1946
*Apr. 25, 26, 29.
*Oct. 1.

KATHLEEN O'NEIL AND OTHERS (DEFENDANTS) ..... } APPELLANTS,

AND

THE ROYAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF E. AMELIA BROWN (PLAINTIFF)..... } RESPONDENT;

AND

ELLEN McCLURE AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Will—Testamentary capacity—Partial unsoundness of mind—Mental delusions or hallucinations—Effect on disposition of property.

At a trial as to the validity of a will, it appeared that the husband of the testatrix had predeceased her in 1919, leaving him surviving his widow and a sister who in turn died in 1927. By the terms of his will the husband left the testatrix a legacy of $2,000, plus an annuity of $150 per month, with a general power of appointment by will over the residue of his estate. The husband's will contained also a request that his wife should make a will leaving the entire estate to his sister for her life and after her death to his grand nieces (the respondents McClure). In 1920, the testatrix made a will giving substantial effect to her husband's wishes. She later became dissatisfied with the terms of her husband's will and in 1927 executed a new will, leaving, by the exercise of her power of appointment, the estate of her late husband to her own niece and nephew (the appellants Sutcliffe). In July, 1929, the testatrix was admitted as a voluntary patient into a sanitarium and remained in the institution until her death in 1943. In November, 1929, the testatrix executed a third will leaving her own estate and the estate of her husband to the latter's nieces (McClure); and it is the validity of this last will which is in question. The testatrix was subject to hallucinations and delusions which "at times" disturbed her, but "were never very fixed at any time," and, amongst them, that she was hearing voices from the grave (presumably her husband's), that she was smelling either gas or dusting powder in her room and that she was tasting poison in her food. But her general rationality was conceded: she was able to converse rationally, had a good memory and was conversant with her husband's estate, her own assets and the contents of the two first wills. The trial judge refused to grant probate basing his conclusions very largely upon the evidence of a medical expert that the testatrix was not capable of managing her own affairs and did not possess testamentary capacity at the time the will was made. The appellate court, reversing that judgment, held that the testimony of experts should not outweigh the testimony of eye-witnesses who had opportunities for observation and knowledge of the testatrix and that the instrument propounded was the last will of a free and capable testator.

*PRESENT: Kerwin, Hudson, Rand, Kellock and Estey JJ.

Held, affirming the judgment appealed from ([1945] 3 W.W.R. 641), that the evidence showed the testatrix to have been competent to make the impugned will and that it must be regarded as valid.

Delusions and hallucinations may, or may not, have influenced the will of a testator in disposing of his property: it is a question of fact to be determined by the jury or the court after the contents of the will and all the surrounding circumstances have been considered.

The proved hallucinations and delusions in this case did not, upon the evidence, influence or direct the motives and reasons that led the testatrix to the making of her will, when she gave instructions and executed it; and it does not appear that in her mind there was any connection between those delusions and the disposition of her property.

Banks v. *Goodfellow* (L.R. 5 Q.B. 549) ref.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of the trial judge, Wilson J., and maintaining the Administrator's action to prove in solemn form the will of E. Amelia Brown, deceased.

J. W. de B. Farris K.C. for the appellants.

A. Bruce Robertson for the defendant respondents.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.:—This appeal arises out of an action to prove in solemn form a will, dated November 28, 1929, of the late Elizabeth Amelia Brown. At the trial it was adjudged she did not possess testamentary capacity at the time she made the will. Upon appeal that judgment was reversed and probate directed. This appeal is from the latter judgment.

Mrs. Brown's husband, John Brown, died June 18, 1919, leaving a will, the material parts of which provided a bequest to his wife of the furniture; the sum of $2,000; a monthly payment of $150 during her life; and a power of appointment over the residue of his estate. It contained requests that his wife take care of his sister, Miss Esther Brown, and that by her will she should leave his

entire estate to my said sister Esther Jane Brown for her life and after her death to my said grand-nieces Ellen and Eva McClure.

