JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 29/82

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAREY, J.A.

BETWEEN:	KARL DELAPENHA PATRICK MANLEY DELAPENHA JUNE SHEARER LESLIE DELAPENHA RICHARD DELAPENHA CISILYN DELAPENHA	)	DEFENDANTS/ APPELLANTS
A N D :	DONALD ALLEN REMA MAY HERON FAITH FINDLAY	)	PLAINTIFFS/ RESPONDENTS

W. B. Frankson, Q.C. for Karl Delapenha, Patrick Delapenha, Leslie Delapenha and June Shearer.

W. A. Scholefield for Richard Delapenha and Cisilyn Delapenha, instructed by Judah, Desnoes, Lake, Nunes and Scholefield.

Emil George, Q.C. and John Graham, for the Executors, Donald Allen, Rema May Heron and Faith Findlay, instructed by Myers, Fletcher & Gordon, and Manton & Hart.

June 18, 19, 20, 21, 22; October 8, 9, 10, 11, 1984; and January 25, 1985.

CARBERRY, J.A.:

This was an appeal from a judgment of Bingham, J, given on the 25th of February, 1982, whereby he admitted to probate in solemn form the will of Louis Patrick Delapenha, late of Monticello, Mandeville, in the parish of Manchester, attorney-at-law, propounded by the plaintiffs/respondents (hereinafter called the executors), and dated the 13th February, 1974.

The proceedings before Bingham, J. occupied some five days of trial. The appeal therefrom occupied some eight days before us. On the ninth day, the 11th October, 1984 we announced our decision in the following words:

> "We are of the view that we ought not to upset the decision of the learned trial judge; that there is not sufficient evidence to establish due execution of the alleged second (later) will. The appeal is accordingly dismissed. Reasons will follow

"at a later date. Costs of the appeal, on both sides, to come out of the estate."

In the judgments that follow we set out the reasons that led us to the conclusion at which we arrived. I have had the opportunity of reading in draft the reasons set out by Rowe and Carey, JJ.A. in their respective judgments, and I agree with them. In what follows I will try to avoid unnecessary repetition and will be content to record only the bare outlines of the facts sufficient for the understanding of the views that I may shortly express.

The testator, as I shall call him, died on the 15th January, 1975, at his home, Monticello, Mandeville in the parish of Manchester. He had been a solicitor (now re-named attorney-at-law) for over forty years, and by the time of his death had amassed considerable wealth, put by counsel during the argument before us as perhaps in excess of J$5,000.000.00. He died a bachelor, but left a large number of close relatives and friends, one of whom was an adopted son Easton Findlay. The testator was a devout Catholic, and in the disputed will gave and bequeathed his home Monticello and certain land on which it stood to the Sisters of Mercy of Jamaica with instructions that its contents should be sold to establish a trust for them to be applied to maintaining the small zoo that he had there. He then directed the disposal of various items of real estate that he owned: 21 McKinley Road he gave to his adopted son Easton Findlay and his wife Faith absolutely; land at Gut River to be sold and divided between some members of his family and various religious or charitable organizations; he then dealt with his half share of the Manchester Shopping Centre, provided for various legacies and seems to have given the residue of his estate to "my trustees" (executors of his will) and his adopted son Easton Findlay absolutely. So far as we can judge the disputed will adequately dealt with his estate and adequately provided for those who would have been expected to benefit from his bounty. We were not

told of any close relative who had been passed over, but it is clear that the extent of his bounty to his adopted son Easton Findlay caused some jealously and ill feeling amongst his relatives.

The testator became ill in the early part of 1974, and was admitted to the Hargreaves Memorial Hospital in Mandeville. He was there between the 9th February and a date in March, and while there was attended by a private nurse, Miss Patricia Arscott. While there he dictated to her, and she recorded in her own handwriting on the yellow foolscap traditionally used by lawyers in Jamaica the will in question. This he duly executed and his signature was witnessed by two doctors, Dr. Leigh Lord and Dr. Delroy McPherson.

The authenticity and due execution of this will dated the 13th February, 1974, the disputed will (hereinafter called the Arscott will) has never been and is not now challenged. What is at issue is that it is alleged that some days after the testator executed it, he besought the aid of Miss Gloria Dennison, the Matron of the hospital, and repeated the exercise with her. He, it is said, used the will of the 13th February 1974 as a working draft, and dictated to Miss Dennison a second will in which though he retained the same executors and apparently the same format, he varied the gifts that he had previously made; some of the variations are small - some of the contents of his home, paintings etcetera, are made the subject of individual gifts to members of his family. The major change appears to have been that he is alleged to have reduced the gift to his adopted son Easton Findlay from one half to a third, by the device of dividing the major item that had hitherto fallen into residue, i.e. the half share of the Manchester Shopping Centre, between three beneficiaries, Easton Findlay, Rema Heron, and his god-daughter Denise. In short members of the testator's family

received more, and Easton Findlay less.

It is alleged that to spare the feelings of Nurse Arscott the dictation of the new will was at first concealed from her, though Matron Dennison said that she was called in at one stage to read her handwriting to the testator and his new amanuensis. (Nurse Arscott denies that any such incident occurred).

According to Nurse Dennison having completed this new draft the testator desired to have it properly typed out, not by his own office, but by some person in Kingston, and Miss Dennison made a trip to Kingston and got a friend of hers, a typist, to type out the new will. The original and a copy were brought back by Miss Dennison, and so great was the testator's desire for secrecy that even the carbon papers used to make the copy were brought back and handed over to the testator. According to Miss Dennison the testator destroyed the carbon papers, and then asked her to witness his signature and to get some other person to be the other witness: this other person was not to be Nurse Arscott or any other nurse, but one of the two ward maids then on duty. The ward maid in question was one Gwendolyn Spencer, and it is alleged by Miss Dennison that the testator duly executed his will in the presence of herself and Gwendolyn Spencer. (This is in marked contrast to the execution of the will of the 13th February before two doctors attached to the hospital).

