EVIDENCE—*EX PARTE* MOTION—RECEPTION OF EVIDENCE WHICH IS NEITHER IRRELEVANT NOR PROHIBITED BY AN ABSOLUTE RULE OF LAW

In *Re Lilley*[1] deceased's widow applied for a grant of letters of administration of his estate upon the footing that deceased had died intestate. The applicant conceded that many years before his death the deceased made a will dated 13 May 1920. She produced this will. The basis of her application was that the 1920 will was revoked by a later will dated 1 June 1945, which was in turn revoked by destruction *animo revocandi*.

The alleged will of 1 June 1945 could not be found, and it therefore fell to the applicant to establish, without the aid of the instrument itself–

(a) its due execution,
(b) that its terms were such as to revoke the earlier will, either expressly or (by inconsistent dispositions) impliedly, and
(c) its own subsequent revocation.

To this end, evidence was adduced of statements by the solicitor (himself since deceased) who had taken instructions for and prepared the second will to the effect that the deceased had in his presence revoked the will by destruction. Such evidence was clearly hearsay. Drafts of the second will were put in evidence.

The matter came before Smith J. by way of *ex parte* motion. Only two persons appeared to have any interest to oppose the motion, and of these the first supported the motion, while the second, being a beneficiary under the second but not the first will, had no interest to object to the reception of evidence of the execution or terms of the second will, but only of its revocation. In these somewhat unusual circumstances His Honour held that the matter might properly be treated as if the two persons interested had been represented and the evidence as to due execution and contents had been admitted without objection.

This raised the question whether a Judge may take into consideration inadmissible evidence received without objection. Phipson[2] says, No. His Honour refined the matter by distinguishing between:

1. Cases where the evidence is either irrelevant or excluded by an absolute rule of law. Here, whether the objection is taken or not, the Judge must exclude the evidence from consideration.
2. Cases in which the evidence is relevant and there is merely a privilege or rule of evidence which a party has an option to take

[1] [1953] V.L.R. 98.   [2] *Evidence* (8th Ed.) at p. 673.

advantage of or not, as he chooses. Here failure to object ordinarily amounts to a waiver of the privilege or the benefit of the rule of evidence, and the Judge is entitled, perhaps bound, to take the evidence into consideration.

The cases cited by Phipson in support of his proposition, His Honour went on, were both examples of the first type of case, in which the evidence is legally irrelevant.[3] The evidence in question in the instant case was inadmissible only in the second sense.

Having drawn this distinction – a distinction, if one may so say with respect, consonant not only with the weight of authority but also with common sense – His Honour proceeded to consider the evidence before him and found, applying the rule in *Cutto v. Gilbert*,[4] that it was insufficient to satisfy the stringent test laid down by that rule.

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[3] The decision of the Court of Appeal in *Jacker's* case (1888) 5 T.L.R. 13 appears to have occasioned His Honour some difficulty. *Quaere* whether the treatment of this case does not involve an *argumentum in circulo*. And compare His Honour's treatment of *Shaw v. Roberts* (1818) 2 Stark. 455.

[4] (1854) 9 Moo. P.C. 131.