

PROVING THE TENOR OF A LOST WILL: WHAT THE SOLICITOR NEEDS TO KNOW

by

IAIN F. MACLEAN, Advocate

Introduction

It's Monday morning. You're at your desk, going through the mail, when a telephone call is routed through to your office. The caller informs you that old Mrs MacTumshie died over the weekend, and the family understand that your firm holds her will. In the course of the morning, you consult your firm's wills index, be it in computerised or card form, and it confirms that your firm does indeed have her will in its custody. At some point during the day, you call up the will from the wills safe. It's then that your day takes a sudden lurch for the worse. The will isn't where it's supposed to be. With mounting concern, you broaden the search, firstly by going through all the "Mac" wills, and then all the "M" wills. Still no sign of the MacTumshie will, and so you summon your unfortunate trainee, whose fate it will be to spend the rest of the day inhaling dust in conditions that the Health and Safety Executive would prosecute over as he or she goes through the entire contents of your wills safe in the hope that the MacTumshie will has just been misfiled. At the same time, assuming that it still exists in physical form, you call up the original will file from storage, hoping against hope that you will find either the principal will paperclipped to the inside of the front cover, or (just as good from your selfish point of view) a copy letter confirming that at some point after it was completed, Mrs MacTumshie asked for the principal will to be released to another firm of solicitors or sent to her for her own retention. But the MacTumshie will remains elusive, and you have to make that embarrassing phone call to the family to report that, unless the principal happens to turn up in Mrs MacTumshie's own repositories (to use that wonderfully resonant old word only ever encountered in this context), it is likely that there will have to be an action raised to prove the tenor of the lost document.

If you have yet to have an experience similar to the one I've just described, you may be forgiven for thinking that the likelihood of it happening to you is remote. Perhaps. But the inspiration for this talk was my realisation that in the course of the last few years, I have advised in a steady stream of cases where a will has gone astray, and in the vast majority of those cases, the wills were lost when supposedly in the safe custody of the testators' solicitors rather than in the hands of the testator/testatrix himself/herself. In one recent case, there was a suggestion in the evidence that when the testatrix borrowed out her house title deeds, which her solicitors also held on her behalf, the will may have gone with them, but as the testatrix had not then asked to uplift her will, and the solicitors' borrowing records were at best ambiguous on the issue of whether the will had been uplifted along with the title deeds, the solicitors ended up having to meet the costs of the action to prove the tenor in any case. The charitable explanation for there being, at least in my experience, far more actions to prove the tenor of a lost will where the will has been lost in the hands of solicitors is that the overwhelming majority of testators take up their solicitor's offer to hold their completed will for them, and so there is simply more opportunity for the will to go missing in the hands of the solicitor than in the hands of the testator. I do wonder, however, whether as the pressure on margins get tighter, firms have cut back on the backroom staff, an important part of whose duties it was, in former times, to look after, and log, the comings and goings of deeds within the office.

Is an action necessary?

So the will is missing, and you have advised the family of the deceased. What happens next? Actions to prove the tenor of a missing document such as a will are competent only in the Court of Session. The Court's jurisdiction to grant decree in such an action is derived from its *nobile officium*, which is the ultimate equitable power vested in the Court to give relief in situations for which the law otherwise makes no provision. Even if undefended, such actions will involve a not insignificant level of expense, which your firm is likely to have to bear where the will has gone astray while in its custody. Accordingly, the first point which it is worth at least considering is whether an action is actually necessary. If the distribution to be effected by the missing will merely replicates what would be the result under the laws of the intestacy, there would appear to be little practical purpose served by the setting up of the will. Similarly, if all the heirs on intestacy are quite content that the

deceased's estate be distributed in accordance with the instructions contained in the missing will, and are prepared to grant the executors discharges in suitable terms of any claim they might have upon the deceased's estate; then once again, the question is begged why it should be necessary to set up the missing will through an action to prove its tenor only to achieve the same result. After all, in confirming to the deceased's estate, the executors need only produce any testament or other writing relating to the disposal of their estate "in . . . their custody or power": **Currie on the Conformation of Executors in Scotland (8th Ed.; by Eilidh M. Scobbie; Edinburgh, 1995) at paragraph 10.67.** While this argument has considerable practical force, I must advise that I am not aware of it having been tested in an application for confirmation made on the stated basis that the will has been lost, but that everyone with an interest in the deceased's estate acknowledges what was provided for in it and is content to proceed on that basis, and I have little doubt that an application for confirmation in such terms would meet with resistance from the commissary/sheriff clerk.