According to Miss Dennison having executed the will (or the original and copy will) she was requested by the testator to buy two brown envelopes into which to put the wills. She did so, and the testator duly put the original and copy into the two separate envelopes, sealed each with sealing wax, and endorsed on the two "The last will and testament of Louis Patrick Delapenha." He stamped the two envelopes with the hospital stamp, and entrusted <u>both</u> to her. She kept them in the Dangerous Drugs

cupboards, under lock and key.

When the testator left the hospital in early March, he took with him the will of the 13th February, (the Arscott will) in the pocket of his dressing gown. It was later put into an Air Mail envelope and on his return home was put into one of the drawers of the chifferobe in the testator's bedroom. Its presence there was known to Nurse Arscott who accompanied him home and continued to nurse him, and also to one of the testator's sisters who had kept house for him at the time of his illness. It was found there after his death.

In contrast, according to Miss Dennison, both copies of the new will were left with her. She tried to get the testator to take them from her but he refused. Subsequently he went off to Texas to get further medical treatment for his illness, and on his return she again pressed him to take them. He this time took them both from her, put them into a big brown envelope which he put under his pillow. This happened some time before his death, but apparently during his last illness, for he was in bed at his home when this conversation took place. Neither copy of the alleged second will has ever been found.

One of the unmentioned and unresolved mysteries of this second will is what happened to the handwritten draft that Miss Dennison made and which the typist in Kingston copied after it was said to have been handed to the testator.

This will of the 13th February, 1974 (the Arscott will) was found in the drawer of the testator's chifferobe in his bedroom after his death. It was produced by his adopted son Easton Findlay who with Nurse Arscott had gone into the deceased's bedroom while other members of his family were outside in the living area. The account given by Rema Heron (one of the executors) in a statement that she made suggests that Easton appeared to her to have been searching in this drawer and to be

putting back the will of the 13th February. This incident occurred on Thursday 16th January, 1975, the day after the testator's death. The will was then examined by the members of the family, and is the will of which probate has been granted. No doubt the extent of the testator's bounty to Easton Findlay was marked by the members of the testator's immediate family.

At this stage preparations were being made for the funeral, (the deceased was given a State funeral in recognition of his services to the country), and a chance remark passing between Matron Dennison and Mrs. Cisilyn Delapenha, a close relative of the deceased's family, led to the revelation by Miss Dennison of the second and later will that she alleged had been made.

Search was made for it, neither the original nor carbon copy have ever been found. During the period that followed Miss Dennison vouchsafed that she had learnt that her friend the typist in Kingston had in fact made a second carbon copy when typing the original. It is sufficient to say that all efforts to recover this copy or even to discover the identity of the typist have failed, and that at every point at which some confirmation or corroboration of Miss Dennison's story of the second will has been attempted, it has not been forthcoming, save in one respect. The other attesting witness Gwendolyn Spencer at first made a statement confirming that she had witnessed this will, but later went back on it, and in short stated that she had been co-erced by Miss Dennison into making that false statement by being threatened with the loss of her job.

It is not unknown for attesting witnesses to deny due execution of a will, and it is not necessarily fatal: Pilkington v. Gray (1899) A.C. 401 (1898) 68 Law Jo. (P.C.) 63. But this witness was one of the few who gave viva voce evidence before

Bingham, J. and he decided that it was unsafe to act upon her evidence either way and that her evidence ought to be disregarded. All the members of this Court have endorsed that view.

The executors then were faced with a difficult situation: there was a clear conflict of interest between the members of the Delapenha family and the Findlays. There was a will in their possession, satisfactorily accounted for, duly executed, and witnessed by persons of unquestionable integrity. On the other hand there was the story of Matron Dennison of a second and later will, never produced, and the draft of which was never accounted for. As to this the only record of its contents were to be found in the memory (aided or unaided) of the Matron; the only proof of its execution in the statements of the Matron and the conflicting and unreliable statements of Gwendolyn Spencer.

It appears that the executors, on behalf of the estate and those interested in it took out Suit No. I 1114/75, in which by notice of motion they sought a subpoena to issue to Matron Dennison requiring her to attend in Court and testify on oath as to the existence of the alleged second will. We were told that this Order was made by Melville, J., that Matron Dennison was served with it, and duly attended before Chambers, J. and we have notes of that hearing on the 4th March 1976, and of the evidence that she then gave. It is sufficient to say that having refused to name the person who typed the alleged second will, because she had promised not to disclose her name, she eventually wrote down a name, and that all efforts to find any such person have failed, before, then, and since, as have efforts to find any copy of the alleged second will. Indeed we do not even know its date.

This inquiry before Chambers, J. on the 4th March, 1976 was part heard and adjourned sine die. It has never been completed, nor have the contesting parties ever had the opportunity

to cross-examine Matron Dennison, Mr. George was present at the hearing, on behalf of the estate and or executors but it is said that the witness was there as a witness of the Court (an attesting witness is a witness of the Court). Miss Dennison has since that time left the jurisdiction and is said to have returned to her homeland, Guyana, and is reputed to have died. She was not available to give evidence before Bingham, J. in the present action.

The executors, left in this inconclusive position, on the 8th December, 1977, commenced the present proceedings. It was amended on 25th April, 1978, and sought to prove the will of the 13th February, 1974 in solemn form. The statement of claim dated the 26th October, 1978 set out their position: they had a will dated 13th February, 1974, and an allegation by Gloria Dennison of a second will revoking the will of 13th February, but she had failed to produce this alleged will or to give evidence of who had typed it, and that Gwendolyn Spencer the other alleged attesting witness had denied its existence.

