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*Mar. 25
*May 4.

GEORGE FAULKNER, (PLAINTIFF) APPELLANT;

AND

ARCHIBALD FAULKNER, (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Will—Testamentary capacity.

A solicitor prepared a will as instructed by the testator who was fully competent when giving the instructions but when the will so drawn was presented for execution he was not in a condition to sign his name and refused to execute it as a marksman. Three days later, on before he died, it was again presented and read over to him, clause by clause, the solicitor, as each was read, asking if he understood it and he indicating that he did. The will was then executed by the testator making his mark the solicitor guiding his hand as he could not see. In an action to set it aside—

Held, affirming the judgment of the Appellate Division (46 Ont. L.R. 69) that the evidence of the solicitor and of the physician in attendance established the mental capacity of the testator to follow the reading of the will and to realize that his instructions had been carried out.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of the trial judge (2) who set aside the will of Hugh Faulkner.

The head-note states the material facts in this case.

Tilley K.C. for the appellant.

Dewart K.C. and *N. S. Macdonnell* for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 46 Ont. L.R. 69. (2) 44 Ont. L.R. 634.

THE CHIEF JUSTICE.—At the close of the argument in this case which was quite elaborate and dealt with every phase of the evidence bearing upon the capacity of the testator to make the will in question alike when the instructions were given for its making on the Tuesday, and again on the Friday when it was executed, I was of the opinion that the appellant had utterly failed to establish the testator's incapacity.

In deference, however, to the opinion of the trial judge to the contrary effect, I have read and carefully considered all of the evidence called to our attention, with the result that I am more strongly confirmed in my opinion.

The Appellate Division which set aside the judgment of the trial judge and affirmed the validity of the will speaks of Mr. Anderson, the solicitor who took his instructions from the testator and drew the will, as a "careful and competent solicitor." He, it appears to me, took great pains to make sure that the testator fully understood the disposition he was making of his property, reading each paragraph over slowly and carefully to him and satisfying himself that the testator clearly understood them. Then we have the evidence of Dr. Forrest, who attended the deceased while he was in hospital and speaks of his mental and physical condition when the instructions for the making of the will were given and when it was read over to the testator, clause by clause, and executed by him.

I agree fully with the judgment of the Appellate Division, delivered by Maclaren J.A., allowing the appeal from the judgment of the trial judge and affirming the validity of the will.

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The Chief Justice.

The decision of the Privy Council in the case of *Perera* v. *Perera* (1), is relied upon in the judgment appealed from and is, I think, peculiarly applicable to the case before us. The head-note to that case reads that

where a testator is of sound mind when he gives instructions for a will but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, held, he must be deemed to be of sound mind when it is executed.

Lord Macnaghten in delivering the judgment of the Judicial Committee is reported at page 361, as follows:—

The learned counsel for the appellant did not contend that the witnesses in support of the will were acting in conspiracy or saying what they knew to be false. He said that the will may have been, and probably was, read over to the testator, but that there was nothing to shew that he followed the reading of the will or understood its meaning He adopted the argument of Laurie J., to the effect that it was not enough to prove that a testator was of sound mind when he gave instructions for his will, and that the instrument drawn in pursuance of those instructions was signed by him as his will, if it is not shewn that he was capable of understanding its provisions at the time of signature. That, however, is not the law. In *Parker* v. *Felgate*, (2), Sir James Hannen lays down the law thus: "If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.

Their Lordships think that the ruling of Sir James Hannen is good law and good sense. They could not, therefore, hold the will invalid even if they were persuaded that Perera was unable to follow all the provisions of his will when it was read over to him by Goonera-tne's clerk. But they desire to add that they see no reason to doubt or qualify the testimony of the witnesses who agreed in saying that the testator was of sound mind when the will was executed.

I would dismiss the appeal with costs.

(1) [1901] A.C. 354. (2) 8 P.D. 171.

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Idington J.

IDINGTON J.—The evidence of the solicitor who drew the will in question is, to my mind, conclusive that the testator was, at the time of giving instructions therefor, possessed of testamentary capacity and sufficiently so to give said instructions and to understand the will drawn in accord therewith as read to him, when he assented thereto.

The solicitor, although he had become acquainted with him in the course of serving him professionally, knew nothing of his family relations, save and except what he got from himself on that occasion.

The will which resulted from the instructions so given by the testator, is what, under all the circumstances in question, including the destruction of a previous will, one might not unreasonably expect.

It seems to fit the testator's peculiar circumstances and purposes in a way that would have been impossible had he been in the sort of comatose state some would seem to be inclined to lead us to believe.

The refusal to make his mark on Tuesday, when too feeble to write, shews the man and the mind, in a way to indicate he knew what he was about—and declined to go down as a mere marksman, though too feeble to be quite sure of holding his pen to the end of writing out his signature.

