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Sugden v Lord St Leonards (1876): Probate of the Missing Will – Hamlet Without the Prince?

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I. Introduction

> 'it is not an ordinary case; it involves legal considerations of great importance, although of great rarity'[1]

Known, with rather insipid humour, as the case of the Lord Chancellor who urged the public to look after their wills and then lost his own, *Sugden v Lord St Leonards* is a prominent decision on probate that has become a popular and memorable anchor for certain legal propositions concerning lost wills and an indicator of the furthest limits of proof by informal means. It deals with two points that arise in the context of a missing will: the approach to reconstructing its contents and the approach to inferring its revocation.

Matters of evidence are of paramount importance to the law of wills. There a several circumstantial factors which suggest that, without legal intervention, evidence as to wills would be at greater risk of error or fraud than evidence as to bilateral, lifetime arrangements. Wills, unlike lifetime arrangements, are not acted upon immediately or even by the parties during their lives; disputes over them almost never arise when the disponor is alive to give evidence of the dealing; antecedent contracts which would supply evidence are not customary; there is no passing of consideration to be recorded; and they control the entirety of one's property. Wills are high value, are often complex in content, run long into the future and are frequently prepared in circumstances of emotional stress. It is these factors which justify particular concern over the evidence of wills, manifested most strongly by the exclusion of certain types of high-risk evidence by requiring compliance with certain formalities. This is the topic that *Sugden v Lord St Leonards* explores.

II. The Case of the Missing Will

[1] *Sugden v Lord St Leonards* (1876) 1 PD 154, 231 (Jessel MR) (*Sugden*).

A. The Great Property Lawyer

Edward Burtenshaw Sugden's career in law and politics had been legendary. From a relatively lowly birth to a London hairdresser[2] in 1781, he was a conveyancer at Lincoln's Inn in his twenties, published the magisterial 'Sugden V and P'[3] aged 24, moved from transactional work to the Bar, where he took silk at 41, was elected as an MP at 47 and appointed Solicitor-General with a knighthood at 48, became Lord Chancellor of Ireland and a Privy Councillor at 53, then became Lord Chancellor of Britain at 71, joining the peerage in the style Baron St Leonards. With such a career – not quite rags to riches, but at least perukes to peerages – it is hardly surprising that he chose the motto '*Labore Vinces*'. He accumulated personal wealth and purchased landed estates. Ensconced in his residence of Boyle Farm,[4] a great villa on the Thames overlooking its own aits in the river and Hampton Court Palace beyond, he spent his later years dwelling on the division of his property amongst his many descendants, with a particular concern to ensure that the new peerage would be supported by suitable financial means, while wrestling with how to signify his displeasure with his grandson Edward, the heir apparent to the peerage and the heir-at-law of the real property.[5]

His internal fluctuations were abundantly clear from the eight codicils he left and from the testimony of a number of persons from different stations in life who had conversed or corresponded with Lord St Leonards in his later years during the 1870s. The unfortunate discovery at his death on 29 January 1875 was that the alleged will, of which he had spoken many times, was not to be found. Despite admonishing the lay readers of his 'Handy Book'[6] to deposit their wills in the central registry, the most eminent property lawyer had neglected to do so, with the result that his estate was drawn into contentious probate proceedings.

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[2] Variously described as a hairdresser, barber or wig maker in the many obituaries of Lord St Leonards.

[3] EB Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* (London, Butterworth, 1805). The fourteenth and final edition was published in 1862, when the author was in his eighties.

[4] His legal acumen was not matched by his architectural taste: onto the handsome Georgian villa he added a jarring tripartite gabled storey in the Jacobean style with pinnacles. This was taken down, and the facades reworked in brick, as soon as the house was sold.

[5] Lord St Leonards' eldest son, Henry, had died in 1866; Edward was entitled as the eldest son of Henry.

[6] Lord St Leonards, *A Handy Book on Property Law*, 4th edn (London, Blackwood, 1858) 158.

B. The Key Witness

The principal witness to the preparation and execution of the alleged will, and the only witness who was able to give evidence as to its contents, was the Hon Charlotte Sugden. She was the only unmarried daughter of the deceased and resided with him

> from childhood up to the time of his death and for many years prior to his death undertook the management of the House for him and was a great favourite of his and nursed him with the utmost unremitting attention during his declining years.[7]

She gave evidence that the will had been written in the deceased's own hand and that it was kept along with the codicils in a small black box, something like a dispatch box. The box was usually placed on the floor in the sitting room, it was usually kept locked and the key was on a bunch kept by the deceased. There was a duplicate key kept in an escritoire, and there were five keys in the house by which the escritoire could be opened, one of them lying in a wine cupboard under the charge of the butler.

The last time Charlotte saw the will was on 20 August 1873, when the final codicil was executed and the will replaced in the box. The deceased took ill in September 1873 and was confined to his room from that time until Christmas of the same year, during which time the box was kept by Charlotte in her own room; when he again rejoined the family downstairs, she replaced the box in the sitting room and it remained there until his last illness commenced in March 1874. At that point, the box was again taken by Charlotte, who kept it in her room until his death.

After his death, the three who believed themselves to have been appointed executors under the alleged will called their solicitor, who looked in the box. Although the codicils and some other testamentary papers (a list of assets and an aide-memoire listing the legacies) were found in the box, the will was not there. Every possible search was made for it. A reward of £5,000 was offered for its production,[8] although the family drew the line at the many offers from spiritualists to furnish

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[7] Taken from the affidavit of Frank Sugden: National Archives, J 121/2644, para 4.

[8] Advertisement in *The Times*, 4 March 1875. Perhaps the family did not check the furniture carefully enough for concealed recesses: a housemaid solemnly testified that the deceased was fond of humming a ditty which described how 'an old lady hid her will in the secret drawer of the cabinet' (*The Times*, 20 November 1875, 11).

tidings of it.[9] Undaunted, the alleged executors claimed that the substance of the will could be reconstructed from memory and they propounded for probate a written declaration embodying it.

The existence of the will, its due execution and attestation were all initially denied in the pleadings of the parties who sought to challenge the will. Once the various witnesses had come forward to give evidence of due execution, however, those parties admitted the will's creation and quondam existence.[10] Having made those admissions, there were no disputed primary facts, leaving only two broad matters as the basis for resisting probate: first, whether the evidence of the contents of the will was sufficient; and secondly, whether the evidence rebutted the presumption of revocation that arose from the disappearance of the will.

C. The Feat of Recollection

The first issue effectively raised the principal question of Charlotte's ability to recall the substance of the will. Immediately after the will was found to be missing from the box, Charlotte wrote out from memory a statement of the substance of the will. This was at the suggestion of her solicitor, perhaps remembering the old rule for oral wills under the Statute of Frauds, which required the will or the substance thereof to have been committed to writing by the witness within six days of the making of the will.[11] The court accepted that she abstained from consulting any other person in order that what she wrote might be the result of her own unassisted recollection. The codicils and other testamentary papers were kept locked and sealed in the box in the presence of the principal party challenging the will, and were only taken out after Charlotte's written statement had been placed in the hands of the solicitor.

According to Charlotte herself, the original will was a large document, filling 19 pages. As counsel challenging the will pointed out,[12] it must have been complicated and replete with technical legal

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[9] *The Times*, 20 November 1875, 11.