The Defence, dated the 19th December, 1978, relied on Miss Dennison's story, and the existence of the alleged second will. They pleaded that this later will revoked the Arscott will, and conceding that it could not now be found, relied on the well-known presumption that where a will known to have been in the testator's possession cannot be found after his death, there is a presumption that he destroyed it and so revoked it. In that event they argued that the testator died intestate and his estate should devolve as on an intestacy, and they sought a declaration to that effect.

By an agreement made between the respective counsel the course of the action took an unusual turn. It was agreed that all statements whether sworn or unsworn taken from all witnesses

at any time should be put before the trial judge as they stood, and without benefit of cross-examination. Thus the evidence given by Matron Dennison before Chambers, J., together with her statement given to the Delapenha family, in which she purported to set out from memory the dispositions of the second will both went in, and this without benefit of cross-examination. This produced manifest inconvenience: for example Miss Dennison never got the opportunity to comment on Gwendolyn Spencer's retraction of her statement that she had witnessed the will, and her allegation that the whole affairs was an invention of the Matron. Further, and more importantly, an affidavit was put in taken from one of the attesting witnesses to the Arscott will, Dr. McPherson, to the effect that subsequent to the testator's discharge from the Hargreaves Memorial Hospital he had met the testator who had in conversation referred to his having witnessed the Arscott will, had termed it "nonsensical" and indicated that "he had since had the will rectified". This statement was strongly relied on by the defendants/appellants as supporting Matron Dennison's story that there was a second will, and the Doctor's affidavit contains an assertion that he spoke to the Matron about this and she confirmed it. (This last was of course pure hearsay).

It should be observed that Matron Dennison was apparently no longer within the jurisdiction, if indeed she was still alive, (and it was stated that she was dead), and that as the whole defence rested upon her story, it would have been impossible to canvass these allegations in the absence of this agreement. We enquired into the limits if any of the agreement during the argument before us, and were assured that the parties did not thereby waive any claim to object to inadmissible evidence. Objection was taken to Dr. McPerson's affidavit, and the point made that post-testamentary declarations by testators, while

admissible as to the content of their wills (for what it may be worth), are not admissible to prove due execution of the same. See In the goods of Ripley (1858) 1 Sw. & Tr. 68; Atkinson v. Morris (1897) P. 40 (C.A.)

As the appellants before us relied strongly on Sugden v. St. Leonards (1876) 1 P.D. 154, it seems appropriate to cite a passage from the judgment of Cockburn, C.J. at page 227 on this point. He said:

> "There are no doubt cases in which the declarations of testators are inadmissible. Thus a statement by a testator that he had duly executed his will could not be received as evidence of its due execution, as was decided in The goods of Ripley; (supra) and there is good reason for the decision, namely that the exercise of the testamentary power, being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the exercise of the right."

See generally Cross on Evidence, 3rd. Edition (1967) pages 422-4. Our own Wills Act reproduces in terms the identical requirements of the English Wills Act, both as to the provisions as to execution of wills, (Section 6 of the Jamaican Act) and also its provisions as to revocation, (see Section 15 of the Jamaican Act).

This brings us conveniently to the heart of this case. Mr. Frankson who argued tenaciously on behalf of the next of kin who sought to upset the Arscott will, conceded in argument that the only area of real conflict was as to the proof of due execution of the second will.

He argued vigorously that the trial judge had wrongly rejected the story put forward by Matron Dennison. In fact the trial judge went further, for not content with finding that he could not accept the story, he in effect found that it was a tissue of lies, and amounted to a conspiracy hatched by some of the next of kin and Matron Dennison with the specific object of

bringing about the rejection of the Arscott will and a consequential intestacy.

I think we are all of the view that it was not necessary to go that far; but we are equally of the view that the evidence given by Matron Dennison and others was not sufficient to satisfy the burden of proving the due execution of the second will and the revocation thereby of the first will.

We were pressed with a series of cases in which the point has been in issue. They included Cutto v. Gilbert (1854) 9 Moo P.C. 131; 14 E.R. 247 (where the earlier will was admitted to proof: though interestingly enough a later will was subsequently found after the case was over and the probate of the earlier will was then revoked). Brown v. Brown (1859) 8 El. & B. 876; 120 E.R. 327 (where the earlier will was held revoked by the later, which however not being found, was held to have been itself revoked and an intestacy declared. It is perhaps worth noting that proof of the execution and contents of the later will were given by the solicitor who prepared it, and his evidence accepted by the trial judge).

Barkwell v. Barkwell (1928) p. 91 (where execution of the missing second will was proved, along with clear evidence that it contained a revocation clause), and Re Wyatt (1952) 1 All E.R. 1030, the headnote in which states:

> "Held: where it is sought to prove the revocation of an earlier will by oral evidence only, such evidence must be 'stringent and conclusive'; there was no such evidence in this case, and, therefore, probate of the first will and codicil would be granted. Cutto v. Gilbert (1854) (9 Moo P.C.C. 131) applied."

And see Vol. 39 - Halsbury - 3rd Edition pp. 890-892 paragraphs 1355-1357.

In the event therefore we are of the view that Bingham, J. was correct in not accepting the evidence of Matron Dennison and in admitting to probate the will of the 13th February, 1974, a will which was proved before him by oral evidence of Dr. Lord to have been duly executed and attested. The Order that we made has already been reported on the first page of this judgment.

