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RE THE ESTATE OF CATHERINE AGNES MARTIN, DECEASED. STEWART MacGREGOR ..... APPELLANT;

*Mar. 25
June 24

AND

DAVID STEWART RYAN, surviving Executor of the Estate of Catherine Agnes Martin and Executor of the Last Will and Testament of Maud Ryan ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Validity—Allegation that testatrix lacked testamentary capacity—Alternative allegation of undue influence—Whether suspicion raised by circumstances surrounding execution of will dispelled—Onus of proof.

The validity of the will of the testatrix, the effect of which was to revoke a prior will, was put in issue by the appellant filing a caveat alleging that the deceased was at the time of her death and at the time of making the will without testamentary capacity or, in the alternative, that she was procured to make her last will by undue influence. By the judgment of the Surrogate Court it was found that the will was duly executed, that the testatrix had testamentary capacity and the allegation of undue influence was dismissed. An appeal from that judgment was dismissed by the Court of Appeal. On the appeal to this Court, the appellant's main contention was that in dismissing the allegation of undue influence on the ground that the caveator had not discharged the burden of proving it, the trial judge failed to give due consideration to the heavy burden resting on the proponents of the will to prove affirmatively the righteousness of the transaction having regard to the fact that the executor R was instrumental in the preparation and execution of the will of a woman over 90 and that he was one of the executors of that will while his wife, who was herself over 80 years of age, was the sole beneficiary.

Held (Judson J dissenting): The appeal should be dismissed.

Per Cartwright, Martland, Ritchie and Spence: There was ample evidence to support the trial judge's finding of fact, confirmed by the Court of Appeal, that the testatrix had testamentary capacity. Such finding should not be disturbed.

The finding of the Courts below that the burden of proving that there was undue influence had not been discharged was valid. But there was a distinction between producing sufficient evidence to satisfy the Court that a suspicion raised by the circumstances surrounding the execution of the will had been dispelled and producing the evidence necessary to establish an allegation of undue influence. The former task lay upon the proponents of the will, the latter was a burden assumed by those who attacked the will.

The evidence supported the finding that this will was the free act of a competent testatrix and having regard to the fact that there were con-

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current findings of two Courts to the effect that there was no "undue influence" which were based on a careful and accurate review of the evidence called for the attacker as well as for the proponents of the will, there was no room for the suggestion that the Court was not "vigilant and jealous" in examining the evidence so as to satisfy itself that any suspicion to which the circumstances might give rise was dispelled.

Barry v. Butlin (1838), 2 Moo. P.C.C. 480; *Fulton v. Andrew* (1875), L.R. 7 H.L. 448; *Riach v. Ferris*, [1934] S.C.R. 725; *Tyrrell v. Painton*, [1894] P. 151; *Leger et al. v. Poirier*, [1944] S.C.R. 152; *Craig v. Lamoureux*, [1920] A.C. 349; *Wintle v. Nye*, [1959] 1 All E.R. 552; *Paske v. Ollat* (1815), 2 Phillim. 323, referred to.

Per Judson J., *dissenting:* The conclusion of the Surrogate Court Judge and the evidence on which it was based did not indicate anything more than that the testatrix was able to understand questions put to her as to ordinary and usual matters. There was no basis for any finding that she had testamentary capacity in the sense ascribed in *Leger et al. v. Poirier, supra.*

The suspicion concerning this will as a valid testamentary document permeated the whole case and could not be removed by a judicial preference for the evidence given by group A witnesses as against that of group B.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Fingland J. Appeal dismissed, Judson J. dissenting.

W. B. Williston, Q.C., and *J. Sopinka*, for the appellant.

J. D. Arnup, Q.C., for the respondent.

D. S. Murphy, for D. S. Ryan, surviving executor.

The judgment of Cartwright, Martland, Ritchie and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of the Surrogate Judge for the County of Huron whereby that judge had ordered that the last will of the late Catherine Agnes Martin was duly executed, that the testatrix possessed testamentary capacity and that an allegation of undue influence made by the present appellant, Dr. MacGregor, the nephew of the testatrix, was to be dismissed.