[10] *Sugden* (n 1) 175.

[11] Statute of Frauds 1677, s 19, applicable whenever six months or more had passed since the speaking of the pretended testamentary words.

[12] *Sugden* (n 1) 174.

terms.[13] Charlotte's statement indicated devises of several estates and other lands to the executors on trust for Edward for life, followed by an entail to his heirs male, with contingent life estates and entails to the other male grandchildren in order, followed by similar dispositions to the deceased's other sons and their male descendants. Heirlooms were to follow the real estates. An estate in Kent went to the deceased's younger son Frank for life, with entails in tail male to his issue in order and remainder to the persons entitled under the other real estate trusts; it was subjected to a charge for the deceased's debts and a charge for certain expenses owed by a son-in-law. Charlotte received life estates in a nearby house and two tenanted cottages, a tenanted farm, two further tenanted houses and a legacy of £6,000. There were many pecuniary legacies in various specified amounts to other descendants. The residue of the personal estate was divided equally between Charlotte and two of her sisters (estimated at around £10,000 apiece in value[14]), with no share for Charlotte's other siblings, who took only fixed legacies. In the event of the real property devises and limitations failing, there were absolute devises as follows: the main residence at Boyle Farm to Edward, the Kent estate to Frank and the Peasemore estate to Charlotte absolutely. According to these arrangements, Charlotte, along with two of her sisters, did rather better out of the estate than they would have done on intestacy.

Charlotte acknowledged that her recollection of the will was only to the best of her belief, and in relation to some of the legacies she said 'I do not remember how the rest was left'.[15] Nevertheless, when it came to her own legacies, her recollection extended to such details as the gift to her of 'two cows to be selected by herself, out of my conservatory two dozen plants, also to be selected by herself, and two dozen bottles of my old sherry … two loads of hay and two loads of straw'.[16]

Charlotte's solicitor embodied her statement in a more detailed and technical declaration, which was then propounded as the substance of the will. Both her original statement and the refined declaration were admitted in evidence in the proceedings.

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[13] That is not to say that Charlotte recalled all 19 pages of drafting: it appears that she recalled the gist of the dispositions, but in the declaration prepared by the solicitor much of the detail was standard-form successive entails in remainder to junior branches and common Victorian boilerplate.

[14] *Sugden* (n 1) 201.

[15] ibid 163.

[16] *Sugden* (n 1) 156–57.

D. The Disappearance: Revocation, Foul Play, Misadventure?

The second issue was whether the will had been revoked. Its disappearance while in the possession of the testator led to a presumption of its revocation, so the question turned on whether this presumption was rebutted on the facts. That involved an inquiry into the state of mind of the testator, the probability that he changed his intention that the instrument should remain his will, and the opportunity to remove it from the box for destruction.

According to the testimony of several witnesses, the deceased had repeatedly indicated that he had a will, or at least affirmed that he would benefit certain family members in ways that tallied with the alleged will, right up to his conversation with the gardener in May 1874 and some oblique comments to one of his daughters in November 1874. These took place at a time when the deceased had ceased to have practical access to the box, which was in Charlotte's room (for good measure, it was made clear by Charlotte's testimony that others had the means to remove the will from the box, including the butler, who had a key to the escritoire in which the key to the box was kept). On top of that, the deceased had expressed satisfaction that he would die with his affairs in order: Charlotte relayed his comments from 1874 proclaiming that it was the first duty of every man to make a distribution of property in such a manner as to prevent dispute, and describing his pleasure at having settled his earthly affairs.[17]

On the other hand, there was one matter which might have led to a change of heart for the deceased's testamentary intentions: the deceased had ceased to entertain the same degree of affection for his grandson, Edward, that he presumably had at the time of writing the will. This, according to the second codicil, was on account of Edward's proposed matrimonial alliance, which the deceased had vetoed. Edward ceased visiting and the deceased used two codicils to reduce his inheritance significantly, providing a greater share for another son and a daughter-in-law instead. It

[17] 'Remarkable Trials – The St Leonards Will Case', *The Annual Register 1875*, vol 117 (London, Longman, 1876) 186 (reporting Charlotte's examination in chief). Sadly, there is nothing there to corroborate the charming tale that Charlotte was tongue-tied in the witness box until prompted by counsel sipping his water noisily, thus reminding her of the occasions when the deceased had sipped his bedtime nightcap as she read the will aloud to him: RE Megarry, *Miscellany-at-Law* (London, Stevens, 1955) 172.

led to discussion whether the disapproval of Edward's proposals might have prompted the deceased to destroy the will with the intention of writing another in which Edward was further disinherited.[18]

E. The Proceedings

The three individuals claiming to be appointed executors under the will propounded the will as represented by the solicitor's declaration of its substance and effect. The three were Charlotte herself, the second son of the deceased and a son-in-law. The deceased's first son had died long before, and was survived by his own eldest son, Edward, who, as successor to the peerage, became the second Lord St Leonards. It was Edward who stood to gain most from a challenge to the will: as heir-at-law he would take the deceased's real estate absolutely and to the exclusion of all others. He was named as first defendant, with his siblings also joined as defendants. A daughter and several granddaughters supported the defendants' arguments as interveners.

Leave was granted to hear the cause before the court without a jury. The hearing to determine the issues of fact came before Sir James Hannen, President of the newly established Probate, Divorce

[18] The testimony dwelt more on the relations with Edward than might be supposed from the judgment. Relations had soured to the extent that the deceased expressed regret at having accepted the peerage (Frank Sugden's testimony reported in *The Times*, 20 November 1875, 11). Charlotte testified to distressing tricks or hoaxes that had been played on the deceased, declining to name the object of her suspicions, although she admitted to holding 'some ideas' – undoubtedly hinting at Edward's hand in it. Certainly the perpetrator had been in a position to replicate the deceased's signature. Charlotte even moved the will box temporarily for fear that 'the perpetrators might carry their malevolence to the extent of abstracting his papers' (*The Times*, 19 November 1875, 11). The family never got to the bottom of the hoaxes. Scotland Yard were baffled. The deceased's anxiety was evident in his plaintive public letters to *The Times* (27 December 1869, 8; 31 December 1869, 9) and in his box of papers relating to the hoaxes (affidavits of Charlotte and Frank Sugden, National Archives, J 121/2644). Subsequent events did little to vouch for Edward's character: following his adultery, his wife obtained a judicial separation and custody of their daughter with costs (National Archives, J 77/274/8051); he descended to an impoverished life in the billiard halls of Richmond (internationally syndicated gossip column, eg *Perth Daily News*, 29 July 1884, 3); he indecently assaulted a housemaid and was convicted at the Old Bailey, where he was sentenced to six weeks in prison (*The Times*, 7 July 1884, 11); bankruptcy ensued, Boyle Farm was auctioned by his creditors and he removed to Ireland until his death in 1908, leaving an estate of a mere £4,817: *Calendar of the Grants of Probate* (London, Principal Probate Registry, 1908).

and Admiralty Division of the High Court.[19] The plaintiffs, defendants and interveners were represented by two silks and a junior apiece, the teams including those learned in the civil law.[20] The decision was that the will had been duly executed and attested, and its contents were as set out in the declaration save for one minor amendment.