ROWE, J.A.:

On February 13, 1974, a registered nurse, Patricia Arscott, prepared a Will, in indifferent handwriting, at the dictation of one who was a solicitor of the Supreme Court of Jamaica for over forty years. This was done while the testator, the late Louis Patrick Delapenha, was seriously ill in the Hargreaves Memorial Hospital, Mandeville. The testator requested the presence of two nurses to witness his signature but Nurse Arscott invited two doctors, Messrs. Leigh Lord and Delroy McPherson, who were present at the Hospital to be the witnesses to the signing of the Will. The doctors accepted the invitation and in signing as witnesses, they initialled the eleven prominent alterations and deletions in the document. There were interlineations which were not similarly initialled. Bingham J. ordered, adjudged and decreed that the Will of 13th February, 1974, referred to above be admitted to probate in Solemn Form. Against this order, the instant appeal was brought, seeking a decree that the Will of Louis Patrick Delapenha dated 13th day of February, 1974 was revoked animus revocandi and that Louis Patrick Delapenha died intestate, a bachelor. At the end of a long and interesting argument which sometimes ranged over matters not at all related to the orders sought on appeal, we dismissed the appeal, with the promise that the oral reasons for judgment would in due course be amplified in writing. These are my reasons.

I will adopt the trial judge's description of the testator. Of him the judge said:

> "He has been described as being a fastidious gentleman of a private nature and he lived alone in magnificent and exquisite surroundings on a twelve 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 this 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 those served him well. By the time of his death he had amassed considerable wealth. "

As it has turned out some of the "wealth of the testator" will not get to the beneficiaries, but will go to pay the legal costs incurred in proving the Will. Is this another example of a man who is proved to be a fool for being his own lawyer?

A novel procedure was adopted in the distillation of the facts relevant to this case. There was an agreement between the parties that they would place before Bingham J. the sworn testimony of one Gloria Dennison which had been obtained earlier before Chambers J. The executors had obtained an order that "a subpoena be issued to Gloria Dennison to testify to the truth according to her knowledge touching a certain paper-writing or script being or purporting to be testamentary of which reasonable grounds exist for believing that she has knowledge. " In answer to this subpoena, Gloria Dennison was examined in what could be termed non-contentious proceedings in that the next-of-kin of the deceased were not represented. Her evidence thus taken was preserved. Counsel's agreement went further. Statements had been collected by one of the executors from a number of persons who claimed to possess knowledge in relation to the making, the custody and the production of the Will of February 13, 1974 as also from Miss Dennison who asserted that a subsequent Will was drawn up and executed in proper form by the deceased in the presence of herself and Gwendolyn Spencer. There was in addition an affidavit from Gwendolyn Spencer retracting the contents of her statement and an affidavit from Dr. McPherson, one of the witnesses to the Will of February 13, 1974.

On the basis of the information contained in the evidence of Miss Dennison, her earlier statement, and on the statements and affidavits referred to above, elaborate submissions were mounted before Bingham, J. and he made findings of fact on those insecure and unusual foundations.

That the Will of February 13, 1974, was properly executed there can be no doubt. Nurse Arscott wrote at the testator's dictation, and he signed the Will in the presence of two reputable witnesses who affixed their signatures all in keeping with the requirements of the Wills Act. Nurse Arscott's statement showed that when the testator was preparing to leave Hargreaves Memorial Hospital she placed the Will, then in an envelope, in the pocket of the dressing gown which the testator planned to wear from the Hospital.

Doris Delapenha, sister of the testator, who kept house for him during his final illness, at the testator's request carried an envelope from his library to this bedroom and in this airmail envelope was another envelope on which was inscribed "Last Will and Testament of Louis Patrick Delapenha." At his direction she placed this envelope in an unlocked drawer of his chifferobe.

The testator later sought treatment for his illness in Texas and upon his return to Jamaica re-employed Nurse Arscott to assist him at his home. Upon his death on January 15, 1975, a search was made for the document which Doris Delapenha had put away in the drawer. It was not found. On the following day, January 16, Nurse Arscott denied any knowledge of a Will. This was on direct questioning from Rema Heron, a niece of the testator, who had been up to then for 40 years a secretary in the testator's law offices. Later on in the same day of January 16, Easton Findlay, a close associate of the testator, was observed to be placing an envelope taken from the inside of his shirt into a

a drawer of the testator's chifferobe. Rema Heron's curiosity was aroused and she demanded to be shown the documents being handled by Findlay. He passed over an unsealed airmail envelope which contained a white semi-official envelope, marked "Last Will and Testament of Mr. Louis Patrick Delapenha". Both Easton Findlay and Nurse Arscott denied recognition of that handwriting. Rema Heron opened the envelope and commenced reading the Will. She addressed Nurse Arscott, thus:

> "Nurse how you say you do not know the handwriting and you wrote it?"

Nurse's reply was:

> "Lord Miss Rema, I wrote it long ago, I thought Mr. D. had had it written over and I did not remember."

Dr. Leigh Lord gave formal evidence on oath of the due execution of the Will on February 13, 1974 and on this accumulation of evidential material, had it not been for Matron Dennison's contribution to the scenario, probate of the Will of 13/2/74 would merit no more than two brief notices in the Jamaica Gazette.

As with so much in this case, there was no concrete evidence as to the whereabouts of Miss Dennison at the time of hearing before Bingham J. but it was widely believed that she had returned to her native Guyana and had since died.

Mrs. Cislyn Delapenha, a niece-in-law of the deceased operated a supermarket in Mandeville. She was concerned that the members of the family were making funeral arrangements for the deceased without any knowledge of his wishes, if any. She was privy to the first unsuccessful search for a Will and the matter of the deceased wishes was unresolved. In conversation with Matron Dennison who, having come into her supermarket to shop, offered her condolences Mrs. Delapenha told her that although the family had made plans for Mr. Delapenha's funeral she was still unhappy as she did not know of any wishes he may have had for his funeral. Matron Dennison's instant reply was:

> "But he wanted a Requiem Mass and he did not want an abundance of flowers. "

Mrs. Delapenha asked:

> "How do you know all this?"

and Matron Dennison replied:

> "I wrote his Will and had it typed in Kingston and he specifically wanted a Requiem Mass. "

This account of the contact and conversation between Mrs. Delapenha and Matron Dennison is taken substantially from the statement of Cislyn Delapenha given on March 7, 1975. She did not give evidence on oath and was not cross-examined in any way.