The validity of the will in question was put in issue by Dr. MacGregor filing a caveat alleging that "the deceased was at the time of her death and at the time of making the will dated on or about the 13th of January 1961 without

testamentary capacity or, in the alternative, the said Stewart Alan MacGregor has reason to fear and does fear that the said Catherine Agnes Martin was procured to make her last will and testament dated on or about the 13th of January 1961 by undue influence".

By order of the acting Surrogate Judge, it was directed that the following were the issues to be tried:

1. David Stewart Ryan and Maud Ryan affirm and Stewart MacGregor denies that the will was duly executed by Catherine Agnes Martin;

2. David Stewart Ryan and Maud Ryan affirm and Stewart MacGregor denies that Catherine Agnes Martin possessed testamentary capacity;

3. Stewart MacGregor affirms and David Stewart Ryan and Maud Ryan deny that the making of the will was procured by undue influence.

The findings of the learned trial judge as to execution, testamentary capacity and undue influence are findings of fact based on a careful review of the evidence and a firm assessment as to the credibility of all the important witnesses. These findings were affirmed by the Court of Appeal and I am not prepared to reverse them or to substitute my assessment for that of the trial judge as to the character, motives, ability and integrity of the various witnesses who appeared before him.

I did not understand counsel for the appellant to question the fact that the will was duly executed, nor did I understand him to take direct issue with the finding as to the testatrix' capacity. His main contention as I understood it was that in dismissing the allegation of undue influence on the ground that the caveator had not discharged the burden of proving it, the learned trial judge failed to give due consideration to the heavy burden resting on the proponents of the will to prove affirmatively the righteousness of the transaction having regard to the fact that Mr. Ryan was instrumental in the preparation and execution of the will of a woman over 90 and that he was one of the executors of that will while his wife, who was herself over 80 years of age, was the sole beneficiary.

The principle which is here invoked on behalf of the appellant is most frequently referred to in the language in

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which it was stated by Baron Parke in *Barry v. Butlin*[1], where his Lordship formulated the following rules:

(1) The onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator, and

(2) If a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

The second of these rules was stated with added force by Lord Hatherley in *Fulton v. Andrew*[2], where he referred to the nature of the onus lying upon the proponents of a will under such circumstances in the following terms:

But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown on them the onus of shewing the righteousness of the transaction.

The same rule has been restated in a number of cases, most of which are referred to in the judgment of Crocket J. in *Riach v. Ferris*[3], in which case Sir Lyman Duff expressly adopted and approved the principle as stated by Davey L.J. in *Tyrrell v. Painton*[4], where it is stated in this form:

. . . the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed.

If a will has been shown to have been duly executed after having been read over to or by a testator who appears to understand it, then it will generally be presumed that he had testamentary capacity at the time of its execution but if, in the course of proving the will, it becomes apparent that there are circumstances raising a well-grounded suspicion as to whether the document indeed expresses the true will of the deceased, then a heavy burden lies on the Court to look beyond the presumption created by compliance with these formalities and be satisfied that the will was the free act of a testator who at the time had a "disposing mind and memory" in the sense defined by Rand J. in *Leger et al. v. Poirier*[5], where he said:

[1] (1838), 2 Moo. P.C.C. 480.
[2] (1875), L.R. 7 H.L. 448 at 471-2
[3] [1934] S.C.R. 725.
[4] [1894] P. 151 at 159-60.
[5] [1944] S.C.R. 152 at 161.

A 'disposing mind and memory' is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; . . .

At the time when the present will was executed the testatrix, who was then 91, had been in the hospital for sixteen days suffering from a combination of infirmities common to a person of her advanced years. She was however, according to the evidence of the nurses, which was believed by the trial judge, alert in her mind, tidy in her habits, determined in whatever course of action she wished to take and quite aware of what she was doing.