On the question of the will's contents, Hannen P accepted that secondary evidence of the contents was admissible and that it required no higher standard of evidence than for other instruments. In relation to Charlotte's reliability, he found that she was the deceased's daily companion, she had heard the deceased read the will aloud, she had read it herself on three occasions and on several occasions when he was dealing with his testamentary papers she had the will before her or in her hands for reference. She had, therefore, a 'special training' and ample opportunities of becoming acquainted with its contents.[21] Furthermore, her recollection was in so many particulars (although not perfectly) corroborated by the codicils and other papers in the box that her recollection could be regarded as reliable even where there was no other evidence, and that despite her great financial interest in the outcome as one of the residuary legatees.

On the question of revocation, Hannen P found that the deceased's disagreement with Edward was not of such a nature that it would have led the deceased to revoke his will. A revocation prompted by that motive was unlikely as it would have also taken away the testamentary gifts to Charlotte and Frank, who had grown in his affections.[22] In the light of his many subsequent statements about his testamentary gifts, the will's disappearance could be explained by a revocation only if he had either revoked it and forgotten that fact or had systematically lied to Charlotte and Frank and those around him. Neither was probable. Furthermore, it was not in keeping with the deceased's known character. It was:

> wholly impossible to believe that Lord St Leonards, with his knowledge upon such subjects, with the pride which he manifested in doing things as he thought in the right way, even to vanity, should have

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[19] The transfer of jurisdiction to the High Court from the Court of Probate had been effected by the Supreme Court of Judicature Act 1873, s 16. The Court of Probate, in turn, had obtained its jurisdiction in place of the ecclesiastical courts by the Court of Probate Act 1857, s 4.

[20] Drs Deane, Spinks and Tristram.

[21] *Sugden* (n 1) 177–78.

[22] Although not mentioned in the judgment, it was sworn that Charlotte had 'no property with the exception of £350 in the Turkish bonds and about £50 cash': affidavit of Frank Sugden (n 7).

> destroyed this will, knowing, as he must have done, the confusion he would throw his affairs into, and the certainty there would be of bringing about that litigation which he so frequently expressed a desire to avoid.[23]

Having made the findings of fact, a later hearing briskly pronounced in favour of the will as contained in the declaration, limited until the original or a more complete copy could be found,[24] and in favour of the eight codicils.

F. The Appeal

Edward and his siblings appealed. The hearing took place on 7 March 1876 and judgment was delivered by the Court of Appeal only six days later. The Court of Appeal referred to the judgment of Hannen P with approbation and dismissed the appeal. Full judgments were delivered by Sir Alexander Cockburn CJ and Sir George Jessel MR, who reached the same conclusions; short concurring judgments were added by James LJ, Mellish LJ and Bagallay JA.[25]

On the question of revocation, Cockburn CJ confirmed the presumption of revocation arising when a will missing at the testator's death is shown to have been in the custody of the testator, but added the rider that the presumption will be more or less strong according to the character of the custody which the testator had over the will. In the case, it was 'anything but a close custody',[26] the presence of the will in the strong box being well known, the location of the box being visible until removed to Charlotte's room and the keys being accessible to the household. There was, moreover, evidence against the deceased having revoked the will by the powerful combination of the deceased's attentiveness to his testamentary arrangements, his sense of duty in providing for his dependants, his methodical habits, his warmest affection for Charlotte, who would have been left unprovided for had the will be revoked, and his repeated statements to all and sundry expressing his

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[23] *Sugden* (n 1) 203.

[24] The report of *Sugden* does not refer to this limit in its summary of the decree (207), but it was in the notice of application (National Archives, J 121/2644); it was proposed by counsel in *Sugden* (n 1) 205 and was acknowledged by Jessel MR (238).

[25] Sir Richard Bagallay retained his original title as Justice of Appeal pursuant to the Supreme Court of Judicature Act 1875, which, as Attorney-General, he had piloted through committee stage.

[26] *Sugden* (n 1) 218.

satisfaction at what he had been able to do for Charlotte and Frank. In the light of those considerations, it was vastly improbable that the testator had revoked it.

What had happened to it was no part of the findings, but a little speculation could not be resisted:

> The only conclusion I can arrive at is, not that he destroyed it, but that it was clandestinely got at by somebody and surreptitiously taken away; who that somebody is, is one of those mysteries which time may possibly solve, but which at present it would defy human ingenuity to say.

Decidedly speculative in the absence of any motive offered – such as the butler's curiosity or the heir-at-law's greed – but no more so than the fantastically speculative observation in another missing will case, stating that it was in no degree improbable that the deceased, being a great smoker, had taken the will out of his trunk and used it to light his pipe![27]

Despite its brief foray into hypothetical realms, the court showed considerable self-restraint in forbearing from any aspersions directed towards Edward. There had been considerable evidence raised at trial which could have been understood to blacken Edward's character and to insinuate in the audience's mind not just a motive for the revocation of the will, but a motive for Edward, spurred either by malice or greed, to steal and destroy it.[28] While the rules of evidence might have been liberal and inclusive, the court seems extremely careful to dismiss from consideration any such evidence which carries insubstantial probative force and which might, had a jury been sitting, have had a seriously prejudicial effect.

Having dispatched the revocation point, the next issue was the reconstruction of the contents of the will. There was in principle no difficulty in admitting parol evidence of the contents of a will in the same manner as for any other instrument. That had been established by authority[29] and was consistent with good policy: to refuse such evidence 'would enable any person who desired, from some sinister motive, to frustrate the testamentary disposition of a dead man, by merely getting

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[27] *Davis v Davis* (1824) 162 ER 275, 277; 2 Add 223.

[28] Above n 18. This seems to have been the commonly held suspicion: eg 'Correspondence' (1884) 18 *American Law Review* 875, 879. The notable exception is JB Atlay, *The Victorian Chancellors* (London, Smith Elder, 1908) 50, who claimed to have it on good authority that it was taken by a household servant anxious to see what legacies it gave to domestics, only to find that the opportunity of replacing it evaporated when the will-box was removed to Charlotte's room.

[29] *Brown v Brown* (1858) 120 ER 327; 8 E & B 876.

possession of the will'.[30] Cockburn CJ did not explicitly consider whether the degree of cogency required of secondary evidence was the same for wills as for other instruments, but Jessel MR made the equation clear,[31] just as Hannen P had done in rejecting certain dicta to the effect that reconstructing the contents of a will demanded 'the strictest proof'.[32]

The Court of Appeal held Charlotte's parol evidence to be entirely sufficient to prove the contents. Her honesty was admitted on all sides, her deep interest in the residuary legacy had not tainted her evidence and the accuracy of her recollection was generally reliable for the reasons given in the High Court, despite it falling short of perfection. That much was corroborated by the codicils, along with the other testamentary documents and oral statements of the deceased, which, despite earlier conflicting judicial opinions,[33] were held to be admissible hearsay, though the court would have reached the same conclusion without relying on them.

Finally, the court dealt with the problem arising from the incompleteness of Charlotte's recollection. The issue was whether this was a ground for refusing probate. The court decided that its duty was to give probate to the will so far as it could be ascertained, though it might leave unfulfilled an intended legacy, this being a lesser evil than striking down all of the testator's wishes.