The parties to the action

Actions are often raised in the names of the executors who were nominated in the missing will, but any person who is a beneficiary under the missing will also would have title and interest to do so. The pursuers require to call as defenders in the action "any person having an interest in the document to be proved": **RCS 52.1 (a)**. This must, in my view, include not only the beneficiaries under the missing will, but also (and indeed arguably more importantly) those persons who would stand to take should the tenor of the missing will not be proved; *i.e.* the heirs on intestacy. Accordingly, the first step which solicitors will have to take, after obtaining instructions to raise an action, is to identify the heirs on intestacy and obtain their addresses for the purposes of effecting service. Nowadays, with the close-knit extended family being perhaps more the exception than the rule, this may not be a straightforward task. It may be a reflection of the Scottish diaspora during the twentieth century, or just the bad luck of the solicitors who have instructed me in these matters, but it seems to be an inflexible rule of proceedings of this sort that the will which goes astray will be that of the spinster who died predeceased by her parents and by her eleven brothers and sisters, each of whom left Scotland in youth for the most remote outposts of Empire, and each of whom was survived by a large family. Tracing all these people and effecting service of a summons on them can be an extremely time consuming and expensive business.

What requires to be proved?

Once the identity of the prospective parties has been established, what further information will Counsel require to draft a relevant summons? To obtain decree in an action of proving the tenor of a lost will, a pursuer must aver and prove:

- (1) the execution of the document;
- (2) its tenor (*i.e.* terms); and
- (3) the *casus amissionis* (the circumstances of the loss).

Although not technically an action for declarator (**Dunbar v. Scottish County Investment Co. 1920 SC 210 per Lord Justice Clerk Scott Dickson at page 213**), the conclusion in an action to prove the tenor of a lost document is declaratory in form: it is for declarator, in the case of a lost will, that the missing will of the testator “was of the tenor following”: [with the whole (or at least the essential) terms of the missing will being set out *ad longum* in the conclusion], and that “the decree to be pronounced herein shall be equivalent to” the original will. The precise words (*ipsissima verba*) of the missing will need not be proved provided that the substance of what was written can be established to the satisfaction of the Court (**Stair, IV, 32, 9**) and parole as well as written adminicles of evidence may be adduced for this purpose: **Leckie v. Leckie (1884) 11 R 1088 per Lord Justice Clerk Moncrieff at page 1092**. The effect of decree in an action to prove the tenor is to revive the lost deed with the same force and effect as the original: **Walker; Civil Remedies (1974) at page 1247**. The resulting extract of the Court’s decree effectively takes the place of the missing will. Clearly, if you took the precaution of making a photocopy of the completed will, and retained it on file, and thereafter on the microfiche of the file, proof of (1) and (2) is eminently straightforward: *cf.* **Young v. Anderson (1904) 7 F 128**. All the information is there, and all that will be required by way of proof is an affidavit from a witness speaking to the provenance and contents of the photocopy to establish both that the will was executed by the testator and what its terms were.

Now I am sure that for all of you, it is second nature to take a photocopy of the completed will, and to place it on file, in addition to the copy you take to send to the testator when your firm has retained the principal for safe keeping. But I have been instructed in cases in which this simple precaution was not observed, with the consequence that proof of execution and of terms has been much less straightforward. Trying to piece together the

contents of a will from barely legible file notes recording the instructions you were given at your initial meeting with the testator, supplemented by the contents of follow up letters, undated preliminary drafts, and incomplete signing schedules, is definitely not a situation you want to find yourself in.