In 1948 Miss Martin and her sister Maud started to live together but in 1951, when she was 78 years of age, Maud married a Mr. David Ryan with whom she later purchased a house in Seaforth where the testatrix came to live in 1953. On the afternoon of January 13, 1961, David Ryan came to visit the testatrix in hospital and upon his arrival her first remark to him appears to have been:

I want to change my will and I want to leave everything to Maud and I want you to take care of things for me.

to which Mr. Ryan is said to have replied that he would look after it and that he would get Mr. Sillery for her. Mr. Sillery is a local lawyer who was well known to the testatrix and it is clear that Mr. Ryan went directly from the hospital to Mr. Sillery's office where he said:

Catherine wants you to go up to the hospital and see you sometime. She wants to make out a new will. She said she wanted to be cremated and she wants to leave it all to her sister Maud Ryan.

and he also said she:

. . . wants Maud and I to be executors.

Mr. Sillery at once procured a will form and had a will typed by his wife which incorporated these instructions. Taking the will with them, Mr. Sillery and Mr. Ryan then went back to the hospital. It is perhaps well to point out that the somewhat undue haste in carrying out the testatrix' instructions is attributable to Mr. Sillery and not to Mr. Ryan. In the course of his evidence Mr. Sillery was asked concerning the drawing and execution of the will:

Q. Why did you do this immediately, when she used the words she wanted to see you one of these days—Any reason why you did it right then?

A. I never like to see anything such as instructions to draw a Will from a hospital not carried out as efficiently and effectively as possible.

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In his evidence Mr. Sillery describes the conversation which he then had with the testatrix as follows:

Q. In any event, when you did arrive, who spoke first?

A. I said to Miss Martin 'I understood you want to do some business with me.' So I said 'How are you feeling?' And she said, pointing to her head, 'All right up here.' Then down to her abdomen, 'but not down here.'

Q. You said 'How are you feeling?' She said 'All right up here, but not down here?'

A. That's right.

Q. What is the next conversation?

A. She said 'I want to change my Will.' I said 'Mr. Ryan gave me the instructions, so I prepared one.' She said 'I have changed my mind about that cremation; strike that one out.'

Q. You said you had prepared one. Did you read it or show it to her?

A. I put it right in front of her, and then read it to her.

Q. You read it to her, and you said you put it right in front of her and then read it to her. Did she have an opportunity or did she to your notice also read the will?

A. Yes, sir.

JUDGE FINGLAND: But more especially, did she read it or did she have the opportunity to read it?

A. I presume she would read it as I was going along, because she got to the cremation clause and she said she changed her mind about that, cancel that, strike that out.

TO MR. MURPHY: Q. You don't know for sure then whether she actually read the Will?

A. No, no.

Q. When you read it to her, where was the Will in relation to where she was?

A. Immediately in front of her on the bed.

Q. In other words, while you were reading, did she have the opportunity to read it with you?

A. Yes, she even asked to have the light turned on.

JUDGE FINGLAND: She asked the nurse to have the light turned on?

A. Yes.

TO MR. MURPHY: Q. In any event, you finished reading it. I think you said she wanted something changed?

A. *She said that she was leaving Sandy out of the Will.*

Q. You said she said 'I have changed my mind about this cremation?'

A. Yes.

Q. I show you the Will. There is apparently a line struck out on Page 1, paragraph 1. Can you tell me what paragraph 1 said before the alteration?

A. It starts out the figure 1 and a period, 'I direct that my body shall be cremated.' There's a name written over it 'Catherine'.

Q. When was this change made in relation to when the Will was signed, before or after?

A. Prior to the signing of the Will.

Mr. Sillery says that Ryan, who was present throughout this conversation and the execution of the will took no part in either.