Mrs. Brown and the Royal Trust Company were named executors and trustees of his estate.

(1) [1945] 3 W.W.R. 641.

1946

O'NEIL v. THE ROYAL TRUST CO. AND MCCLURE

Estey J.

In 1920 Mrs. Brown made a will giving substantial effect to her husband's wishes. About 1925 Miss Brown contracted arthritis and thereafter until her death in June 1927 she required a good deal of care and attention. Much of that time she was confined to her bed and at times a nurse was employed, but in the main Mrs. Brown looked after and cared for her in a manner that was described as "excellent".

Mrs. Brown paid the expenses incurred because of the illness of Miss Brown as well as the funeral expenses. She felt that the Trust Company should have paid the latter item but this it refused to do. On one occasion she asked the company for an additional allowance of $25 at Christmas, and this it also refused. She became "very indignant about" the Trust Company. Then with respect to her late husband's will, she thought the payment of $150 per month was not enough and that she should have been left the entire estate. In fact, she described her husband's will as a "terrible will". In this frame of mind she decided in 1927 to exercise her right under the power of appointment and leave the estate of her late husband, not as he had expressly requested, but to her own niece Susie Sutcliffe and her nephew George Sutcliffe.

Mr. O'Brian, a barrister of Vancouver, had not only been Mr. Brown's solicitor, but had been a personal friend and after Mr. Brown's death he and Mrs. O'Brian continued to visit Mrs. Brown. Mr. O'Brian had drawn Mrs. Brown's will in 1920 and she now consulted him. As to that interview, he deposed as follows:

> She came in in September or October of 1927 and got the 1920 will. She told me she had a right to leave Mr. Brown's property to whom she liked and that if she so desired she could leave it to her own grand-nieces the Sutcliffe's. I told her that I considered the directions contained in Mr. Brown's will to be binding on her conscience and that if she didn't carry out the directions contained in his will she was doing something very wrong. She remarked to me that that was her own particular business. She took the will and we didn't leave on the ordinary cordial terms.

Mrs. Brown had made up her mind. She refused the advice of her friend and solicitor and consulted another solicitor, Mr. Burnett. Under her instructions Mr. Burnett prepared a will in which she revoked her will of 1920 and exercised the power of appointment under her husband's will in favour of her niece Susie Sutcliffe and her nephew

George Sutcliffe. She also left her own property to these relatives. This will is dated October 4, 1927, and no question is raised as to her competency at that time.

Two years later Mrs. Brown sent for Mr. O'Brian and executed a third will dated November 28, 1929, under which she revoked the will of 1927 and left all of her own estate and the estate of her late husband, over which she had power of appointment, to Ellen and Eva McClure, nieces of her late husband. In so leaving the property to his nieces she complied with the request contained in the will of her late husband.

It is the validity of this last will dated November 28, 1929, that is the subject matter of this litigation. Mrs. Brown, except for one week in 1929, remained at Hollywood Sanitarium from July 12, 1929, until she died on June 24, 1943.

The learned trial judge refused to grant probate basing his conclusions very largely upon the evidence of Dr. McKay that the testatrix was not capable of managing her own affairs and did not possess testamentary capacity. In the Court of Appeal Mr. Justice Bird, who wrote the judgment of the Court, was concerned about the weight that ought to be given Dr. McKay's evidence and concluded that the evidence of the other witnesses who had "opportunities for observation and knowledge of the testatrix" was sufficient

> to satisfy the conscience of the Court that the document propounded is the last will of a free and capable testator.

Then referring particularly to her mental difficulties Mr. Justice Bird concluded:

> I think that the mental difficulties so described were "of a degree or form of unsoundness which neither disturbed the exercise of the faculties necessary for the making of a will nor were capable of influencing the result."