III. Doctrinal Significance

The Court of Appeal's contribution to the development of legal doctrine is modest. No issues of substantive law were in dispute. The significance attributed to the case is in the field of procedural law, and even there its precedential status is not always entirely clear.[34] It offers a range of determinations which concern presumptions, evidentiary thresholds, and the admissibility and

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[30] *Sugden* (n 1) 220.

[31] ibid 239.

[32] ibid 176 (Hannen P), rejecting the dicta in *Wharram v Wharram* (1864) 164 ER 1290, 1292; 3 Sw & Tr 301, 306 (Sir JP Wilde).

[33] *Doe d Shallcross v Palmer* (1851) 20 LJQB 367; *In the Goods of Ripley* (1858) 164 ER 632; 1 Sw & Tr 68, *Quick v Quick* (1864) 164 ER 1347; 3 Sw & Tr 442.

[34] E Kahn, 'Trimestral Potpourri' (1995) 122 *South Africa Law Journal* 351, 356.

sufficiency of evidence. Within those elements, the case does not break new ground in all respects, but, rather, selects from amongst various competing traditions.

A. Presumption of Revocation

The decision establishes two points about the presumption of revocation arising from a missing will that had been in the testator's custody. First, the strength of the presumption varies with the closeness of the custody. Secondly, declarations by a testator of his adherence to the will are admissible in evidence to rebut the presumption, as an exception to the general rule excluding hearsay evidence.

B. Proof of Contents

The points relating to proof of the contents of a missing will were the occasion for the more intense argumentation. Five items can be extracted from the Court of Appeal's decision.

(i) The decision confirms that the contents of a will may be proved by secondary evidence. This is far from a novel point, many cases having been previously decided on that basis.[35] However, *Sugden* quelled the doubts raised a decade earlier in the Court of Probate by Sir JP Wilde, who questioned whether the legislative intent implicit in the Wills Act 1837 was that the will itself be produced to the court.[36] Even though *Sugden* confirms the earlier case law allowing secondary evidence of contents, the judgments in *Sugden* pass silently over the ancient case law of the King's Bench, which had refused to reconstruct a will that had been ceased to be physically in existence at the time of death. Regrettably, nobody cited[37] the whimsical seventeenth-century case, *Etheringham*

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[35] eg *Trevelyan v Trevelyan* (1810) 1 Ph 149; 161 ER 944; *Foster v Foster* (1823) 1 Add 462; 162 ER 163; *Davis v Davis* (1824) 2 Add 223; 162 ER 275; *Martin v Laking* (1828) 1 Hagg Ecc 244; 161 ER 152; *Brown v Brown* (1858) 120 ER 327; 8 E & B 876. Lord St Leonards himself knew that 'destruction of the will by accident or mistake, if clearly proved, would not defeat the gifts if the contents of the will could be shown': Lord St Leonards (n 6) 146.

[36] *Wharram v Wharram* (1864) 3 Sw & Tr 301, 304–05; 164 ER 1290, 1292.

[37] Yet Jessel MR in *Sugden* (n 1) 237 seems to recall its memorable facts when he briefly alludes to an example of a will that had been eaten by rats.

v Etheringham,[38] in which a will was found 'gnawn all to pieces with rats'; there, in relation to devises of real property,[39] the King's Bench held that the jury could accept the secondary evidence of contents only if the gnawing had occurred after the testator's death.[40] *Sugden* holds that secondary evidence is admissible whenever the destruction or loss occurred and abandons all idea that the documentary record must enjoy a real physical existence at the time when it becomes effective.

(ii) The threshold for the cogency of evidence for establishing the content of the will is not pitched at some particular high level but is simply equated with the threshold for deeds and other instruments. This is not a novel point, but merely reasserts the long-standing approach in probate, which had recently been shaken by Sir JP Wilde in the Court of Probate stating that 'In the absence of the will itself this portion of the case requires clear, strong and irrefragable evidence, free from suspicion or doubt in its sources, exact and certain in its conclusions'.[41] The response in *Sugden* was that the court need not bind itself to some particular abstract threshold, but would weigh the evidence in the normal manner.[42]

(iii) Declarations by a testator made before or after execution of the will are admissible as evidence of the contents of the will.[43] In respect of post-execution declarations, this required the court to

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[38] *Etheringham v Etheringham* (1670) Aleyn 2; 82 ER 883.

[39] Presumably the Ecclesiastical Court applied no such rule requiring existence at death, since the will had already been proved there in relation to personal property.

[40] See also *Lawrence v Kete* (1648) Aleyn 54; 82 ER 912 (not cited in *Sugden*): 'If a will continue in writing at the time of the death of the testator, although it be lost or burnt afterwards, it stands good; but if it be burnt at the time of his death, the devise is void.'

[41] *Podmore v Whatton* (1864) 3 Sw & Tr 449, 451; 164 ER 1349, 1350 (not cited in *Sugden*). See also *Wharram v Wharram* (1864) 164 ER 1290, 1293; 3 Sw & Tr 301, 307.

[42] This part of the decision was in turn shaken by Lord Herschell's obiter comments that parol evidence of contents must be of 'extreme cogency' and convincing 'beyond reasonable doubt': *Woodward v Goulstone* (1886) 11 App Cas 469, 475.

[43] This was the only point for dissent: Mellish LJ (251) argued that to allow the testator's post-execution statements would subvert the rule against hearsay by allowing too broad an exception, and that even pre-execution statements should be limited to those which corroborate other evidence of contents. The House of Lords felt that there was much in favour of entirely excluding the testator's post-execution statements: *Woodward v Goulstone* (1886) 11 App Cas 469, 480, 484.

create a new exception[44] to the rule excluding hearsay and to overrule an earlier case to the contrary.[45] The point may, however, have been obiter dictum since it was concluded that Charlotte's direct evidence alone would have been sufficient without the hearsay.[46]

The decision to admit a testator's post-execution declarations is interesting because of its interaction with the principle that unattested alterations to the will made after its execution are void. The dictum in *Sugden* would allow the testator's unattested and unwritten statements to control what is probated, despite being made after execution. While that does not directly contradict the rule against unattested alterations, it does show that the court in *Sugden* refuses to take analogies that would restrict the evidence, and instead demonstrates the court's confidence in its ability to discern whether a declaration comprises a bona fide representation of the will as executed, a mistake of recollection or some disingenuous ploy to informally revise its content.

(iv) Incomplete evidence of the will's contents does not preclude it from probate. In this regard, the court took a view entirely opposed to the Real Property Commissioners, whose work led to the Wills Act 1837. Their view – not put before the court – was that 'the most serious evil'[47] lay in disrupting the balance set by the testator's will if only part were probated. In particular, the testator might in one clause bequeath all his leaseholds and personal estate to his eldest son, the heir-at-law, and in a later clause might devise all his freeholds to his younger son. If the part of the will containing the first clause were admitted to probate but not the second, then the eldest son would take the entire estate and the younger son nothing. Such a result would not only deprive the younger son of what he was intended to receive under the missing part of the will, but would also take away that which he would otherwise have received on intestacy. That was thought to be too much of a risk. It motivated some of the commissioners' proposals, such as the rule that the testator must sign

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[44] For a penetrating analysis of the hearsay issue, including a critique of Cockburn CJ's equation of pre- and post-execution declarations, see C Tapper, 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1990) 106 *LQR* 441. The proposition that *Sugden* restricts admissible post-execution declarations to those which corroborate other evidence seems to be incorrect: S Alward, 'Chief Justice Cockburn' (1915) 35 *Canadian Law Times* 655, 663.

