A. DONDO WARE, Attorney at Law, for the Estate of his Wife, HANNAH A. WARE, Appellant, v. **J. A. WATSON**, Brother of the Late HANNAH A. WARE, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Argued April 24, 1944. Decided May 4, 1944.

1. Our statutes make it mandatorily incumbent upon the Probate Court before which objections are filed to transfer such contested will cases to the Court of Quarter Sessions and Common Pleas (now circuit court), to be there tried by a jury upon their merits and by it either rejected, set aside, quashed, or approved.

2. Proof of the loss or destruction of a last will and testament must be made by clear and convincing evidence. In that instance its contents may be shown by parol in the same way as the contents of any other lost instrument.

On appeal from decision dismissing probate proceeding, *judgment reversed and remanded.*

A. B. Ricks for appellant. C. .*Abayomi Cassell* for appellee.

MR. JUSTICE SHANNON delivered the opinion of the Court.

Had the trial judge of this case taken the trouble to study painstakingly and to digest carefully and correctly the statutes as well as the common law on wills, the taking and hearing of this appeal would have been avoided and the time needlessly wasted on it would have been saved for other meritorious work.

It appears that on July 19, 1936, one Hannah A. Ware, a resident of the city of Robertsport in the county of Grand Cape Mount, died. About a little over two months after her death, that is to say, on October 6, 1936, her husband, A. Dondo Ware, appellant, offered for probate before the Circuit Court for the Fifth Judicial Circuit in that county an instrument purporting to be the last will and testament of the said Hannah A. Ware, to which strong objections were raised and filed by J. A. Watson, brother of the said Hannah A. Ware. The last pleading filed was the reply of the said J. A. Watson, objector and appellee herein.

Pleadings thus rested in the month of November, 1936 were never taken up or

handled. Neither was the cause, since it was concerned with a contested will, transferred to the proper judicial forum for disposition, possibly on account of the disqualification of His Honor Isaac A. David, then the circuit judge of that circuit but since elevated to the Bench of this Court, as is shown by his own request to be recused at this hearing, until His Honor T. Gyibli Collins, as circuit judge and successor to His Honor Mr. Justice David, sitting in probate on April 13, 1943, called the case up and proceeded to the reading of the pleadings, obviously with a view of disposing of the issues of law raised therein. It was during the reading of said pleadings that the attention of the said judge was called to the fact "that the will in question had been lost during the incumbency of the late probate clerk (P. J. Lewis)," deceased, of the city of Robertsport. The certified minutes of the said court show that at that stage, "the court discontinued the further reading of the pleadings in said case at bar and respondent A. Dondo Ware brought to the attention of the Court that before the will was lost, both parties obtained authenticated copies from the Clerk's Office, under his signature and seal of office."

On the following day, which was April 14, 1943, His Honor Judge Collins, upon resuming the case, entered the following ruling dismissing the case for want of a triable cause of action :

"COURT'S RULING ON LAW ISSUES

"At the call of the Abovenamed case, the objector was represented by Attorney George B. Caine and the respondent A. Dondo Ware appeared in person. The court ordered reading of the pleadings filed against and in support of the will in question, but before the reading of the objections and the Answer filed, it was brought to the notice of the court, that the testamentary will, the very foundation of this suit, had disappeared from the Clerk's Office, during the incumbency of the late Probate Clerk, Mr. Lewis, the deceased and, consequently, could not be produced. After reading the objections and Answer aforesaid, the court, not having the testamentary will in court, disallowed further reading of any other pleadings as well as argument.

"IT IS HEREBY ADJUDGED, that in view of the facts and circumstances growing out of the loss of the alleged documentary devise, upon which this case is based, the court finds no other alternative but to dismiss this case for want of triable cause of action before it. Costs disallowed ; AND IT IS SO ORDERED."

The respondent excepted to this ruling of His Honor Judge Collins and has brought the matter up here on appeal.

Our statutes have laid down the procedure to be followed in the trial of contested will cases and have made it mandatorily incumbent upon the Probate Court before which the objections are filed to transfer such contested will cases to the Court of Quarter Sessions and Common Pleas (now the circuit court) to be there tried by a jury upon their merits and by it either rejected, set aside, quashed, or approved. We here quote the relevant portion of the statutes thus referred to :

"The Court of Monthly Sessions now established in each of the counties of this Republic . . . and shall be a court of probate; and said probate court shall cause the probate of any will, or testamentary paper that shall possess the features of one;—shall have a record of wills proven in that court. *Contested wills shall be sent to the Court of Quarter Sessions [now the circuit court] to be tried by jury, upon its merits, and by them either rejected, set aside, or quashed, or approved: and if rejected, the same may be removed by appeal to the Supreme Court on petition made by any person aggrieved, according to the laws which relate to appeals; and if found valid, shall be sent back to the probate court to be placed on its records. . . ."* Art. II of the original Judiciary Act, Old Blue Book, p. 117, § 1. (Emphasis added.)