The repeated categorical assent (given on the following Friday when the will was executed) to each clause therein indicates that degree of intelligence and understanding on the part of the testator which has been upheld in many cases as sufficient for the mere execution of a will prepared according to instructions given when testamentary capacity had existed as I find herein.

I therefore think the appeal should be dismissed with costs.

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Anglin J.

ANGLIN J.—Without discrediting and in large part rejecting the testimony of Mr. Anderson, the solicitor who prepared the impeached will, it is, in my opinion, not possible to set it aside. That I am certainly not prepared to do.

The testamentary capacity of the testator on the Tuesday, when instructions for the will were given and it was drafted, is in my opinion well established by the evidence considered as a whole. Although Dr. Forrest undoubtedly left himself open to some criticism as a witness, I cannot regard his testimony as entirely undeserving of credit.

While the condition of the testator on the Friday, when the will was executed, is perhaps more questionable, the weight of the evidence, in my opinion, is that he then had the degree of capacity required under such authorities as *Parker* v. *Felgate*, (1); *Perera* v. *Perera* (2), and *Kaulbach* v. *Archbold* (3).

I would dismiss the appeal with costs.

BRODEUR J.—I concur with my brother Mignault.

MIGNAULT J.—After carefully reading the evidence in this case I am satisfied that the testator, Hugh Faulkner, had sufficient testamentary capacity on the afternoon of Tuesday, January 29th, 1918, after his admission to the hospital, to give instructions for his will. Outside of his brother, the respondent, several independent witnesses saw him on that Tuesday, and state that he was perfectly rational, although severely ill, and with assistance he walked down the stairs and steps of his lodging house, and went to the hospital in a taxi. Shortly afterwards, Mr. Anderson, the solicitor who prepared the will, arrived at the hospital and received the testator's instructions, and unless Mr.

(1) 8 P.D. 171, 174. (2) [1901] A.C. 354, 361.
(3) 31 Can. S.C.R. 387, 391.

Anderson's testimony is rejected as unreliable, the testator fully understood the nature of the disposition which he was making of his property. The will was written out by Mr. Anderson then and there and read over to the testator, but when the time came to sign it, Hugh Faulkner was in a sleepy or drowsy condition, and after a couple of attempts, Mr. Anderson and the nurse thought they had better wait and have him sign another time. Had he then signed the will, I do not think that on the evidence it could be successfully contended that he did not have sufficient testamentary capacity.

Mr. Anderson was called early on Friday, he says, by the superintendent of the hospital, Miss Walkdem, to have the will signed, and it was then that the testator, his hand being aided by Mr. Anderson, for the disease had blinded him, put his mark to the will before three witnesses, including Dr. Forrest, his medical attendant, for whose arrival Mr. Anderson had very prudently waited before proceeding with the execution of the will. The question then was: Could the testator think thus far

> I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.

(Per Sir James Hannen in *Parker* v. *Felgate* (1), approved by the Judicial Committee of the Privy Council in *Perera* v. *Perera* (2). In fact this test is more than satisfied because Mr. Anderson states:—

> I said to him "Mr. Faulkner, do you know who is speaking? Anderson is speaking." He said: "Yes, oh yes." "Are you willing to have your will signed this morning?" He said "Yes." Then I said "You remember the other day you did not sign your will, you would not make your mark?" He said "Yes." I said "Are you willing to make your mark this morning, I am afraid you cannot

(1) 8 P.D. 171. (2) [1901] A.C. 354.

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see." He said "Yes." "Well," I said, "the will is the same will that I drew the other day, only we will have to change the date of it to this morning." I think I changed the date right there. Then I read it over to him. I read it clause by clause, and after each clause—Q.—Just a moment. In reading it over to him, what was your judgment as to whether he heard and understood what you were reading? A. He certainly heard and understood, to my mind, what was said.

Mr. Anderson adds that he went back to the clause concerning the appellant, to whom $1.00 only was bequeathed, and asked the testator if he wished to change this legacy, and he answered "No."

As I have said, it would be necessary to reject Mr. Anderson's testimony to decide that the will was not properly executed by a competent testator.

I have considered, of course, the nurses' evidence that Hugh Faulkner, while at the hospital, was unconscious all the time, apparently because they could not get him to speak to them. The expert medical testimony is not sufficiently strong to my mind, characterized as it really is by many qualifications, to discredit the direct evidence of testamentary capacity. The testator, it is clear, was not delirious at any time, he was generally in a state of stupor, from which, however, he could be and evidently was roused, sufficiently, without doubt, to give his instructions for his will on the Tuesday, and on the Friday sufficiently to know that he was executing the will prepared according to these instructions.

The Appellate Division under these circumstances reversed the judgment of the learned trial judge, and after reading the evidence, I would not feel justified in disturbing its judgment.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Irwin, Hales & Irwin.*

Solicitors for the respondent: *Anderson & McMaster.*