[45] *Quick v Quick* (1864) 164 ER 1347; 3 Sw & Tr 442.

[46] *Sugden* (n 1) 224.

[47] 'Fourth Report of the Commissioners Appointed to Inquire into the Law of England Respecting Real Property' (1833, HCP) 13.

at the foot in order to signify that the testator's record of testamentary intentions was not incomplete.[48] The Court of Appeal nonetheless dismissed concerns of that nature and allowed probate, even though it was aware that Charlotte could not precisely remember all the legacies and had erred in some particulars.

In relation to Charlotte's errors, the court corrected the declaration on the basis of circumstantial rather than direct evidence of the will's content. The court was influenced by evidence that the errors were minor: so where Charlotte could not recall which items had been struck through, the court acted upon the testator's own declaration in a codicil that his 'principal alteration'[49] had been the substitution of one trustee for another. Rather than failing the entirety, the court took an approach of weighing the evidence and making inferences about the extent of the possible errors and omissions in Charlotte's reconstruction.

(v) In determining the contents of a will, it is open to the court to rely on the testimony of a sole witness who takes a substantial interest under the will. This is a matter that was clearly raised by counsel, but it is easily overlooked since the appeal judgments do not tackle it expressly and do not refer to the authority counsel cited in support. The court did acknowledge the corroboration to Charlotte's testimony which was afforded by the codicils, the testamentary papers and the deceased's declarations, but all that was held not to be essential to the decision. The court forcibly asserted that Charlotte's evidence would have been accepted 'if there were not one tittle of confirmatory evidence'.[50]

A sole interested witness might therefore prove the contents – a decisive break from the ecclesiastical court's rule in probate proceedings, which had required the evidence of two witnesses.[51] The two-witness rule was not merely based on some inference from, or analogy to, the

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[48] ibid 16. The abolition of the foot rule of the Wills Act 1837, s 9 by the Wills Act Amendment Act 1852, s 1 was an achievement for which Lord St Leonards himself took the credit.

[49] *Sugden* (n 1) 182.

[50] ibid 224.

[51] JH Wigmore, 'Required Numbers of Witnesses: A Brief History of the Numerical System in England' (1901) 15 *Harvard Law Review* 83; 'Fourth Report of the Commissioners' (n 47) 62. Not every particular fact or every part of the testamentary transaction need be proved by two witnesses, provided that the circumstances showed that a testamentary act was in progress and tended to corroborate the act itself: EV Williams, A *Treatise on the Law of Executors and Administrators*, 5th edn, vol 1 (London, Stevens & Norton, 1856) 306.

formality rule concerning the execution of a will, as it pre-dated both the Wills Act 1837 and the Statute of Frauds 1677. In relation to evidence of contents, the rule was acknowledged by the first published source of probate law written in English, citing the continental authorities of the Renaissance:

> What if a Testament being made in Writing, and afterwards lost by some Casualty … whether may this Will written and lost be proved by Witnesses, yea or nay? Whereunto my Answer is, that albeit the very original Testament be lost, yet if there be two Witnesses, which did see and read the Testament written, and do remember the Contents thereof, these two Witnesses, so deposing the Tenor of the Will, are sufficient for the Proof thereof …[52]

From 1857, the rules of evidence in contentious probate were aligned with those of common law,[53] so that two witnesses were no longer insisted upon. Yet there were 'great lawyers'[54] at the time of the *Sugden* litigation who advised that a court would still not go as far as granting probate to a will where the contents were proved by secondary evidence from only one witness who had a financial interest in the outcome. They had even begun preparing heads of compromise to be embodied in a private Act of Parliament.[55] But the great lawyers were wrong. *Sugden* shows the court's inclination to resist any predetermined rule of evidence based on numerical minima and instead assess for itself the credibility of the particular speaker and her testimony.

C. Overall Impression

Taking collectively all the above points resolved by the Court of Appeal in respect of proof, it is apparent that the court has entered an era in which it has an unwavering belief in its ability to sift evidence. This should be no surprise when the King's Bench practice of the time is compared to the old ecclesiastical courts' custom of trying issues on written depositions taken in private through the

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[52] H Swinburn, *A Brief Treatise of Testaments and Last Wills* (London, Company of Stationers, 1611) 265b (pt 6, s 14, pl 4).

[53] Court of Probate Act 1857, s 33: 'The rules of evidence observed in the superior courts of common law at Westminster shall be applicable to and observed in the trial of all questions of fact'; Rules of HM Court of Probate in Respect of Contentious Business 1857, r 32.

[54] WS Holdsworth, *History of English Law*, vol 16 (London, Methuen, 1936) 46. The great lawyers included 'some of the ablest members of the Common Law bar and that great real property lawyer, the late Mr Joshua Williams': JB Atlay, *The Victorian Chancellors* (London, Smith Elder, 1908) 50.

[55] Atlay (n 54) 50. Atlay also reports, perhaps surprisingly, that the suggestion to pursue proceedings came from an old member of Doctors' Commons.

medium of an examiner,[56] without face-to-face cross-examination by the other side in front of the tribunal of fact.[57] In *Sugden*, various rigid constraints on admissibility are consigned to history: no blanket prohibition on secondary evidence, no minimum threshold for its cogency, no restriction of evidence to account for the loss of the will before death, no two-witness rule, no ban on interested witnesses, no rejection of testator's post-execution hearsay and no preclusion of evidence which shows that the incompletely reconstituted parts of the will were insubstantial. The court dismissed the opportunity presented by Sir JP Wilde[58] to tighten the rules of evidence in probate and even to suppress altogether secondary evidence of the contents. There are consequential questions about whether similarly bold approaches would be taken in relation to other doctrines reliant on external evidence, such as rules concerning interpretation and rectification of wills or additions and deletions to documentary wills.[59]

The decision in *Sugden* reveals a rational spirit of factual inquiry that dismisses prophylactic evidential rules which would deny the courts access to evidence for fear of being swayed by deception or flawed memory. It betokens a supreme confidence in the forensic process and its capacity to test the evidence and arrive at the truth. This liberality in the rules of evidence stands in contrast to the stark formality rules of statute law. There appears at first glance a certain tension between the statutory rule requiring that a will must be in writing, executed and attested on the one hand, and on the other hand the judicial rule that a single interested witness may establish the

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[56] See generally 'Report of the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts' (1831–2 PP 199, xxiv) 18–19; BG Hutton, 'The Reform of the Testamentary Jurisdiction of the Ecclesiastical Courts 1830–1857', PhD Thesis (Brunel University, 2002).

[57] These shortcomings had been one motivation for the establishment of a temporal probate court: 'Fourth Report of the Commissioners' (n 47) 62–65. Viva voce testimony and cross-examination before the tribunal were introduced for contentious probate regarding personal property by the Court of Probate Act 1857, s 31, and specifically confirmed on the transfer of jurisdiction to the High Court under the Supreme Court of Judicature Act 1875, Schedule, O 37, r 1, along with the general preservation of other probate rules under the Supreme Court of Judicature Act 1875, s 18 and the broad adoption of the practice and procedure of the predecessor court under the Supreme Court of Judicature Act 1873, s 21.