The contention of the appellants may be summarized as follows: That the learned judges in the Court of Appeal failed to appreciate that Mrs. Brown's proved delusions or hallucinations were such as were likely to directly influence her in making a will, particularly the fact that she was hearing voices from the grave (presumably her husband's), coupled with the fact of her distress that she had not in her previous will carried out his requests as to the beneficiaries in her will.

Associated with this were other contentions that the learned judges had not given due consideration to the heavy burden

1946

O'NEIL v. THE ROYAL TRUST CO. AND McCLURE

Estey J.

of proof that rested upon the party propounding the will of a testatrix who is admittedly of unsound mind in at least some particulars, and that undue weight was given to lay witnesses as compared with expert opinion.

On its face it is a rational will and carries out the express wish of her late husband. Where, however, the question of testamentary capacity is an issue,

> it is not sufficient that the will upon the face of it should be what might be considered a rational will. We have to go below the surface and consider whether the testator was in such a state of mind that he could rationally take into consideration not merely the amount and nature of his property, but the claims of those who, by personal relationship or otherwise, had claims upon him;

Smee v. *Smee* (1).

Mr. O'Brian deposed that on the day he received her instructions and prepared the will:

> I thought she was very clear mentally and with full capacity to appreciate the nature and extent of her estate,

and Mr. Watson, who was present with Mr. O'Brian when Mrs. Brown gave her instructions, and who signed the will as a witness:

> In my opinion she was highly nervous and unstrung but knew what she was about, and was quite competent to make a will.

She was conversant with the details of her husband's estate, her own assets and the contents of her wills of 1920 and 1927. That in the latter she had left the property to the Sutcliffes contrary to her husband's request. She also stated that she had deceived her husband in that she had accumulated a sum out of her housekeeping allowance and that she had not used this money to give Miss Brown proper nursing attention. It was not contended that anything said upon that occasion would justify a conclusion that she did not possess testamentary capacity.

It is, however, submitted that the statements made upon that occasion must be read in association with the other facts and circumstances disclosed in the evidence, and when so read support the appellants' contentions.

Mr. O'Brian first suspected something irrational about Mrs. Brown in the spring of 1928. In July 1929 she voluntarily entered Hollywood Sanitarium, a privately owned and operated institution for the treatment of mental and functional nervous diseases. She then gave her age

(1) (1879) 5 Pro. D. 84; L.J. 49 P.D. & A. 8, at 13.

as 64. In February 1930 an application for the appointment of a committee was heard by the Court in British Columbia, and on March 17, 1930, judgment rendered that

Elizabeth Amelia Brown is, by reason of mental infirmity, arising from age or otherwise, incapable of managing her affairs.

Dr. McKay, who had specialized in psychiatry and functional neurological conditions since 1907, and who since 1919 had been managing director and medical superintendent of the Hollywood Sanitarium, stated that when Mrs. Brown entered the sanitarium "she had certain peculiarities" and that

she used to have an idea that there was gas in her room. It was either gas in her room or she was afraid of powder, that is such as dusting powder, it was either one of those two.

She had hallucinations and delusions which "were never very fixed at any time."

When questioned if Mrs. Brown worried, he replied:

The only worries I can recall her possessing, was worrying regarding things she had done to her husband. That is the only thing that I can recall. There may have been others, but I do recall that because it came up innumerable times. I mean many times. She used to talk about that she hadn't treated her husband well, and she hadn't lived up to his requests.

Mrs. Brown possessed a good memory and often talked with Dr. McKay

about her life in Vancouver here, her life in Montreal, and even prior to coming to Canada,

but never mentioned to him anything about a will.

He concluded his direct examination with a statement:

I personally believe that she was competent (to make a will) for this reason * * * that she did not possess any delusions or hallucinations or illusions that would govern her one way or the other in constructing a will.

In cross-examination he was referred to his affidavit dated January 6, 1930, filed in support of the application for the appointment of a committee to manage her affairs. This affidavit read in part as follows:

At the time of her admission she was restless, delusional and hallucinatory, her delusions being of the persecutory character.