A frenzy of activity followed the Dennison disclosure. Family members gathered at the home of the deceased and meticulously searched the house for this second Will. It was not found.

Three persons were named as executors and trustees in the Will of February 13, 1974, viz. Rema May Heron, Faith Findlay and Donald Allen. Rema was described as his niece, Donald Allen as an Attorney-at-Law. It was common knowledge that Donald Allen was the testator's legal partner, and that Rema Heron and Faith Findlay were employed to the firm. The testator was suitably buried after an official funeral but the search continued for the Will of which Matron Dennison spoke. Mrs. Rema Heron took a series of statements from persons whose names were given to her. Nurse Arscott's statement is undated but all the others were taken between March 2 and March 11, 1975.

It was Matron Dennison who introduced the existence of a Will executed in March 1974. This is how she said it came about. A nurse summoned her and she went to Mr. Delapenha, then a patient in Hargreaves Memorial Hospital. Mr. Delapenha said:

> "Matron, I would like you to do something for me, if you can. I have written a Will but it is not clear. It is confusing and I think I am a little ashamed of it as a practising lawyer of my experience. "

She replied:

> "I am sure there is nothing to be ashamed of. "

And he continued:

> "There are too many crossing-out and initialling and if you do not mind I would like you to do it over for me. "

She then agreed and he commenced dictation, all the while having in his hands sheets of yellow paper with writing thereon. Matron Dennison said that at times the testator complained that the spelling was so bad that he could not recall what he had said and that there was no logical thinking in some of what he read. At this, said Matron Dennison, Mr. Delapenha called in Nurse Arscott, who on being brought into the room, would be asked to read certain sections of the Will which were not clear. The draft was completed on February 25, 1974. The testator requested that the Will be typed but neither at his Mandeville office nor at the Hospital. Matron Dennison said she agreed to his suggestion that the Will be typed in Kingston and that the following procedure was adopted:

(a) It was to be typed in triple space, "because if there were any corrections, it would not look like the cesspool, I am holding in my hands."

(b) She was to bring back the carbon on which it was typed.

(c) He wanted one original and one copy.

Matron Dennison said she took the draft Will to Kingston and caused it to be typed by her friend and as instructed she brought back the draft, the original and one copy and the carbon and these she delivered to the testator. It was late afternoon. He declined

to have Nurse Arscott as a witness and agreed for a ward-maid to sign along with Matron Dennison, remarking that the ward-maid need not be literate if only she could sign her name. On the account of Matron Dennison, one Gwendolyn Spencer, a ward-maid, witnessed the testator's signature and signed as a witness. So too did Matron Dennison. The Wills were each placed in an envelope and both were sealed with sealing wax. At the testator's request the sealed envelopes were retained by Matron Dennison who secured them in the Dangerous Drugs Cupboard. When he was being discharged from the Hospital, the testator asked Matron Dennison to retain the Wills in her possession.

The nature of the testator's final illness was not material but Matron Dennison said that after his treatment in Texas and his return to Jamaica, on her second attempt, he accepted the two sealed envelopes containing the original and copy Will. Again this account of Miss Dennison's involvement in the making of a Will for the deceased is taken from her statement given to Rema Heron and repeated on oath before Chambers J.

Responsible executors would be concerned to get hold of a copy of the March Will to ascertain if any of these assertions of Matron Dennison could be corroborated. Matron Dennison said her friend confirmed to her that she had kept a copy of the Will, which she was willing to produce. This would be a third copy. However, the friend had a change of heart when she learned that secretaries in Kingston law firms were being enquired of if they had done the typing and that there was a request that should a copy Will exist it should be sent to Delapenha & Iver in Mandeville. The inability to produce the copy Will led to the issue of the Subpoena to Miss Dennison to come to Court and tell what she knew of the making of the March Will. Since Matron Dennison said she had not obtained the copy Will, the executors wished to learn the name of the typist. At the hearing Counsel asked Miss Dennison:

"Q. Will you now tell the court who typed the Will of Louis Patrick Delapenha?

A. I will have to accept whatever penalty the court imposes on me."

Counsel pressed for the name of the typist in many subtle ways and finally elicited a name as that of the person who typed the Will which was written by the witness on a piece of note-paper which read:

Maiden name:	Susan Mae Jackson	
Married name:	Susan Mae Phillips	(First Marriage)
	Susan Mae Evans	(Second Marriage)

Matron Dennison wrote that the typist went by the name of her first marriage and that she worked at "Jaymar and Company." This note was signed by Matron Dennison and was received in evidence as an exhibit.

Why was she reluctant to disclose the name of the typist? Matron Dennison said that the typist told her that as she worked with a firm of lawyers she was forbidden to do any outside work of a legal nature so she did not want her name called. The typist, she said, had taken the stand that she did not want to be involved with anybody like the Delapenhas and for that reason the typist would not hand over the copy Will. Although this refusal on the part of the typist had caused their friendship to be broken, Matron Dennison maintained that she had made a promise to the typist that if she typed the Will her name would not be mentioned. It was in honour of this promise that Matron Dennison said she would suffer the legal consequences.