When the will had been executed it was duly witnessed by Mr. Sillery and the nurse in attendance, both of whom initialled the change which the testatrix had made. The effect of this will was to revoke a prior will of May 21, 1951, by the terms of which the residue of the estate was given to the Toronto General Trust Corporation as sole executor and trustee upon trust to pay the income to the sister Maud during her lifetime with power to encroach on the capital for her care and maintenance whenever requested to do so by her and provided the trustees considered it necessary and desirable and on the sister's death to transfer and make over the whole of the residue of the estate to Dr. Stewart A. MacGregor. Dr. MacGregor was a nephew of the testatrix to the cost of whose education she had contributed and to whom she always referred as Sandy. By January 1961 Dr. MacGregor was a successful dentist and, agreeing as I do with the learned trial judge in accepting the evidence of Mr. Sillery, I am satisfied that Miss Martin was fully aware of the fact that the effect of the will in question was "to cut Sandy out" and to leave her estate absolutely to Maud because "she had lived with her". This appears to me to be made doubly clear in the following excerpt from Mr. Sillery's cross-examination:

Q. And what was said about Dr. —

A. 'I'm going to cut Sandy —' She always called him Sandy — 'I'm going to cut Sandy out of this Will.'

Q. Dr. MacGregor or Sandy that you are referring to, he's the Caveator in these proceedings?

A. Yes, I presume so.

Q. Did she give any reason for cutting Dr. MacGregor out?

A. No, she said she was going to leave it to her only sister.

Q. That is the only reason she gave?

A. That's the only reason— 'I have lived with her.'

Mr. Sillery does not appear to have asked the testatrix anything about the extent of her estate or the members of her family for whom she might wish to provide, nor did he give her any advice respecting succession duties, but he does testify to having had the following conversation respecting the revocation of her former will:

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Q. So then after the Will was signed was there any further conversation with Miss Martin?

A. Yes. She did say 'I have another Will in the Toronto General Trust.'

Q. She said she had another will in the Toronto General Trust?

A. 'I want to get that.' And I advised her there was a revocation clause in the Will which would revoke the previous Will.

It was contended on behalf of the appellant that the instructions which David Ryan gave to Mr. Sillery concerning cremation indicated that Mr. Ryan had discussed the making of a new will and its terms with Miss Martin before coming to the hospital on January 13 as there is no evidence of that matter having been discussed between them in the hospital. This was cited in support of the contention that the will was the product of Ryan's advice and influence, but I do not think that it supports any such inference as Miss Martin had apparently discussed the question of cremation informally with others, notably Mr. Sillery, at an earlier date.

It is apparent from the evidence of Anny Coyne, who was a witness to the will, that the testatrix had perfectly rational thoughts on the subject of cremation and valid reasons for deciding not to be cremated. In this regard Miss Coyne's evidence is as follows:

Q. Now you have already described to us what occurred while the Will was being signed. What is your opinion as to whether Miss Martin knew what she was doing when she signed that Will? You were there. What was your impression?

A. I'd say yes, she knew what she was doing. She knew what she wanted to do and she was doing it . . .

Q. Would you have witnessed this Will if you had any doubt about that?

A. No.

Q. Now after Mr. Sillery and Mr. Ryan left did you have any conversation with Miss Martin?

A. Yes.

Q. What did you discuss?

A. Immediately after, she brought up the subject of cremation and anointing.

Q. What did she say about cremation?

A. She said if she was in Montreal she would be cremated. As I took it, she would request that she be cremated. But as she was living away far and it wasn't readily available that she wasn't just going to bother about it.

It was contended also that the fact that the family doctor had prepared a certificate dated January 13, which he later

repudiated, to the effect that he had found the testatrix that day to be in sound mind and aware of her own affairs, was a highly suspicious circumstance because the certificate was in fact not made out until January 17 and the doctor had made no such examination on the 13th of that month. It is true that such a certificate was requested by Mr. Ryan but he was no party to it being falsely dated and it is clear that it was sought by him at the suggestion of Mr. Sillery. The trial judge expressly rejected this doctor's evidence saying "I place no credibility on the doctor's testimony".

The question of whether or not the testatrix had a "disposing mind and memory" is a question of fact and the issue as to testamentary capacity stated in the order of the acting Surrogate Judge places the burden of proof in this regard on the executors. This question has been decided in the affirmative by the learned trial judge and has been confirmed by the Court of Appeal and the rule established in this Court by a long series of cases is that such a concurrent finding should not be disturbed unless it cannot be supported by the evidence. In my view there is ample evidence upon which to base this finding.