She possessed hallucinations of taste, believing she could taste poison in her food.

She also had hallucinations of smell, claiming that she could smell gas which was being forced into her room with the idea of doing her bodily harm.

1946

O'NEIL
v.
THE ROYAL TRUST CO. AND McCLURE

Estey J.

At times she is very disturbed which is altogether due to these false ideas that she possesses.

Owing to the delusions and hallucinations that were present, the said Mrs. Elizabeth Amelia Brown is incompetent to look after herself or her affairs.

Throughout his cross-examination there was much disagreement between counsel and Dr. McKay, and finally the following appears:

Q. Well, what you said on the 7th of January, 1930, was, in your opinion—you said, owing to delusions, and hallucinations that are present, the said Elizabeth Amelia Brown is incompetent to look after herself or her affairs. That was your truthful opinion at that time?

A. Probably it was.

Q. If it was your truthful opinion at that time, then it means that, in your opinion, at that time she was not competent to make a will, does it not?

A. We would only be starting another argument, so I will admit it.

This admission does not purport to embody the considered opinion of Dr. McKay but rather an opinion expressed to avoid another argument. Another argument upon the question whether because she could not manage her own affairs it followed she was not competent to make a will. Just before this admission Dr. McKay stated: "I don't think * * * you have the right to combine those two features". Such an admission as a matter of testing credibility would have weight, but as evidence in support of an essential factor in a cause of action it is for practical purposes of no value. When read in association with the whole of his evidence it falls far short of establishing that because a person is unable to manage her affairs she is incompetent to make a will. Nor does it in this case provide evidence in support of the contention that her hallucinations and delusions were influencing or directing her thinking as she gave instructions and executed this will.

Dr. McKay referred to hallucinations and delusions of a persecutory character and mentioned only those of taste and smell. He described them as

of a minor character not fixed on any person or persons—never fixed at any time—

and

there wasn't any category from the standpoint of medical diseases that I think I could conscientiously at all place her in.

It is significant that in referring to matters respecting her husband he classifies them as worries on her part. Throughout his evidence these hallucinations and delusions are not associated with her worries.

Apart from Dr. McKay's evidence there are the statements made to Mr. O'Brian and Mr. Watson on November 28, 1929, the day the will was made, and those to Mr. O'Brian and Dr. Gillies on January 23, 1930. Upon these dates she was concerned about changing the beneficiaries in her will that she might comply with the wish of her late husband, and throughout these conversations she made no mention of taste or smell, of poison or of bodily harm.

Mr. O'Brian in October or November of 1927 had told her that the request of her late husband was binding on her conscience. In consequence of the illness of Miss Brown and the funeral expenses, which she paid but thought the Trust Company should at least have paid the funeral expenses, Mrs. Brown had become annoyed at the Trust Company and felt her husband's will should have left everything to her. In that state of mind she had made the will of 1927. Now after a period of two years she viewed the matter differently. "Her husband's will was a proper one, although at one time she did not think so". She now felt she should respect the request of her late husband. Her conscience dictated that course. It was always upon her mind; she was concerned about the legality of the will. It was written in the handwriting of Mr. O'Brian, was that sufficient, and then was it properly witnessed?

She was sure she would feel much better if she could satisfy her mind that the McClure children would get the estate.

In speaking of her feelings to Mr. O'Brian, Mr. Watson and Dr. Gillies, she used various phrases, but her strongest language appears in her conversation of January 23, 1930:

She said she got very depressed at times; had a pain in the top of her head; that the day seemed to be the night sometimes, and the night the day; felt sometimes she was going out of her mind; that voices spoke to her at night, as if from the grave; and she was at times in great torment. She felt she would never see Mr. Brown or Miss Brown; that she had done wrong; that she hadn't been fair to them; that there was no hope for her in the next world; that if she could only be sure the McClure's would get the whole estate, she might feel better.