But where was this typist? Matron Dennison said she was in England. How did she know? She had received the information from a person in Jamaica. After lengthy examination by Counsel, Matron Dennison said her informant was Mrs. Fay Summers of Golden Spring Postal Agency, St. Andrew. On enquiry it was discovered that

"Fay Simons" answered the telephone at the number supplied by Matron Dennison, that she was the sister of Matron Dennison and that she had no knowledge whatever of the matters about which Matron Dennison had spoken. "Jaymar and Company" had no telephone listing and no one at "Jaymar Trading Co. Ltd." knew of anyone by any of the names supplied by Matron Dennison as that of the typist. Significantly, the attorney for the executors had made extensive enquiries for typists named "Shirley Clough" and "Hermine Harris" and no such persons had been located.

No copy of the alleged Will of March 1974 was ever found. The person who is alleged to have typed it was not found. There was independent evidence that Matron Dennison had prevaricated in relation to the identity and whereabouts of the typist. Gwendolyn Spencer, in an affidavit sworn to on August 20, 1977, retracted her statement of March 11, 1975 and gave as an explanation that she had signed the original statement,

> "Because Matron Dennison threatened me that if I did not sign she would let me lose my job."

In her evidence before Bingham J. Gwendolyn Spencer gave conflicting accounts of how she came to sign the original statement, repeated her accusations against Matron Dennison and in the course of the cross-examination by Mr. George this passage emerged:

> "Q. The piece of paper which you gave to Mrs. Heron stated that you did go into Mr. Delapenha's room with Matron Dennison and that you signed a paper in there, was that true?
>
> A. No sir, she made it up herself - the Matron of the Hospital. She was so lie sir. "

Nurse Arscott denied having re-read passages of the Will of February 13, 1974 to the testator in the presence of Matron Dennison.

Where the existence of a duly executed Will is proved, before one can begin an enquiry as to what effect a later Will by the same testator can have upon the earlier Will the existence and due execution of that later Will must be proved. If there is a paper-writing purporting to be the later Will and containing the signature of the testator and signatures of attesting witnesses, the question may be the genuineness of the signatures. Where, however, there is no documentary proof of the later Will, on principle alone one would require the most cogent evidence to prove that such a later Will was in fact made. The danger is obvious. Three ingenious people could defeat a testator's intentions by simply stating and re-stating that he had made a second Will. This indeed would make practical nonsense of the provisions of the Wills Act as to the execution of Wills.

As long ago as 1854 the Privy Council settled the law as to the onus and standard of proof in relation to the due execution of the second Will. The English statute on which this decision was made is in pari materia with the Wills Act of Jamaica. Dr. Lushington gave the advice of the Board in Cutto v. Gilbert [1854-55] 9 Moore's Privy Council Cases, 131. The testator died in 1853 and the only Will found upon his death bore date August 11, 1825. His widow sought probate of that Will but this was opposed by the sister of the deceased on the ground that the Will of 1825 had been revoked by a later Will.

At page 140 of the Report, Dr. Lushington said:

> " In this state of things, as mere length of time does not operate as a revocation, probate of the will of 1825 would, if there were no other facts, have passed in common form.
>
> Mrs. Gilbert, however, the only next-of-kin of the deceased, has pleaded a revocation by the execution of a subsequent will, not forthcoming. We agree in the position laid down at the Bar, that the onus probandi lies upon her: She must prove the execution of the subsequent will, and establish her position of law that it is a revocation, with reference to all the facts connected with such subsequent will.
>
> The first fact to be proved, is the execution of some subsequent testamentary paper; and we here think it right to observe, that we are of the opinion, that where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not appearing, 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 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, 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."

Cutto v. Gilbert supra was cited with approval by Collingwood J. in Re Wyatt [1952] 1 All E.R. 1030.

In my opinion the principle laid down in Cutto v. Gilbert is applicable to the instant case. The onus of proof lay upon the appellants to show that there came into existence a second Will executed in accordance with the provisions of the Wills Act. This they failed to do. No reliance could be placed upon the evidence of Gwendolyn Spencer to prove anything whatever. Matron Dennison's recall of the contents of the Will which she alleged was dictated by Mr. Delapenha bore a strong similarity to the contents of the Will of February 13, 1974. This was the foundation of the submissions of Counsel for the appellants that such knowledge could only have come to her from Mr. Delapenha. But Matron Dennison was not frank to the court. She invented evidence

as she went along and the reluctance to disclose the identity of the "typist" damaged her credibility beyond redemption. Matron Dennison volunteered information of the most momentous nature and yet deliberately frustrated all efforts on the part of the executors to secure confirmation of her testimony on any material particular.

What other evidence was there that the testator had executed a later Will in proper form? Cislyn Delapenha spoke of a conversation which she had with the deceased on an aircraft in which he hinted that she and her husband stood to benefit considerably under his Will. Dr. McPherson recounted a conversation which the deceased had with him. The deceased chided Dr. McPherson for allowing him to make "such a non-sensical Will" whereupon Dr. McPherson assured the deceased that he was ignorant of the contents of the Will which he witnessed. Mr. Delapenha ended the conversation by saying that he had had the matter rectified. But these statements by the testator are inadmissible to prove the fact of due execution under the Wills Act.

In Atkinson v. Morris [1897] P.40, Lord Russell C.J. said:

> "The evidence offered in this case was in effect hearsay evidence - statements said to have been made ex post facto by the testatrix herself ..... There is no case to be found which goes the length of saying that statements made by a testator to the effect that he has executed a will are admissible evidence in substitution for the proper and regular evidence of the fact of the execution of the will conformably to and with the formalities enjoined by the Wills Act. "

As in my opinion the defendants/appellants have not discharged the onus which rests on them to show that the deceased executed a Will subsequent to the 13th day of February, 1974, in conformity with the provisions of section 6 of the Wills Act the questions as to the manner and circumstances in which a later Will may revoke an earlier one do not arise.

