting his Will, but there were places where the spelling was so bad and he could not recall what he said. He said there was no logical thinking in this and called Nurse Arscott. She was brought into the room and asked to read certain sections that were not clear."

I pause here to observe that having read through the Will of 13th February, 1974 many times during the hearing of this matter and in the process of writing this Judgment, that apart from one obvious error with reference to the bequest to "Harold Vaughan Iver" someone who it is admitted has been dead for over forty years but whose widow is still alive, there is nothing that I can find in the Will that is illogical or not clear. As to the words "there were places where the spelling was so bad......." on a persual of the February Will, on the first page the only misspellings are "testamentor expences" instead of "testamentary expenses", and "descression" instead of "discretion". On the second page, "Montecello" instead of "Monticello" and there are none on the third or fourth pages. "And he could not recall what he said." Miss Dennison seemed to have momentarily forgotten that the deceased was supposed to have had the February Will with him and reading it over as she took down dictation. If the deceased had forgotten what he had said all he had to do would be to look at the Will.

Nurse Arscott in her statement has said that "at no time did I read over to Mr. Delapenha or Matron Dennison the aforesaid Will of 13th February, 1974, after its execution."

If this statement of Miss Arscott's is true then it gives the lie to the account given by Miss Dennison in her statement and casts grave doubts upon the whole of her evidence that she prepared a Will for the deceased by way of taking dictation from him while he was a patient in the Hargreaves Hospital between 9th February to March 1974.

Mr. Frankson has challenged the credibility of Nurse Arscott by referring to the statement of Rena Heron and Cisilyn Delapenha in so far they relate to the incident involving Easton Findlay at the deceased home on the afternoon of the 15th January, 1975. He has submitted that on that occasion Nurse Arscott was lying when she first sought to deny knowledge of the existence of the February Will when it was discovered in the possession of Easton Findlay. Easton Findlay's conduct has also been questioned. He submits that in so far Miss Dennison's statement conflicts with that of Nurse Arscott, the account of Miss Dennison ought to be believed.

Whereas it is true that Nurse Arscott from her conduct on that occasion was clearly covering up the fact that she had any knowledge of the February Will, that was her immediate reaction when she was shown the sealed white envelope with the handwriting of the deceased on it marked "Last Will and Testament of Louis Patrick Delapenha." Mrs. Heron's statement reads in part "the white envelope was marked Last Will and Testament of Louis Patrick Delapenha." I said "Easton do you know whose handwriting this is?" He replied, "No." I then turned to Nurse and said "Nurse do you know this handwriting?" She replied, "No Miss Rena." Nurse Arscott would probably at that stage have recognised the handwriting as she had placed the envelope in the pocket of deceased

dressing gown on his instructions the evening before he was due to be discharged from the Hargreaves Hospital. Up to that stage, however, she had only been shown the sealed envelope with the deceased handwriting on it. Mrs. Heron then said that "Easton still continued looking and taking out things in the side of the chifferobe. I proceeded to open the envelope the Will---------." I then said "Nurse how can you say you do not know whose handwriting and you wrote it." She replied "Lord Miss Rena, I wrote it so long ago I thought Mr. D. had written it over and I did not remember." Nurse Arscott therefore once she had been confronted with the document by Rena Heron admitted that she had written it. Can it be said that in those circumstances she was lying? It is further clear from the circumstances surrounding the preparation and execution of this document that the testator did not wish any of his immediate family to know of its existence. He had confided in Nurse Arscott and she was not seeking to betray that confidence. She may have in all probability been sworn to secrecy. Her conduct when the Will was discovered that afternoon at Monticello is consistent with that fact. The deceased conduct when that Will was prepared is also consistent with the nature of the man, he being a very private person, and one who in his lifetime one may rightly assume had the occasion to advise many clients and no doubt possessed many of their secrets, his being a profession in which most of the instructions he would receive had of necessity to be of a most confidential nature. When Nurse Arscott's evidence is examined in this light bearing in mind that the document which she prepared is not being challenged as to its validity her bona fides cannot be doubted. I accept her statement as true and in so far as it does conflict with

that of Miss Dennison, I accept the account as given by Nurse Arscott.