The casus amissionis

It is only when a testator has died, sometimes many years after the will was first executed, completed and consigned into the solicitor's care, that its loss becomes apparent, and so in the great majority of cases, the firm concerned is unlikely to be able to shed much light on what happened to it. There may be clues to be derived from the contents of the will file and the wills index. If there is a letter on the file stating that the principal will is to be placed in the firm's wills safe for safe keeping, but no corresponding entry in the wills index, the inference would be that the will never reached the sanctuary of the wills safe, but went astray *en route* thereto. Alternatively, if there is an entry in the wills index, but no will in the safe, the inference is that the will did reach the safe, but was inadvertently removed therefrom when some other deed was borrowed out. There may be circumstances in the firm's history which suggest possible explanations as to why the will should have gone missing: perhaps the firm moved premises in the period between the will's execution and the death of the testator, or perhaps it amalgamated with another firm, with the integration of the two firms' respective will stocks providing an opportunity for the will to be misplaced. If any such circumstances pertain, Counsel will wish to know about it, with a view to making them the subject of averment in the summons. The efforts which have been made by the firm to locate the missing will should be narrated in an precognition taken from the solicitor responsible for the search (which later in the process can be used as the template for a sworn affidavit) so that they too can be averred: **Walker v. Brock (1852) 14 D 362**; **McKean (1857) 19 D 448**. In actions which proceed as undefended, there will be no automatic opportunity to adjust the pleadings and so the summons must, to all intents and purposes, pass the signet in its final form. **RCS 52.2** also requires that any supporting documentary evidence of the tenor of the document to be proved shall be lodged in process on lodging the summons for signeting. It follows that Counsel will need to know, at the point of drafting the summons, precisely what evidence the pursuers are in a position actually to adduce before the Court in support of their position. The good news is that, at least in my experience, the Court is, in this context, quite

sympathetic to the realities of solicitors' practice, and prepared to accept that, in even the best run offices, important documents can, on occasion, go astray. Accordingly, the Court is prepared to accept what might be termed fairly generic explanations as what may have become of the lost will; *i.e.* destruction *casu fortuito* (by accident). When, in the recent past, solicitors appeared in person before the Court to give evidence in actions to prove the tenor of a lost will, so long as they sounded suitably contrite, they were more likely to be sympathised with and thanked for their trouble than subjected to criticism by the Lord Ordinary.

Proof

Formerly, **RCS 52.3** provided that where no appearance had been entered or no defences lodged in an action of proving the tenor, the pursuer was to apply by motion for an order for proof. A proof diet would be fixed for some future date, and on that date, the Pursuer would appear, lay the evidence before the Lord Ordinary, and move for decree. Since the enactment of the Civil Evidence (Scotland) Act 1988, with a view to saving Court time and expense, pursuers in undefended actions to prove the tenor increasingly often opted in appropriate cases to rely on affidavit evidence rather than adduce parole evidence from witnesses, and that background informs the change which has been made to **RCS 52.3**. Paragraph 6 (1) of the Act of Sederunt (Rules of the Court of Session Amendment)(Miscellaneous) Order 2009 (SSI 2009 No. 63), which was made on 23 February 2009 and came into force on 23 March 2009, substituted a new **RCS 52.3** in the following terms:

“(1) In an action of proving the tenor in which no defences have been lodged, evidence shall be given by affidavit unless the court otherwise directs.

(2) In an action to which paragraph (1) applies, if counsel or other person having a right of audience, on consideration of the available affidavits and supporting documents, is satisfied that a motion for decree may properly be made, he or she may move the court by minute in Form 52.3 to grant decree in terms of the summons.

(3) The court may, on consideration of the minute, affidavits and any other supporting documents, without requiring appearance –

(a) grant decree in terms of the minute;

(b) put the action out by order for further procedure, if any, including proof by parole evidence, as the court thinks fit.”

Paragraph 6 (2) inserts into the Rules of the Court of Session a form of minute for decree as set out in the Schedule to the Act of Sederunt [**Form 52.3**]. The minute narrates that counsel or other person having right of audience, “having considered the evidence contained in the affidavits and the other documents as specified in the attached schedule and being satisfied that on this evidence a motion for decree in terms of the conclusions of the summons may properly be made, moves the court accordingly.”

3. It is open to debate what is meant by “being satisfied that on this evidence a motion for decree in terms of the conclusions of the summons may properly be made”: the Court cannot delegate the job of assessing the quality of the evidence to the person who signs the minute, and so it seems to me that this can mean no more than that the person who signs the minute is satisfied that there is a technical sufficiency of evidence in the affidavits and other documents specified in the schedule to the minute. In practical terms, what this change to **RCS 52.3** means, as far as instructing solicitors are concerned, is that there is no intermediate stage between the fixing and the hearing of the proof, during which preparations for proof may be made. Instead, decree may be moved for once preparations for proof have been completed. As they have been required by a rule of court, the affidavits upon which it is proposed to rely require to be lodged as steps in process rather than as productions: see **Annotation 1.3.7** in **Greens Annotated Rules of the Court of Session 2010-2011**.

