

TESTAMENTARY JURISDICTION.

Before Mr. Justice Ameer Ali.

IN THE GOODS OF L. P. D. BROUGHTON.

1902
March 6.

Probate—Practice—Application for probate of copy-will with alterations in pencil—Codicil—Will, pencil alterations in, made before execution—Photographic facsimile of will attached to probate—Succession Act (X of 1865), s. 58—Illegible portions of will.

Where the executors applied for probate of a will consisting of two documents, the first being a copy-will with various alterations and interlineations made in pencil by the testator himself some time before the execution of the second which was in the nature of a codicil confirming the first as altered, the Court granted probate with a copy of the will showing the alterations and interlineations in red ink, and directed a photographic *facsimile* of the copy-will taken in the presence of the Registrar and the executors to be attached, as the pencil alterations were likely to fade in course of time.

Gann v. Gregory (1) and *Shea v. Boschetti* (2) relied upon. *In the Goods of Hall* (3) distinguished.

Held, the provisions of the Succession Act, s. 58, are inapplicable to this case.

APPLICATION for probate of the last will of Lewis Price Delves Broughton, the late Administrator-General of Bengal, consisting of two testamentary documents,—the first being a copy-will altered in pencil by the testator himself some time before the execution of the second.

Mr. Broughton died somewhat unexpectedly on January 3, 1902, at 8, Pretoria Street, Calcutta.

It appears that on April 25, 1894, Mr. Broughton executed a will (while in England), and some time previous to October 1901 he obtained a copy of it from his solicitors in England, and after making various alterations and interlineations in it, in pencil, by his own hand, made over the same to N. S. Watkins, an Attorney of this Court, for safe custody.

The affidavits filed in this matter show that on January 3, 1902, Mr. Broughton sent for N. S. Watkins desiring him to bring the copy-will of 1894 with him. On the same day Mr. Watkins called at 8, Pretoria Street with the copy-will, and Mr. Broughton, shortly before his death, executed a fresh testamentary document, which was partly written out by

(1) (1854) 3 De G. M. & G. 777.

(2) (1854) 18 Beav. 321.

(3) (1871) L. R. 2 P. & D. 256.

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Dr. Arnold Caddy, his medical attendant, and partly by Mr. Watkins, confirming, amongst other things, the said copy-will of 1894 as previously altered by Mr. Broughton in pencil.

Some of the pencil alterations in the copy-will appeared to have been rubbed out, some of which were partly legible, and some altogether illegible.

N. S. Watkins and Henry Bateson, merchant, who were appointed to be executors in India under the testamentary document of January 3, 1902, applied for probate of both these documents as the last will and testament of the late L. P. D. Broughton, there being assets of the deceased within the jurisdiction of this Court to be administered.

Mr. J. G. Woodroffe for the applicants. The provisions of s. 58 of the Succession Act are not applicable to the present case, the alterations having been made before the documents were executed—*Ffinch v. Combe* (1); *In the goods of Brasier* (2). In cases such as the present one, where some of the alterations appear to have been rubbed out and where the construction of the will may be affected by the appearance of the original paper, the Court will order a *facsimile* probate to issue: *Williams on Executors and Administrators* (9th edition, pages 273, 324, 482). The issue of such probate will determine the question as to the nature, condition, and appearance of the documents which form the last will of the testator, leaving it open to a Court of construction to afterwards decide, if necessary, upon the question of the effect of the condition of the documents on the bequests which appear to be given thereby—*Gann v. Gregory* (3), *Shea v. Boschetti* (4), *Taylor v. Richardson* (5).

Though ordinarily the *facsimile* is made by hand, there is nothing in principle or convenience to prevent the use of photography for such purpose. In the present case, owing to the condition of the document, a *facsimile* is only obtainable by means of photography, it not being possible to reproduce in ink the effect of pencil alterations, which appear to have been erased to some eyes, though they may still be legible to others. The uniformity of the ink copy will not show the

(1) (1894) L. R. P. & D. 191.

(3) (1854) 3 De G. M. and G. 777.

(2) (1899) P. 3.

(4) (1854) 18 Beav. 321.

(5) (1853) 2 Drewr. 16.

various gradations of the original pencil alterations. [AMEER ALI J. Can you cite any precedent in support of your application for the issue of photographic *facsimile* ?] I am unable to find any, but there is nothing against the proposed course. We wish to adopt the most efficient means available.

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AMEER ALI J. This is an application for probate of the will of Mr. L. P. D. Broughton, late Administrator-General of Bengal.

It appears that he had executed a will in the year 1894, and that some time in 1901 he made over to Mr. N. S. Watkins a copy of that will with various alterations in pencil, which are sworn to be in his handwriting; that copy remained in the custody of Mr. Watkins until it was produced on the 3rd of January 1902 shortly before Mr. Broughton died. Mr. Watkins has in his affidavit stated that the document which is now produced with the pencil alterations was in his custody all along in the condition in which it was delivered to him by the deceased.

On the 3rd of January this year Mr. Broughton executed a document, which I may treat as a codicil, and which is, with the exception of a few words, in the handwriting of Dr. Arnold Caddy of this city, who was attending the testator medically about the time of his decease. The words not in Dr. Caddy's handwriting were written by Mr. Watkins. By this codicil, which I hold upon the affidavits to have been duly executed by Mr. Broughton, he confirms the copy-will as altered by him in pencil.

These two documents, therefore, upon the affidavits of Miss Rawlings and Mr. Watkins, really represent the last wishes of the deceased. The alterations in pencil in the copy-will, I have no doubt, were made before the execution on the 3rd of January, 1902, of the document I have referred to, and therefore do not come under the provisions of section 58 of the Succession Act; and as they together represent his last wishes and testamentary dispositions, the applicants, who were appointed by the deceased as his executors, are entitled to probate thereof.

I have ascertained from the Registrar the practice of this Court regarding wills containing alterations made by the deceased, and I am informed that the practice has been

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to attach to the document of which probate is sought, a copy in writing with the alterations incorporated in the text, and I think I ought not to depart in this case from that practice; but having regard to the fact that the alterations here have been made in pencil by the testator himself and that the pencil writings are likely to fade in course of time, I direct, in the exercise of my discretion, that a photographic *facsimile*, taken in the presence of the Registrar and of the executors, be attached to the probate.

I may add that the case *In the goods of Hall* (1) does not apply to this case. In my opinion the alterations shown in the document of which probate is sought are not of a merely deliberative character, and that therefore the applicants are entitled to probate of the will with the alterations. The directions I have given are amply supported by the authorities to which I was referred by *Mr. Woodroffe*, viz. *Gann v. Gregory* (2) and *Shea v. Boschetti* (3). In the copy in writing, which I have directed to be attached, the pencil alterations and interlineations should be shown in red ink.

[*Mr. Woodroffe*. There may be some question as to what is legible or illegible, and the red ink portions may not contain all that may be said to be legible. This difficulty may be obviated by a photographic *facsimile* probate.]

Under the ruling of Lord Penzance in *In re Hall* (1) I can only allow to be copied the portions that are legible, and regarding which I can say they represent the testator's disposing mind. Under that ruling portions rubbed out must be treated as revoked.

[*Mr. Woodroffe*. Will your Lordship decide what is legible?]

No. I will leave that to the Registrar. He can have a copy made and submitted to you, and, if any question arises, it can be referred to me

Probate granted.

Attorney for the applicants: *Frank Williamson*.

B. D. B.

(1) (1871) L.R. 2 P. & D. 256. (2) (1854) 3 De G. M. & G. 777.

(3) (1854) 13 Beav. 321.