This is a portion of the conversation when Mr. O'Brian and Dr. Gillies visited Mrs. Brown on January 23, 1930,

1946

O'NEIL v. THE ROYAL TRUST CO. AND MCCLURE

Estey J.

in order that Dr. Gillies might converse with Mrs. Brown and express his opinion as to her competency to make a will. Dr. Gillies made notes of the conversation but unfortunately upon changing his offices in 1933 these notes were lost. He had, however, a very definite recollection that as he left the sanitarium he was of the opinion that Mrs. Brown was competent to make a will. As to the details of that conversation he said his memory was "extremely vague". He did think she mentioned "she heard voices" but could not remember her making any mention of poison. He did not recall any hallucinations or delusions. Dr. Gillies therefore heard the foregoing statement as part of her conversation and was of the opinion that she was competent to make a will.

Mrs. Kane was in charge of the office of the sanitarium from July 1931, and apart from a year and a half in 1940 and 1942, she was there as long as Mrs. Brown lived. She saw Mrs. Brown practically every day and found her

> quite an interesting conversationalist. Quite wordy, quite bright. Would gossip and interested in all we were doing.

She never heard Mrs. Brown speak of either the Sutcliffes or the McClures, and never heard her mention either gas or poison. Her memory was good and she did speak of her late husband and of her late sister-in-law. Mrs. Brown was very friendly with the staff and often came into the kitchen where the staff was having tea in the afternoons.

That Mrs. Brown possessed certain hallucinations and delusions of the type and character described by Dr. McKay must be conceded. The possession of such does not invalidate a will unless they have brought about the will or constituted "an actual and impelling influence" in the making thereof: *Sivewright* v. *Sivewright* (1). Dr. McKay describes her concern with respect to her husband's affairs as worries and does not associate the hallucinations and delusions therewith. The other witnesses make no reference to the hallucinations and delusions, and it may be that they looked upon her concern with respect to her husband's affairs in a manner that might be described as worries. Mr. O'Brian said she was "depressed and under great mental strain" and "tormented by her conscience". Mr. Watson said she

(1) 1920 S.C. (H.L.) 63.

seemed to be distressed because she had neglected to bequeath the money and property as her husband had requested her to, and she now desires to make amends.

Messrs. O'Brian, Watson and Dr. Gillies, who heard her make the remarks the appellants so much rely upon, were definitely of the opinion that Mrs. Brown was competent to make a will. A perusal of Dr. McKay's evidence as a whole, including his admission, indicates that he believed she was competent to make the will. The credibility of all of these witnesses is admitted. Mr. O'Brian had known Mrs. Brown over a long period of years and had been consulted professionally by her as early as 1920. Dr. McKay had her under his care as a patient since July 1929.

It is possible that a person may conduct herself in a very rational manner, even making a rational will, and still be motivated and governed by insane delusions. That is the reason the authorities require that in such a case as this "we have to go below the surface" and determine if in fact the will be or be not the result of a "free and capable testator".

In 1920 Mrs. Brown complied with her husband's request. In 1927, under the stress of circumstances then obtaining, she disregarded his request. In the course of time and changing circumstances she concluded that she had made a mistake and her conscience now dictated that her husband's request should be complied with. In order to do so she made her will of November 1929.

The proved hallucinations and delusions are not upon the evidence connected with the motives and reasons that led to the making of this will in question. Dr. McKay did not associate her hallucinations and delusions with her worries. In this regard it is significant that Mrs. Brown did not discuss her will with Dr. McKay and never mentioned the taste of poison or the smell of gas to Mr. O'Brian, Mr. Watson or Dr. Gillies. This is an indication that in her mind they were not related. Her statements of November 28, 1929, and January 23, 1930, already discussed, when read in relation to all the other facts and circumstances, are not more than the extreme or extravagant expressions of one's thoughts and feelings who finds herself in some such position as Mrs. Brown.

1946

O'NEIL
v.
THE ROYAL TRUST CO. AND McCLURE

Estey J.