As to the question of whether the execution of this will was the "free act" of the testatrix, the learned trial judge and the Court of Appeal have both found that there was no undue influence. This is also a question of fact the burden of proving which rested on the caveator. I am equally satisfied as to the validity of the finding that this burden has not been discharged, but as I have stated, what is put forward by appellant's counsel is that even if this be so, the conclusion of the trial judge is still open to objection on the ground that he misdirected himself and failed to take into account the burden resting on the proponents of the will to dispel the suspicion created by the fact that Mr. Ryan was instrumental in obtaining it.

There is a distinction to be borne in mind between producing sufficient evidence to satisfy the Court that a suspicion raised by the circumstances surrounding the execution of the will have been dispelled and producing the evidence necessary to establish an allegation of undue influence. The former task lies upon the proponents of the will, the latter is a burden assumed by those who are attacking the will and can only be discharged by proof of the existence

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of an influence acting upon the mind of the testator of the kind described by Viscount Haldane in *Craig v. Lamoureux*[1], at p. 357 where he says:

> Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.

The distinction to which I have referred is well described by Crocket J. in *Riach v. Ferris, supra,* at p. 736 where he says:

> Assuming that in the case in behalf of a plaintiff seeking to establish the validity of a will, there may be such circumstances of apparent coercion or fraud disclosed as, coupled with the testator's physical and mental debility, raise a well-grounded suspicion in the mind of the court that the testator did not really comprehend what he was doing when he executed the will, and that in such a case it is for the plaintiff to remove that suspicion by affirmatively proving that the testator did in truth appreciate the effect of what he was doing, there is no question that, once this latter fact is proved, the onus entirely lies upon those impugning the will to affirmatively prove that its execution was procured by the practice of some undue influence or fraud upon the testator.

In the case of *Barry v. Butlin, supra,* and in most of the cases which have followed it, including the case of *Wintle v. Nye*[2], upon which much reliance was placed by the appellant, the circumstances giving rise to suspicion were that a person who benefited under the will in question had actually prepared the document, but it is apparent from the decision in *Tyrrell v. Painton, supra,* that any well-grounded suspicion is sufficient to put the Court on its guard to scrutinize the circumstances so as to ensure that it has been put at rest before deciding in favour of the will.

Counsel for the appellant contended that in all cases where the circumstances surrounding the preparation or execution of the will give rise to a suspicion, the burden lying on the proponents of that will to show that it was the testator's free act is an unusually heavy one, but it would be a mistake, in my view, to treat all such cases as if they called for the meeting of some standard of proof of a more than ordinarily onerous character. The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case. It is true that there are expressions in some of the

[1] [1920] A.C. 349. [2] [1959] 1 All E.R. 552.

judgments to which I have referred which are capable of being construed as meaning that a particularly heavy burden lies upon the proponents in all such cases, but in my view nothing which has been said should be taken to have established the requirements of a higher degree of proof than that referred to by Sir John Nicholl in *Paske v. Ollat*[1], where he said at p. 324:

> . . . the law of England requires, in all instances of the sort, that the proof should be clear and decisive;—the balance must not be left in equilibrio; the proof must go not merely to the act of signing, but to the knowledege of the contents of the paper. In ordinary cases this is not necessary; *but where the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person;*—propriety and delicacy would infer that he should not conduct the transaction; . . .

The italics are my own.

This is not a case in which the will was prepared by a beneficiary and it appears from the evidence that the first suggestion as to its preparation was made by the testatrix herself, but the age of the testatrix, the haste with which the instructions were carried out, the absence of Mr. Ryan from the witness stand and the failure of Mr. Sillery to discuss the changes made from the former will or to give any advice concerning them, are circumstances which standing alone might well constitute grounds for a suspicion that "undue influence" had been exercised, and there can be no doubt that Mr. Ryan was an "interested person". I am, however, of opinion that the evidence supports the finding that this will was the free act of a competent testatrix and having regard to the fact that there are concurrent findings of two Courts to the effect that there was no "undue influence" which are based on a careful and accurate review of the evidence called for the attacker as well as for the proponents of the will, I am unable to see that there is any room for the suggestion that the Court was not "vigilant and jealous" in examining the evidence so as to satisfy itself that any suspicion to which the circumstances might give rise was dispelled.