[58] *Wharram v Wharram* (1864) 164 ER 1290, 1292; 3 Sw & Tr 301, 304–6; *Podmore v Whatton* (1864) 3 Sw & Tr 449; 164 ER 1349.

[59] See B Häcker, 'What's in a Will?' in B Häcker and C Mitchell (eds), *Current Issues in Succession Law* (Oxford, Hart Publishing, 2016) 158–64.

contents (and due execution) by oral testimony. Does this application of the procedural law of evidence undercut the substantive law of formalities? The answer requires a consideration of the functions of formalities.

IV. Functional Analysis of Formalities

A. A Catalogue of Formality Functions

The idea behind the functional analysis of formality requirements is that they are underpinned by considerations of policy. They are not ends in themselves, but are capable of being justified as a means to attain objectives concerning the law relating to property transfers. The classic reference point for analysis is an article by Fuller concerned primarily with contract formalities.[60]

Fuller advanced three functions.[61] The first is the Evidentiary Function, which recognises the effect of formalities in ensuring a record of the existence and contents of the disposition. The second is the Cautionary Function. This recognises the paternalistic role of formalities in hindering legal effect until some rite has been carried out, which allows a pause for deliberation and an opportunity for circumspection, perhaps even to consider taking legal advice. It acts as a check against impulsive or inconsiderate action, and potentially a moment away from external pressures.[62] The third is the Channelling Function. Fuller argued that a legal formality requirement may serve to encourage owners to implement their wishes through a particular medium, thereby making it easier for others to determine whether the owner intended to alter legal rights and, if so, what type of alteration.

Fuller appreciated the intimate connection between the three functions:[63] whatever tends to accomplish one often also tends to accomplish the others. A requirement to furnish a record of intention will encourage the author to deliberate. Devices which induce deliberation are also likely to aid in generating evidence of the intention. Whenever deliberation is induced and a record

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[60] LL Fuller, 'Consideration and Form' (1941) 41 *Columbia Law Review* 799.

[61] ibid 800–03.

[62] The obvious example springing to Hannen P's mind was the 'young man caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour': *Wingrove v Wingrove* (1885) 11 PD 81, 82.

[63] Fuller (n 60) 803–04.

generated, it is more likely that the party will channel his or her intention through a recognised legal category. Any channelling which effects a division between legally effective and ineffective outcomes, or between types of legal transactions, tends also to support the deliberation as to the legal consequences. Despite these close interrelationships, Fuller counselled against confusing the functions because the determination of a marginal case may hinge upon assumptions about what is the primary function of a particular formality requirement. That certainly rings true for the analysis of an outlier such as *Sugden*.

Fuller's analysis does not exhaust the scholarship on formalities. Writing at the same time, Gulliver and Tilson created their own tripartite functional analysis of formalities which covers similar but not identical ground.[64] First, they recognised the same Evidentiary Function that formalities may enhance the reliability of the evidence of the testator's wishes, particularly through the requirement of writing to preserve a record that is free from the risks of misunderstanding or unconscious bias in recollecting its terms and which may be available long after the witnesses have died. Secondly, a Ritual Function recognises that a formality may impress the testator with the significance of his actions and will therefore both encourage the testator not to act ill-advisedly, and also assist the court to infer that the expressed intention was meant to be legally operative and not merely a tentative, unconfirmed draft. This function possesses two limbs, which correspond to aspects of Fuller's Cautionary Function and Channelling Function. Thirdly, a Protective Function is alleged to safeguard a testator from undue influence and other forms of imposition at the time of execution. This corresponds to another aspect of Fuller's Cautionary Function.

Another contributor, Langbein, approached the subject specifically with regard to wills and distilled four functions.[65] He accepted the Evidentiary Function and Cautionary Function. A Protective Function recognised the effectiveness of formalities in protecting a testator from external impositions or documentary substitutions. Langbein's fourth function was labelled a Channelling Function, but was a novel concept that differed from Fuller's analysis under the same name. Langbein understood formalities to have the potential to encourage such a degree of uniformity in the organisation, language and content of wills that their validity could be routinely and efficiently

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[64] A Gulliver and C Tilson, 'Classification of Gratuitous Transfers' (1941) 51 *Yale Law Journal* 1, especially 3–15.

[65] JH Langbein, 'Substantial Compliance with the Wills Act' (1975) 88 *Harvard Law Review* 489, 492–27. See also JH Langbein, 'Excusing Harmless Error in the Execution of Wills' (1987) 87 *Columbia Law Review* 1, 3.

determined by bureaucratic probate processes that are more administrative than adjudicative in nature.

Further purposes attributable to formalities have been raised by Perillo.[66] He identified a Clarifying Function which acknowledges that formality requirements may tend to focus the testator's attention on drafting the formal document and consequently serve to refine the terms of the transaction as he contemplates his intentions in depth. Perillo also identified a Regulatory and Taxation Function on the ground that directing a transaction into a particular formal channel may make it easier for the state to pursue its interest in regulating, policing and taxing certain transactions.[67] To that might also be added the state's interest in collecting data.[68]

The functions outlined above have been widely accepted as the catalogue of purposes capable of being served by formalities in respect of wills. But it has been argued that only one subset of them truly justifies the imposition of statutory formalities, and that all the other functions are matters that could be perfectly well (and more efficiently) achieved by other means. Eric Posner[69] has proposed arguments which, translated to the case of wills, suggest that the testator rather than the state should be permitted to decide whether it is worth running the risks against which the formalities typically protect – the risk of recording a will in a form possessing lower evidential reliability, the risk of making a will via a less clear channel and the risk of hastiness when preparing the will. After all, the costs of doing so would be borne by the intended beneficiaries, not inflicted more widely on society, so the testator should be permitted to opt out. But optional formalities would not protect against a fraudster who simply gave false testimony that the testator had opted out of the formalities and made an oral will. Posner contends that the only function which justifies mandatory formalities is to hinder fraudsters from making such false claims. In view of its special attributes, Posner seeks to isolate it from the Evidentiary Function of which it is a subset under Fuller's account. A suitable label might be the Anti-fraud Function.

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[66] JM Perillo, 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form' (1974) 43 *Fordham Law Review* 39, 56–58.

[67] ibid 62–64.

[68] P Critchley, 'Taking Formalities Seriously' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford, Oxford University Press, 1998) 518.

[69] E Posner, 'Norms, Formalities and the Statute of Frauds' (1996) 144 *University of Pennsylvania Law Review* 1971, 1976–77, 1984–86.

B. *Sugden* and the Formality Functions

This section turns to what the decision in *Sugden* implies for the formality functions canvassed above. The Wills Act requires a will to satisfy formality requirements of writing, signature and attestation,[70] to which the full catalogue of formality functions outlined above can be attributed. *Sugden* allowed the reconstruction of the contents of a will through highly informal evidence, principally Charlotte's oral testimony, supplemented by various hearsay statements found to be unnecessary for the decision. Yet doing so would not prevent the fulfilment of many of the formality functions associated with the Wills Act.