Lessons for practice

1. Create a separate will file. I am aware that some firms of solicitors now offer to prepare wills for free when acting for a client in other matters, but I would recommend that even where a will is being prepared for a client as an “add on” to some other business, a separate will file should be opened. If anything does go wrong, it is much easier if all the will documentation is held together on one discrete and readily located file, and it is less likely that the file, when it is located, will turn out to be incomplete than where the material relating to the will is scattered through a file principally concerned with some other conveyancing or business transaction.

2. Retain a photocopy of the completed will on file, and subsequently on the microfiche of the file.

3. If the testator decides to hold the principal will himself, make sure that there is documentary evidence on your file, in the form of a copy letter to him, to record that fact. If the testator borrows out or uplifts the principal will from your firm's custody, make sure that this fact too is vouched for in unambiguous documentary form, preferably in the form of an acknowledgment of receipt signed by the testator.

4. It is safer to hold a testator's will separately from his title or other deeds.

Where the will goes missing in the hands of the testator

My discussion to date has focused on the situation where the will has been lost while in the custody of the solicitor. But what about where the will was in the hands of the testator himself? Proof in that situation is potentially more difficult, because the presumption *animus revocandi* has to be overcome.

Because a man effectually may cancel or revoke his will by destroying it, when it is shown that a man duly executed a will and had it at one time in his custody, and it is not forthcoming at his death, the legal presumption is, **in the absence of evidence to the contrary** [my emphasis], that he destroyed it *animus revocandi*: **Bonthrone v. Ireland (1883) 10 R 779 per Lord Young at page 790; Clyde v. Clyde 1958 SC 343; Dickson; A Treatise on the Law of Evidence in Scotland (3rd Ed., 1887) at paragraph 114 (2)**. The onus thus lies on the person founding on the will to prove its continuing validity by successfully prosecuting an action to prove the tenor. In the Outer House of the Court of Session, in the case of **Lauder v. Briggs 1999 SC 453**, an argument, described by the Lord Ordinary (**Penrose**) as "persuasive", was advanced by Senior Counsel on behalf of the pursuer to the effect that the preponderance of authority did not support the existence of such a presumption in Scots law, but it ultimately was held by **Lord Penrose** that a review of this area of the law was a matter for the Inner House, that the presumption was now well established, and that it would be inappropriate for him as Lord Ordinary to proceed on any

basis other than that it applied in the case before him. In that case, there were averments that the testatrix was, after the principal of her will came into her hands, while not *incapax* to the extent of being incapable of forming the intention to revoke her will, nevertheless incapable of managing her affairs and there were also averments (as the Lord Ordinary put it) of “a confused treatment of her belongings.” The pursuer’s case was that “the absence of a deed from the repositories of a confused person may not, in all of the circumstances . . . sustain the inference that the person must have destroyed the deed at all . . .”: **Lord Penrose** at page 458. These averments were held relevant for inquiry by way of proof before answer. Session Papers disclose that a subsequent diet of proof before answer was discharged by agreement of the parties on the basis of a negotiated settlement.

The preliminary steps in an action to prove the tenor of a missing will where the will was understood to have been in the testator’s own hands, but cannot be found in his repositories after his death, are essentially the same as in the case where the will has gone missing while in the custody of the testator’s solicitor, except that in such a case, it generally will be advisable to check also with the other solicitors’ firms in the locality, either by way of inquiry or advertisement, that they do not hold either that will, or any subsequent will, on behalf of the testator. The fact that this has been done may be made the subject of averment in the summons. Where the testator has entrusted his will to his agents’ custody, to be held to his order, and there is no evidence that he ever countermanded that instruction, there will, in general, be no room for operation of the presumption: **25 Stair Memorial Encyclopaedia 744**. Interesting issues arise where the testator has defaced or mutilated a copy in his hands: *cf.* **Crosbie v. Wilson (1865) 3 M 870**; **Cruikshank’s Trustees v. Glasgow Magistrates (1887) 14 R 603**; **Pattison’s Trustees v. University of Edinburgh (1888) 16 R 73**; **Fotheringham’s Trustee v. Reid 1936 SC 831**. The most recent case in which these issues was explored in depth is one which will be of particular interest to solicitors in the North East, because the first named pursuer, in what was a comparatively rare defended action to prove the tenor of a missing will, was a local sheriff. In **McLernan and Another v. Ash and Others (Outer House, Lord Eassie, 6 March 2001, unreported**, but accessible in the Opinions section of the Supreme Courts website: www.scotcourts.gov.uk), the Lord Ordinary proceeded upon the basis that the presumption did apply (although curiously, **Lord Eassie** would appear not to have been referred to the Opinion of **Lord Penrose** in **Lauder v.**