I would accordingly dismiss this appeal and I direct that the costs of the surviving executor as between solicitor and client be paid out of the estate. In view of all the circumstances, I would also direct that the costs of the caveator on a party and party basis be paid from the same fund.

[1] (1815), 2 Phillim. 323.

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JUDSON J. (*dissenting*):—My opinion is that this will should not have been admitted to probate. The principle on which the Surrogate Court should have acted in this case is not in doubt and is authoritatively stated in a judgment of this Court in *Riach v. Ferris*[1]. There was failure in that Court to examine the evidence in the light of that case. The Court of Appeal, however, corrected the omission and decided that the burden of establishing testamentary capacity when the circumstances were suspicious had been met, and, further, that there was no evidence of undue influence. Consequently, the judgment of the Surrogate Court was affirmed.

Counsel for the appellant in this Court did not argue undue influence but confined himself to the one point that an examination of the evidence could not indicate that the suspicion had been removed.

I take the principle to be applied from the concurring judgment of Duff C. J. in *Riach v. Ferris:*

> I entirely agree in the conclusions of my brother Crocket as well as in the reasons by which those conclusions are supported. My purpose in adding what I am now saying is merely to note that the law is well established and well known and that, as applicable to this appeal, it is best, as well as completely, stated in this passage from the judgment of Lord Davey (then Davey L.J.) in his judgment in *Tyrrell v. Painton* (L.R. [1894] P. 151, at 159-160):
>
> > ". . . the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed."

I do not think that the conclusion of the Surrogate Court Judge and the evidence on which it was based indicates anything more than this, that the testatrix was able to understand questions put to her as to ordinary and usual matters. To me there is no basis for any finding that she had testamentary capacity in the sense ascribed in *Leger et al. v. Poirier*[2]:

> But there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; this has been recognized in many cases.

* * *

[1] [1934] S.C.R. 725. [2] [1944] S.C.R. 152.

Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this I am satisfied was not present here.

I turn now to a consideration of the suspicious circumstances on which the appellant relies for the invalidation of this will. The testatrix, Catherine Martin, was born on February 2, 1870. She made this will on January 13, 1961, when she was in hospital during her last illness. She died on February 4, 1961. The will came into being as a result of instructions given by her to her brother-in-law, David Ryan. According to Mr. Ryan's report to a solicitor, she wanted to leave the whole estate to her sister Maud, who was Ryan's wife. Ryan himself did not give evidence. We have Ryan's instructions only through the mouth of the solicitor. The solicitor prepared the will immediately without first consulting Miss Martin. He then took it to the hospital, accompanied by Ryan, and had it executed. He then delivered the will to Ryan. Ryan then obtained a false certificate from the doctor who was in attendance on Miss Martin to the effect that she knew what she was doing. This certificate was dated January 13, 1961, the date of the execution of the will. It was, in fact, signed four days later, on January 17. It is in these terms:

Jan. 13/61

To Whom it may Concern:

This is to certify that I have this day examined Miss Catherine A. Martin and find her to be in sound mind and aware of her own affairs.

The testatrix, her sister Maud and her sister's husband had been living together in Seaforth since the year 1953. David Ryan was a second husband of Maud Ryan. They were married in 1951. Maud Ryan did not survive her sister very long. She died on December 10, 1963, in her eighties. Her husband was, at the date of the trial, also in his eighties.

There is nothing in any of the evidence to explain a sudden, precipitate revocation of a previous will which had been twice confirmed by the testatrix when she was undoubtedly of sound mind. This will had been executed in 1951 and left to the sister a life interest with power to the trustees to encroach on capital in case of need. It was a rational will and made adequate provision for the sister. If in 1951 she had decided to leave everything to the sister

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absolutely, there could have been no issue. I recognize that the sister was a natural object of the bounty of the testatrix, perhaps more so than Dr. MacGregor. However, in 1951, Dr. MacGregor had been left the residue after the life interest of the sister and after any necessary encroachment. We do not know why, three weeks before her death, the testatrix changed her mind and departed from these well-thought-out plans for her sister.