In particular, the Cautionary Function is preserved intact because of the need for evidence of due execution (which, by the time of trial, had been conceded). If duly executed, the testator must have committed the will to writing and sought out witnesses for its attestation, the very processes which bring an opportunity for the testator to reflect and deliberate. The same process would engage the Clarifying Function. The testator's signature and attestation may also be taken as convenient signals that the testator intended to make the document operative as a testamentary instrument and that it represented his settled wishes, in which case *Sugden* is also fully consistent with the implementation of the Channelling and Ritual Functions. And it does nothing to impair the Regulatory, Taxation or Information Functions. But all those functions rank low in the list of priorities. The main issue emanating from *Sugden* is its impact on the Anti-fraud Function.

C. *Sugden* and the Anti-fraud Function

The Evidentiary Function is the most obvious and prominent function of statutory formalities for private instruments. To the extent that the formalities deter fraudsters, they pursue the Anti-fraud Function. Take the example of the requirements imposed by the Wills Act formalities: writing, signature and attestation. They exclude any non-conforming putative wills from admission in evidence and thus discourage all but the most dedicated fraudster who is prepared to go beyond mere perjured testimony and forge a documentary will.

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[70] Wills Act 1837, s 9: 'No Will shall be valid unless it shall be in Writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time; and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.'

If the Wills Act was understood to require that a will could be proved in the probate court by no method other than producing the conforming physical embodiment of the will, then a strong Anti-fraud Function could be attributed to the statutory formalities. But the decision in *Sugden* clearly derogates from that potential function by reconstructing the contents of a will on the oral evidence of a sole interested witness. *Sugden* asserts that there are no rules that would automatically filter out evidence of contents simply because the evidence is of a class that is generally perceived to be unreliable. Perhaps this is unsurprising given that *Sugden* was, in a sense, a hard case. On the facts, there were very powerful circumstances to lend credibility to Charlotte's story.[71] Her testimony was consistently corroborated by the deceased's written notes and declarations by multiple witnesses. Moreover, Charlotte had her reputation to protect, for if the will were later to emerge and differ from her testimony, it would be very difficult for her to claim that such a complex and intricate content as she claimed to have memorised was all an innocent mistake. In circumstances where her credibility was universally commended, these factors could only have encouraged the court to seek substantive justice and avoid restrictions on admissibility.

Doubtlessly the court in *Sugden* regarded itself as competent to determine the truth of the oral testimony on each of these matters through the normal processes of requiring oaths, observing the demeanour during viva voce testimony, live cross-examination and self-administered judicial cautions in relation to hearsay evidence and interested witnesses. Nevertheless, the effect of *Sugden* is that the Wills Act is perceived not to exclude evidence of contents on the ground that such evidence is unwritten, unsigned or unattested; instead, the decision shows a notable willingness to admit the high-risk class of informal evidence. The decision therefore prevents the Wills Act formalities from pursuing any Anti-fraud Function in relation to the will contents. This does not sit very comfortably with the general understanding of the Wills Act that may be deduced from its attestation rules or from its antecedents.

D. The Wills Act and Attestation

The tension between *Sugden* and the Wills Act is brought into stark relief by considering two elements of attesting the execution of a will. First, Charlotte alone could not have validly attested

[71] Highly credible secondary evidence in the form of lawyer's drafts had long been accepted: see *Podmore v Whatton* (1864) 3 Sw & Tr 449; 164 ER 1349. Lord St Leonards had missed such an opportunity by doing his own 'home-made' will!

the testator's execution of the will because a second attesting witness would have been required. Secondly, Charlotte could not have taken her legacy under the will and also proved due execution as an attesting witness, not even alongside a second witness; before the Wills Act, her legacy would have led to disqualification, whereas after the Wills Act the incompatibility between legacy and attestation would have been manifested by her forfeiting the legacy.[72] So Charlotte's competence to testify as attesting witness to the execution of the will in either of these circumstances would have been impaired. In direct contrast to proof of execution, *Sugden* confirms that Charlotte was fully competent to give proof of contents – without a second witness and without forfeiting her legacy.

The statutory rules for proof of execution could have been used as the basis for arguing that similar restrictions ought to apply to proof of contents. It is submitted that they are more than merely analogous to proof of contents; rather, they are integral to the idea of authenticity which underlies the Wills Act formalities. Prior to the Wills Act, when oral wills could still be made, the witnesses had to give evidence not only that the testator had bidden them to attest his declaration, but also of the contents declared. There was no separation between the proof of attested publication and the proof of content. Once the Wills Act imposed a written form, the signature and attesting subscriptions served to authenticate the preceding record of contents. If the signature and attesting subscriptions are divorced from the record of the content, as *Sugden* necessarily implies, they lose their capacity to authenticate the terms of the will. The outcome was that the execution ceremony was devoid of any power to authenticate Charlotte's evidence as to contents.

The argument that proof of contents should not be divorced from the proof of attested execution which authenticates the contents was one which found favour with the former probate judge, Sir JP Wilde, who, after mentioning some recent cases of reconstructing missing wills, launched this attack:

> Now, in all this I venture to doubt if the operation of the statute relating to wills has been sufficiently considered. To what end, it may be asked, does the Wills Act of 1857 declare that 'no will shall be valid' unless it be in writing and signed by the testator in the presence of witnesses, and signed by them in the presence of the testator, if a parol oath and the fiction of a loss can make a will valid without any writing at all? … Was not this writing itself, and the triple signatures with the detailed requirements as to position on the paper, intended also, as living witnesses, to bear visible testimony to the reality of the act and the exact disposition of the property which they were designed to attest? And if so, can the Court dispense with the paper and writing altogether?[73]

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[72] Wills Act 1837, s 15.

[73] *Wharram v Wharram* (1864) 164 ER 1290, 1292; 3 Sw & Tr 301, 304–05.

The powerful logic against separating proof contents from proof of execution, coupled with the stiffly worded remonstration of the Court of Probate, presented the court in *Sugden* with an opportunity to reject Charlotte's non-compliant proof of content. In deciding the opposing way, the court in *Sugden* selected to remove an Anti-fraud Function that could have been attributed to the statute, leaving only a rump of miscellaneous and considerably less important functions.

E. The Wills Act and Its Antecedents

The Wills Act 1837 may not have explicitly ordered the courts to reject oral evidence of contents, but could that have been the assumption of those who prepared the Act? The Act was substantially driven by the Fourth Report of the Real Property Commissioners,[74] who never confronted the issue of secondary evidence. One of the immense written submissions to the Commissioners briefly mentioned an old case in which it was held that devises in a will were good even though the will be lost or burnt after the testator's death,[75] from which the Commissioners ought to have appreciated the necessary implication that secondary evidence was admissible. On the other hand, the only relevant comment by the Commissioners themselves was to record the common law practice that in a title contest depending on the validity of the will, 'the Will must be produced before the Judge and Jury'.[76] Bearing in mind that the Commissioners had felt constrained not to suggest alterations in the general rules of evidence,[77] the common law rule might have been an assumption on which their proposed reforms were founded. The inference is not strong, but if the Commissioners perceived the necessity for actual production of the documentary will as an integral part of their scheme, then it is another ground for arguing that *Sugden*'s admission of secondary evidence of contents was a significant step away from the legislative policy.

The thrust of the Commissioners' report was to rationalise and unify the law of wills, in particular the form of execution, and this was achieved by a single solution for all wills based on the writing, signature and attestation requirements applicable to wills of real property under the Statute of

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[74] 'Fourth Report of the Commissioners' (n 47).