This method of procedure as directed by the statute quoted above has been strictly and continuously stressed by this Court in sundry opinions, the most recent of which is that of the first appeal of the case *Jones v. Dennis,* 6 L.L.R. 220, delivered at the November term, 1937, wherein His Honor Mr. Chief Justice Grimes, speaking for the Court, said *inter alia:*

"The majority of my colleagues are, however, of opinion that there is so far one incurable error in this case. For, inasmuch as when the witnesses to the will having testified in support thereof they were respectively cross-examined by objectors who maintained that said will had not been proven, that raised an issue of fact which the judge was incompetent under the law to decide without a jury because of the statute in force which provides that:

" 'Contested Wills shall be sent to the Court of Quarter Sessions to be tried by jury upon its merits, and by them either rejected, set aside, or quashed, or approved ; and if rejected, the same may be removed by appeal to the Supreme Court. . . .' Art. II of the original Judiciary Act, Old Blue Book, p. 117, § I etc., 2 Rev. Stat. § 1272. "Hence they say, not only would said statute appear to be mandatory so soon as an issue of fact is raised, but the court should have recognized that here was an issue which, in accordance with the statute just cited, it was bound to submit to a jury for its verdict." *Id.* at 227-28.

The Chief Justice who wrote said opinion, however, dissented therein to the proposition that a contested will case in which only questions of law are raised should be tried by jury.

In view of the premises above, this Court is of the opinion that His Honor Judge Collins erred in disposing of a contested will case whilst sitting in probate without a jury, especially where and when the objections as filed raised issues of fact.

The Court is also of the opinion that the reason assigned for the dismissal of the case, the loss of the will, even where Judge Collins had the right independent of a jury to dispose of the legal issues raised in a contested will case, is without legal merit. *Ruling Case* Law supports this position taken by this Court:

"A will, lost or destroyed previous to the testator's death, may, if unrevoked, be established by evidence of its execution and contents, and admitted to probate. But in order to establish a lost or destroyed will its due execution must be proved, and it has sometimes been said that such execution must be proved by the suscribing witnesses. . . . Clear and convincing evidence is usually required as to the existence of a lost will, and to entitle a party to give parol evidence of the contents of a will alleged to have been lost or destroyed, where there is not sufficient evidence to warrant the conclusion of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found, if in existence. . . . It seems . that the fact of loss or destruction may be proved by either circumstantial or direct evidence, and it is for the court to decide in the first instance whether there is sufficient proof of the loss or destruction of, or sufficient inquiry and search for, a will alleged to have been lost or destroyed, to render secondary evidence of its contents admissible.

"Proof that a lost or destroyed will was executed must be accompanied by proof to a reasonable certainty of its contents. When a legal will is accidentally lost or destroyed the establishment of its contents is not the making of a new will, but a restoration merely of that which the testator himself made and left behind him to govern his estate. Therefore on proof that a will has been lost, it is generally held that its contents may be shown by parol in the same way as the contents of any other lost instrument, and it now seems to be settled that although a statute may require wills to be attested by two or more witnesses, the contents of a lost or destroyed will may be proved by a single unimpeachable witness. The best evidence of its contents is a copy or draft of the will if it can be obtained, and this is sufficient when satisfactorily proved. . . ." 28 *Id. Wills,* §§ 384, 386, at 380-82 (1921).

On this same score we also have the following from *Cyclopedia of Law and Procedure:*

"Where a will has not been destroyed by the testator with an intent to revoke, but has been lost or destroyed, either after his death or accidentally or fraudulently during his lifetime, its status as an executed instrument taking effect on his death is not destroyed, nor are the interests of the devisees and legatees affected; but they have the right, both under and independently of statute, to have the will probated or established, in the court having jurisdiction thereof, *upon competent and sufficient proof of its execution, loss, or destruction, and contents, or a part thereof,* the court having power to probate those provisions which are sufficiently proved when they are separable from the remainder and independently enforceable." 40 *Id. Wills* 123637 (1912).

Because of : (1) The authorities quoted above and what has been stated herein as the law governing and controlling the hearing and disposition of contested will cases, and (2) The fact that the lower court was informed by the respondent that, notwithstanding the reported loss of the said will in the office of the former and late probate clerk, P. J. Lewis, each of the parties had obtained a duly certified copy of the said will as offered for probate under the signature of the clerk and the seal of court, which statement was not controverted by the attorney for the objector in the court below and was confirmed by his counsel in this Court; the Court is of the opinion that the ruling of His Honor Judge Collins should be reversed and the case remanded for trial according to the provisions of the statutes of this Republic and the common law herein quoted, and in harmony with the method of procedure directed by this Court in its first opinion in the case of *Jones v. Dennis* hereinbefore cited ; and it is hereby so ordered.

Reversed.