This now brings me to the evidence of Gwendolyn Spencer. It will be recalled that a statement was taken from her by Rema Heron in March 1975 in which she related having witnessed a Will for the deceased in the presence of the deceased and Miss Dennison. After the disappearance of Miss Dennison an Affidavit was obtained from her by Mr. Owen Crosbie an Attorney-at-Law which was sworn to before Mr. Stewart, a Justice of the Peace on 20th August, 1977, and she deponed that during the time that the deceased was a patient at the Hargreaves Hospital she never went into his room, or witnessed any document for him. She retracted her earlier statement in this regard. She was called to give evidence in this matter on Thursday, 4th February. In her evidence, although admitting that she did tell Mrs. Heron in the statement which was taken from her in March 1975 that she had witnessed a Will for the deceased, she said that she did so because she had been threatened by Miss Dennison that if she did not say so she would have lost her job. She has also before me on oath categorically denied going into the deceased room in March 1974 or to witnessing any Will.

Her evidence in the manner that it is, makes it unsafe to act upon bearing in mind the sort of inquiry that I am undertaking, and in the light of the fact that she has given two contradictory statements relating to the same fact before coming to Court and again in Court. Taking her evidence therefore as a whole in my view her evidence ought to be disregarded.

That now leaves me to consider the Affidavit of Dr. McPherson about which I have already made some passing reference to earlier on.

I cannot but agree with the observation of Mr. George to add to my earlier comments, in so far as they relate to this person. The Affidavit is obviously manufactured and done to suit a particular purpose and it is certainly not to Dr. McPherson's credit indeed that he elected to swear to it in the form that it is. He also no doubt from the language used in the body of the document obtained some assistance in preparing it from an Attorney-at-Law or someone with some experience in drafting such documents. Most of the words contained in it are not his words but the highly technical language of an Attorney. I will refer for example to such phrases as "purporting to be the Last Will and Testament" in paragraph 2. "Subsequent to" in paragraph 4. "A non-sensical Will to which I attested" in paragraph 5. "The contents of the Will but only attested my signature" in paragraph 6. "I mentioned the conversation to Matron Dennison who concurred" in paragraph 9. (The underlines are mine for emphasis).

Mr. Schofield has said that if these persons and in particular Millicent Dennison, Gwendolyn Spencer and Delroy McPherson are not to be believed then the whole matter of the story of the March Will must have been a grand conspiracy. The fact that I am not prepared to accept their statements as truthful leads me to ask the question therefore as to what purpose were these accounts made? I need only ask this further question, who stood to gain most out of the deceased estate on an intestacy? The answer to these questions in the light of my examination of the statements of Millicent Dennison, Gwendolyn Spencer and Delroy McPherson provides the key to the solution of the whole question as to whether in fact there was a later Will.

It is therefore not out of disrespect to the Attorneys in this matter if I do not think it necessary to examine any of the authorities which they have cited or the various propositions of law that these cases touched upon.

I will, however, end by referring to the words of Dr. Lushington in Cutto vs Gilbert one of the cases to which reference has been made whose words I adopt.

> "Where the revocation of an existing Will is sought to be established by proof of the execution of a subsequent Will not appearing, and where there is no draft or instructions in writing, when such f ct is to be proved by oral evidence only, such evidence ought to be most clear and satisfactory for we concur in the opinion which has been expressed by very learned persons that to revoke an existing Will by parol evidence alone that another Will has been executed though the Law may admit of it is a course of proceeding not unattended with danger, and consequently that such oral evidence ought to be stringent and conclusive."

(The underlines are mine again for emphasis).

Having examined the evidence in this matter not only do I form the view that the accounts given by Millicent Gloria Dennison in her statement and depositions as to the existence of a second Will, which allegedly came into being on or around the first Thursday in March 1974, as not being truthful, but I would think it folly on my part to proceed to act upon what after careful analysis has rightly been referred to by Mr. George, as passing for evidence.

I accordingly reject the contentions of the Attorneys for the propounders of the alleged later Will, and uphold the Will now in Court dated 13th February, 1974 as the Last Will and Testament of the deceased which is accordingly admitted to Probate in Solemn Form.

D.O. Bingham
Judge