The circumstances in which the will was prepared and executed give rise to suspicion. The solicitor took his instructions from an intermediary. He immediately prepared a will according to these instructions and took it for execution. He made no effort to ascertain by independent inquiry from the testatrix what her instructions were. The extent of these instructions depends entirely on what Ryan told the solicitor. This solicitor cannot be regarded as an independent adviser chosen by the testatrix. Ryan was in the room when the will was executed. The solicitor did no more than read over the will to her and made the change when she said that she had decided against being cremated. If the solicitor decided to draw the will on Ryan's instructions, he should have interviewed Miss Martin in the absence of Ryan. He should have made some independent attempt to ascertain testamentary capacity, her reasons for the change, her knowledge and appreciation of the extent of her property, and of her former will, and why she was cutting out Dr. MacGregor, if he knew that. What a prudent, careful and competent solicitor would do in circumstances such as these is fully discussed in what I regard as the leading case in Ontario on this subject, *Murphy v. Lamphier*[1].

The obtaining of the medical certificate is significant. It was falsely dated. The doctor said that he gave it to Ryan, who was also his patient, because he did not wish to upset him. Later, when there was a prospect of litigation, he told Ryan that the certificate was in error and that he would not stand behind it. The doctor's evidence at the trial was that the testatrix was often confused, that she could not answer questions correctly and was mixed up as to day and night.

[1] (1914), 31 O.L.R. 287 (Boyd C.), affirmed (1914), 32 O.L.R. 19.

The irresistible conclusion from his evidence, if it is to be accepted, is that the testatrix was not in complete possession of her faculties and that there was grave doubt about her mental capacity. The learned trial judge chose to disregard this evidence in its entirety, but the fact remains that he was the one best qualified to know. He was correcting his error and, in my opinion, it was no solution to the difficult problem before the learned trial judge to disregard entirely the only professional evidence on the subject.

There was other evidence confirming the doctor's evidence, as well as evidence against it. The evidence against it is that of two private nurses, the hospital superintendent and a minister who thought that the testatrix knew what she was doing. I do not know that any of this evidence touches on testamentary capacity. A night nurse thought that the testatrix was confused and talked irrationally. On January 14, the day after the will-making, the appellant and his wife visited the testatrix when they found her lying with her mouth open, staring at the ceiling, making a gurgling noise, unable to recognize them and unable to conduct any conversation. Another witness, who became a fellow patient in the same room with the testatrix on January 14, said that this was the condition in which she found the testatrix during her stay in the hospital.

Finally, it was of the utmost significance in this case that Ryan did not give evidence. We know nothing of his instructions beyond what he repeated to the solicitor and what the solicitor reported back to the testatrix. Ryan's evidence was absolutely essential to any proper appreciation of what had gone on between him and the testatrix leading up to the making of this will. It is true that he was an old man at the time of the trial, a year or two older than he was when the will was made, but he was in Court on the opening of the trial. He was present when some of the evidence was given. He was a surviving executor of the will and yet he did not give evidence. How can it be said in those circumstances that the suspicion concerning this will as a valid testamentary document has been removed? The suspicion permeates the whole case and cannot be removed by a judicial prefer-

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ence for the evidence given by group A witnesses as against that of group B.

I would allow the appeal and dismiss the application for probate made in the Surrogate Court of the County of Huron. The appellant should have his costs throughout. I would make no order for costs in favour of the executors of the will offered for probate.

Appeal dismissed, JUDSON J. *dissenting.*

Solicitors for the appellant: Fasken, Calvin, Mackenzie, Williston & Swackhamer, Toronto.

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Solicitors for the respondent, D. S. Ryan, executor of Maud Ryan: Anderson, Neilson, Ehgoetz, Bell, Dilks & Misener, Stratford.