[75] ibid 'Appendix, Evidence of Samuel Gale', [267], citing *Lawrence v Kete* (1648) Aleyn 54; 82 ER 912.

[76] ibid 34.

[77] ibid 20.

Frauds 1677.[78] It is therefore also worth considering the motivations for the Statute of Frauds as the direct ancestor of the Wills Act. Without any doubt, the Statute of Frauds was not merely aimed at fulfilling various Cautionary or Channelling functions: its preamble recites that it exists 'For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury'. Although historical investigations have shown that its early sections were designed with a channelling goal in mind, namely to force title documents into a form that could voluntarily be enrolled or registered,[79] the immediate objective was to ensure that documents affecting real property were authenticated to reduce fraud.[80] This was how the bench understood it.[81] The primacy of this Anti-fraud Function is evident from the explanation that the will formality rules in the Statute of Frauds were a specific response to a case involving oral testimony to the effect that one will had been orally revoked and replaced by another oral will – all of which evidence was later found to be perjured.[82] Tracking its descent into the Wills Act suggests that the same anti-fraud objective should have been the primary concern in *Sugden*.

In fact, the Court of Appeal in *Sugden* passed over the risk of fraud and instead focused on the reasons for admitting secondary evidence of contents. Cockburn CJ adhered to an earlier decision on wills[83] without addressing any tensions with the Statute of Frauds or the Wills Act, but rather presenting the converse argument that without secondary evidence valid wills might occasionally be

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[78] ibid 14; Wills Act 1837, s 9. The exceptions relate to soldiers' and sailors' wills.

[79] P Hamburger, 'The Conveyancing Purposes of the Statute of Frauds' (1983) 27 *American Journal of Legal History* 354.

[80] JB Baron, 'Gifts, Bargains and Form' (1989) 64 *Indiana Law Journal* 155, 166; CI Nelson and JM Stark, 'Formalities and Formalism: A Critical Look at the Execution of Wills' (1978) 6 *Pepperdine Law Review* 331, 339. E Rabel, 'The Statute of Frauds and Comparative Legal History' (1947) 63 *LQR* 174 points to the anti-fraud function, but also suggests broader evidential and cautionary functions.

[81] eg *Chetwynd v Wyndham* (1757) 1 Bl Rep 95, 100; 96 ER 53, 55 (Lord Mansfield CJ): the Statute of Frauds exists 'to guard against fraud'.

[82] *Cole v Mordaunt* (unreported, 22 May 1676), discussed in *Mathews v Warner* (1798) 4 Ves Jun 186; 31 ER 96, 107, fn 2. See CD Hening, 'The Original Drafts of the Statute of Frauds and Their Authors' (1913) 61 *University of Pennsylvania Law Review* 283; Nelson and Stark (n 80) 338; AJ Hirsch, 'Formalizing Gratuitous and Contractual Transfers' (2014) 91 *Washington University Law Journal* 797, 853.

[83] *Brown v Brown* (1858) 8 El & Bl 876; 120 ER 327.

excluded from probate – a view which the Commissioners had seen as a necessary sacrifice.[84] Jessel MR justified the admission of secondary evidence by reference to case law on deeds which had accepted it. But deeds in those days had not been regulated by any statutory formalities, so the matter of legislative anti-fraud policy was absent from discussion.

In summary, *Sugden* deprives the Wills Act formality requirements of any role in excluding informal evidence of contents so as to secure an Anti-fraud Function. There is no filter by way of fixed rules of inadmissibility; instead, all goes to the judicial forum for ad hoc assessment of credibility. In this way it repeats the approach taken in relation to hearsay evidence pertaining to the testator's declarations. It does not transgress any particular rule of the Wills Act 1837, but it does frustrate the Act's general ambitions as inferred from the attestation requirement, the Commissioners' report and ultimately the original motivations behind the Statute of Frauds.

V. Conclusion

Succession to property on death depends on the deceased's intention, but statute law regulates the expression of that intention by requiring it to be mediated through a particular form. *Sugden v Lord St Leonards* fixes the judicial approach to regulating the evidence of that formal expression. The decision came at an important moment. First, the two great streams of probate jurisdiction (ecclesiastical and common law) had merged 17 years earlier, then transferred to the High Court in the previous year, and the conflicting case law from those streams had not been brought into full alignment. Secondly, the procedure in probate had at the same time ceased to follow that of the ecclesiastical courts and turned exclusively to that of common law, with its far superior fact-finding capacity. Thirdly, the Real Property Commissioners had reviewed will formalities, and their reinvigorated scheme of formalities had been implemented in the Wills Act 1837. Fourthly, recent probate cases had asserted that will reconstructions required the highest threshold of proof and had also suggested that the enactment of the Wills Act 1837 justified a re-evaluation of the earlier authorities.

Sugden responded with a decision that eroded the significance of the formal written instrument. The will, having once been captured in writing, was held to survive the loss of its corporeal

[84] 'Fourth Report of the Commissioners' (n 47) 22.

manifestation, so that its contents could be supplied by external evidence. That signifies that it is the act of publishing the testamentary intention which has normative force as the reason for changing the private legal order and not the continued existence of some physical object in which it is embodied. It implies an enlightened jurisprudential approach which accepts substantive law as being separate from evidence so that the legal efficacy of the testator's expressed intention does not depend on the great mystical object being flourished in court. Having established a judicial willingness in principle to admit secondary evidence, the decision goes on to regulate other rules of evidence relevant to adherence and reconstruction. In every respect it liberalises the rules, admitting hearsay evidence, accepting the testimony of interested witnesses, dispensing with corroboration, tolerating incomplete recollection and so on. The downplaying of the physical document is therefore coupled with an emphatic assertion of the court's ability to assess the credibility of informal evidence under the common law process of proof.

In dispensing with the need for the documentary will to be produced at trial, it may be argued that *Sugden* went too far and disrupted the integrity of attestation as authentication of content. The reconstruction of a will's contents necessarily relies on sources of evidence that lack the legislature's hallmarks of authenticity as mandated in the Wills Act 1837. This causes a possible tension with the functions or objectives of the statutory formalities. *Sugden*'s approach does not automatically exclude claims based on informal evidence, but rather directs them into proceedings where credibility is decided ad hoc: anyone can challenge the putative beneficiaries expecting to take under a will or intestacy by alleging the existence of another will supported by merely oral evidence of its execution and contents. *Sugden* therefore deprives the Wills Act of automatic preventative effect in relation to fraudulent evidence of a will's contents. Any suppression of fraud is to be achieved after *Sugden* only by individual assessment at trial and not by the peremptory rejection of claims. This point has been neglected in the literature, which generally perseveres in extolling the anti-fraud function of statutory will formalities.[85] It shows how judge-made procedural law can discreetly effectuate a radical reshaping of the formality functions achieved by the law in action. It should prompt critics to query whether modern fact-finding procedures are so effective that they have quite overtaken the surrogate for authenticity that is afforded by the formal expression of intention in a written, signed and attested will.

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[85] The exception is A Gulliver and C Tilson, 'Classification of Gratuitous Transfers' (1941) 51 *Yale Law Journal* 1, 7, which notes the point but does not elaborate on its significance.