Bingham J. was presented with an unusual situation in that he was asked to form opinions on statements of persons whom he did not see or hear. This was a proper case for the learned trial judge to have confined his comments to questions relative to the burden of proof. In so far, therefore, as any of the views expressed by Bingham J. cast aspersions on unnamed members of the Delapenha family and more particularly on Dr. McPherson, I emphatically dissent from those views. He had no sufficient evidence to warrant those implications.

CAREY, J.A.:

By an order of Bingham, J., in the Supreme Court dated 25th February, 1982, the will of the late Louis Patrick Delapenha, an eminent attorney-at-law, who for many years practised in Mandeville, was admitted to probate in solemn form of law. The circumstances which made these contentious proceedings necessary are somewhat curious, as the following narration, I think, makes clear.

When the testator died on the 15th January, 1975, the only will of which the executors were aware, was one dated 13th February, 1974, and this was found in the testator's bed-room at his death. While preparations were in train for the funeral service, a Miss Gloria Dennison, then the Matron of the Hargreaves Memorial Hospital in Mandeville went shopping at a supermarket owned by Cisilyn Delapenha, one of the defendants in the action and a relation by marriage to the testator and, in conversation, asserted to her that the testator had made a will, which she had had typed by a friend in Kingston. It should be said at once that all subsequent efforts by the family to find this second will proved fruitless. Miss Dennison who had volunteered this intelligence proved less than helpful thereafter, in providing any assistance which would lead to persons other than the alleged typist and herself ever having had a sight of it. She had assumed the responsibility of having the will typed by a friend of hers and had even taken the trouble to return the carbon used in preparing a copy to the testator himself, at his request. She had signed as one of the attesting witnesses to this will which she had kept in safe custody because at the time the testator was ill in the Hargreaves Hospital. Despite all this benevolence, however, she declined when cited to appear under a subpoena regarding her knowledge of this second will, to divulge the name of the typist. She did, nevertheless, at the very same inquiry, give

a name and address, of a typist, but this information proved false. She stated also on oath at that enquiry that the typist was in England but she knew "someone" who had the address in England. This "someone" proved to be her own sister.

There was also material before the learned judge that this second will had been witnessed as well by a ward-maid at the hospital, one Gwendolyn Spencer. This attesting witness who attended at the hearing before Bingham, J., there recanted an earlier story as to her attestation and made grave accusations against the Matron, charging that she had been coerced into signing a statement acknowledging her attestation of the second will on pain of losing her job at the hospital.

These then were the circumstances which influenced the executors in the action pursued before Bingham, J., which produced the result indicated at the beginning of this Judgment. There was, I should add, a counter action taken on behalf of some of the defendants being persons who would benefit under an intestacy whereby they sought a declaration -

> "that there was an intestacy in the Estate of the Late Louis Patrick Delapenha and that Letters of Administration of his Estate be granted to such persons as the Court may appoint limited however to such time as the Last Will and Testament be brought into Court and Probate thereof granted."

It is right to point out that apart from the viva voce evidence of Gwendolyn Spencer and Dr. Leigh Lord (an attesting witness to the first will) adduced before Bingham J., the remainder of the evidence comprised affidavits from one Dr. McPherson who had also witnessed the will admitted to probate, from Gwendolyn Spencer stating that she had never witnessed any will of the late Louis Patrick Delapenha, and an earlier statement from her saying she had witnessed the will, a deposition of Matron Dennison taken at the enquiry before Chambers J., and statements from - the Matron, Rema May Heron, Cisilyn Veronica Delapenha, Richard Evans, and attorney-at-law, Doris Delapenha and Nurse Arscott,

the nurse who attended the deceased up to his death. Not having seen or heard these persons except, of course, Gwendolyn Spencer and Dr. Lord, the judge's task was not altogether an easy one. He was not insensible to the difficulties inherent in that state of affairs for at page 14 of his judgment, he commented as follows:

> "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 the learned Attorneys for the defendants have on more than one occasion during the hearing 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."

For my part, I wholeheartedly endorse these observations as representing the correct approach of a trial judge in a matter of this nature. One must never lose sight of the fact, which I venture to reiterate for emphasis, that only two witnesses appeared before the judge and the remainder of the "evidence" adduced and which comprised the agreed bundle of documents, consisted of statements and depositions. The judge was obliged to give such weight to this material as he thought fit, and to be mindful of the burden of proof, which an action of this nature, called for. It is well known that the burden on the propounders of a second will which is not being produced, is to prove its execution and further that this second will revoked the first.

Cutto v. Gilbert (1854) 9 Moo P.C. 130; 14 E.R. 247 is, I think, helpful because the facts are not entirely dissimilar. There, upon the death of the testator Abraham Cutto, a will dated 11th August 1825 was found. His widow sought probate of this will and this was opposed by the sister of the testator on the ground that a subsequent will had revoked the will of 1825. No other will was ever found or produced. There was evidence however that a witness had seen some document which commenced with the words - "This is the Last Will and Testament ..." Dr. Lushington in delivering judgment said this:

> "We agree in the position laid down at the Bar that the onus probandi lies upon her; she must prove the execution of the subsequent will and establish her position of law that it is a revocation."

As in Cutto v. Gilbert, the appellants in the present case were called upon to prove the execution of a subsequent will, and establish that it operated to revoke the will admitted to probate.