Briggs). After his own review of the authorities, **Lord Eassie**, at paragraph 30 of his Opinion, concluded that:

“It is plainly not sufficient simply to aver and prove that a testamentary deed executed by a testator and subsequently in his actual custody is no longer extant at his death, if only for the reason that those simple facts alone provide no basis for holding that the absence of the deed is not the result of a decision by the testator to revoke its provisions by destroying the deed itself. There must be averred and proved circumstances which, in the particular case, offer a **real possibility** [my emphasis] that the loss or destruction of the deed occurred otherwise than by destruction by or on behalf of the testator *animo revocandi*. Where the existence of such circumstances are averred and proved, the decision whether the absence of the testamentary writ is attributable to the possibility or possibilities thus identified, or to the exercise by the testator of his power of revocation by destruction, is one to be arrived at on the balance of probabilities.”

In **McLernan v. Ash**, the testatrix, a widow, had died in hospital. Sheriff McLernan, a second cousin of hers, testified that on the day before she had gone to hospital, she had shown him a holograph will drawn up and signed by her, bequeathing her house and contents to him and the second named pursuer, a Father Kilpatrick. Provision was also said to have been made in the holograph will for her building society and bank books, savings and investments to be divided three ways among Sheriff McLernan, Father Kilpatrick and Sheriff McLernan’s sister, Mrs. Ash, who was the first named defender in the action. According to his evidence, he had suggested to her that she place the holograph will among the dishes in a sideboard within the rear living room of the house for safekeeping, and Mrs. Ash gave evidence that the testatrix had told her this was where it was. Sheriff McLernan subsequently typed up a will in the terms recollected by him which he took to the testatrix in hospital for her to sign, but she by then was unable to do so. **Lord Eassie** accepted that a testamentary document, the tenor of which was as recollected by Sheriff McLernan, had been in existence prior to the admission of the testatrix to hospital, and that she would not have taken it to hospital with her. There was evidence that her house had been broken into while she was in hospital, and that the contents of an item of furniture in the rear living room had been disturbed. In **Lord Eassie’s** Opinion, while a holograph will was not something which a housebreaker would ordinarily seek out for its intrinsic value, the “housebreakings and the restoration of order in their aftermath”, provided “a possible, and possibly coherent, explanation for the absence of the will at the death of the [testatrix],” which, on an assessment of the evidence as a whole, was more probable than the destruction *animo revocandi* by the testatrix. In **McLernan v. Ash**, the *casus amissionis* founded upon and

ultimately held proved was the housebreakings and their aftermath. The case is one that repays careful reading, not only for its thorough analysis of the relevant authorities, but also for the insight it provides into how the Court goes about the task of picking its way through a body of inconsistent and conflicting evidence to arrive at a decision. The Opinion of **Lord Eassie** in **McLernan v. Ash** was published on the Supreme Courts website, as all written Opinions issued by the Court of Session now are, and it consequently attracted press coverage, but in undefended actions to prove the tenor of a lost will, there is most unlikely to be a written Opinion issued which will appear on the website or otherwise be reported to cause your firm embarrassment.

Iain F. Maclean, Advocate

Note

The foregoing is the text of a talk first delivered to an audience of solicitors in Aberdeen on 28 March 2007. The text was revised on 21 November 2009 principally to reflect changes made earlier in 2009 to the Rules of the Court of Session [RCS] to the procedure to be followed in undefended actions of proving the tenor. The author assumes no responsibility or duty of care, whether contractual or delictual, towards any person in respect of anything written in this text and what is so written is provided strictly on that basis.