The proponents, the appellants, very much alive to the onus on them, argued in relation to the first limb of proof, that Matron Dennison was a person of integrity, who held a high position, was endowed with high intelligence, was demonstrably helpful and had a good memory and her word should have been accepted especially when Dr. McPherson had given an affidavit, which showed that he was of opinion that a second will existed. It would be helpful to set out the contents of the affidavit of Dr. McPherson (so far as they are material) at this point before I express my own views as to the validity of the arguments. The relevant paragraphs are those numbered 4 - 9:

> "4. Subsequent to Mr. Louis Patrick Delapenha's discharge from the said Hargreaves Memorial Hospital, on a Sunday morning whilst he was seated in the Volkswagan motor car belonging to Dr. Hame Persaud I had the occasion to have a talk with the said Louis Patrick Delapenha.
>
> 5. Among other things the said Louis Patrick Delapenha enquired of me why I had not visited him at his home and he went on to mention that he had not realized how ill he was which was the cause why he had made such a non-sensical

"Will to which I had attested.

6. I explained to Mr. Louis Patrick Delapenha that I had not read the contents of the Will but had only attested my signature to the said Will.

7. He thereupon told me that I should not worry about same as he had since had the Will rectified.

8. Before Mr. Louis Patrick Delapenha and myself parted I made a promise that I would go and see him.

9. Subsequent to speaking to Mr. Louis Patrick Delapenha and before his death I mentioned the conversation to Matron Dennison who concurred that there was indeed another Will which she had in safe-keeping. In confidence she pointed to the locked Cupboard on the western wall of her Office in Hargreaves Hospital the key to which was in her sole possession."

Mr. Frankson's suggestion was that that statement alleged to have been made by the testator as reflected in the final paragraph tended to show that a second will had been made by the testator. This is plainly not an inevitable inference to be drawn from that statement: Dr. McPherson, of course, never ever saw a second will despite paragraph 9 of his affidavit.

The learned judge uttered severe strictures on the affidavit of this medical practitioner and expressed the view that 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." With all respect to the learned judge, although it was perfectly true that the appellants attempted to rely on its contents to prove the existence of a second will, it could not by any manner or means achieve that objective. The deponent at no time stated that he saw any will, which if he had, it would have been perfectly simple to record. It can hardly be remarked on as worthy of any significance as the judge did, that the language of the affidavit was drafted in "lawyer's language." What is of more importance to be borne in mind is that declarations

made by a testator after the date of an alleged will are not admissible to prove execution of the will. See Atkinson v. Morris (1827) P.D. 40 and Barkwell v. Barkwell [1928] p. 91 to the like effect. So that as to the statement attributed to the testator by Dr. McPherson, viz., that he should not worry about same as he had since had the will rectified, even if it could be inferred that the testator had made another will, that statement was inadmissible in proof of execution. Indeed, had the learned judge kept in the forefront of his mind the cautionary advice he said he gave himself, he could not have come to the conclusion he did, nor make the gratuitously unfortunate statement reflecting adversely on the character of a person whom he had neither seen nor heard.

As respects Miss Dennison, the matron of the hospital, the learned judge thought that this lady was one of the three conspirators to a plot to create a second will, the other two being Dr. McPherson, about whom I have spoken, and Gwendolyn Spencer, in respect of whom I will have some few comments to make. Seeing that the onus was on the appellants to prove the execution of this second will, all that was required was an enquiry whether the evidence adduced satisfied that burden on a balance of probabilities. I would have thought myself that on the totality of the material provided in regard to this witness, viz., that although she had at first vouchsafed information which suggested the execution of a second will, on every occasion thereafter when it was fairly simple to provide confirmation of its existence, she demonstrated a striking disinclination to be cooperative. It is true that in civil cases, criminal conduct need only be established on a preponderance of probability, but on the evidence before Bingham, J., it is difficult to appreciate what facts could lead to the conclusion that there was a conspiracy on the part of the three persons named. A judge should, in my view, be slow in a civil case to impute criminal conduct to persons who are not before him and thus unable to be heard in their own defence.

Mr. Frankson for the appellants sought to show that Matron Dennison (the acceptance of whose evidence was crucial to the success of his case) was a person who, shortly put, had not been shown to have any interest of her own to serve, and accordingly had no need to prevaricate. But I think it is plain from what has been said with respect to her peculiar conduct, that no court would be disposed to treat her evidence as reliable. Then there was the evidence of Gwendolyn Spencer, who first gave a statement supporting Matron Dennison that the testator had in fact made a second will which had been attested by herself and Matron Dennison and then deposed in an affidavit that she had not signed as a witness to any will and indeed, had not even ventured into his room during his stay at the Hargreaves Hospital nor spoken with him or he with her. The only inference to be drawn from that affidavit was that she had never set eyes on a second will. She explained in that affidavit that she had been coerced into signing the statement in which she had acknowledged being a witness of Dr. Delapenha's will. When she appeared before the learned judge she confirmed her affidavit and denied her statement. The judge cannot, in my view, be faulted when he held at p. 28 of his judgment:

> "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.

There was no other material before the judge which could in any way assist him to find for the proponents of a second will. Such evidence that had been adduced, was plainly unreliable. In the state of that evidence, there really was no other conclusion to which the learned judge could have come. The propounders of the second will had not discharged the onus that was undoubtedly on them.

Indeed, it is not amiss to call attention to the following dictum of Dr. Lushington in Cutto v. Gilbert at p. 140 where he said:

> ".... where the revocation of an existing Will is sought to be established by the proof of the execution of a subsequent Will not appearing, and there is no draft or instructions in writing, when such fact 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, is, though the law may admit of it, a course of proceeding not unattended with danger, and consequently that such evidence ought to be stringent and conclusive."

The evidence, if what was presented may be so charitably characterized, fell far short of being most clear and satisfactory or stringent and conclusive.

The testator, on any view, wished to die testate. It would have been a grave injustice if these proceedings had ended in a declaration of an intestacy so vigorously sought by these appellants. For the reasons I have rehearsed, such a result could not have been achieved, and accordingly, I concurred in the order of others of my brethren.