In my opinion, when the evidence in this case is submitted to the test, so often quoted with approval, set forth in *Banks* v. *Goodfellow* (1), and which has been adopted in this Court, particularly in *Skinner* v. *Farquharson* (2) and *Ouderkirk* v. *Ouderkirk* (3), Mrs. Brown's will must be regarded as valid.

Counsel for the appellants, in a very forceful and exhaustive presentation of this case, contended that the learned judges of the Court of Appeal

did not appreciate that there is a much greater burden of proof when the facts actually show insanity or mental derangement.

It is true that some of the early authorities go far to justify such a statement. The decision of *Banks* v. *Goodfellow* (4), makes it clear that these earlier authorities go too far. That while the burden of proof always rests upon the party supporting the will, and that the existence of proved hallucinations and delusions often presents a "difficult and delicate investigation", it remains a question of fact to be determined as in civil cases by a balance of probabilities. In the determination of this fact the contents of the will and all the surrounding circumstances must be considered by the jury or the Court called upon to arrive at a decision. If satisfied that at the relevant time the testator was not impelled or directed by hallucinations or delusions and was in possession of testamentary capacity, the will is valid. *Boughton* v. *Knight* (5); *Smee* v. *Smee* (6); Halsbury, 2nd Ed., Vol. 2, p. 38.

The appeal should be dismissed with costs.

HUDSON J.:—I have had an opportunity of reading the judgment of my brother Estey and agree with him that the appeal should be dismissed with costs.

To what is said I wish to add only a few words. On the argument before us the point most pressed by Mr. Farris was that at the time of execution of the will the testatrix was suffering from delusions, and in particular from the delusion that she heard voices as from the dead which reproached her with having departed from her husband's wishes in making a previous will. Admitting that the evidence established that the testatrix did make the statements attributed to her, it does not seem to me that this is

(1) (1870) L.R. 5 Q.B. 549, at 565.
(2) (1902) 32 Can. S.C.R. 58.
(3) [1936] S.C.R. 619.
(4) (1870) L.R. 5 Q.B. 549.
(5) (1873) L.R. 3 P. & D. 64.
(6) (1879) L.J. 49 P.D. & A. 8.

sufficient to invalidate a disposition of property which she should have made in the absence of any delusion. What she heard would appear after all to have been the "voice of conscience" under the circumstances.

In *Banks* v. *Goodfellow* (1), the general principle is stated thus:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

The disposition of property here was entirely in accord with what might have been made by the most sane and well intentioned person.

RAND J.:—Notwithstanding the able argument of Mr. Farris, I think the evidence shows the testatrix to have been competent to make the impugned will. Her general rationality was conceded, and the case against capacity depends upon showing the presence of insane delusionary hallucinations so related to matters admittedly disturbing her conscience as to have governed her mind in making the dispositions. Those matters were, having saved money from household allowances without disclosure to her husband, having toward the end of his sister's life as a result of the financial pressure which the illness and necessary care of the latter made upon her become resentful of the limited allowance made to her under his will, and having failed in spirit at least to maintain toward the sister in her last days what a sense of duty to him as well as to her later seemed to dictate. That they gave rise to a body of deranged thought or sensations so rooted and substantial as to dominate her mind and pervert her judgment in the distribution of her husband's and her own property, is not, in my opinion, a proper conclusion from the facts disclosed.

Although Dr. McKay, in charge of the Home in which the testatrix lived voluntarily for 14 years, whose ability as a psychiatrist and veracity are unquestioned, knew of

(1) (1870) L.R. 5 Q.B. 549, at 565.

1946

O'NEIL v. THE ROYAL TRUST CO. AND McCLURE

Rand J.

her notions of tasting poison in food and of smelling gas forced through keyholes to do her physical injury, and observed delusionary thought of a persecutory character, which "at times" disturbed her, he looked upon them as transient and erratic wanderings "never very fixed at any time" rather than manifestations of deep-seated irrationalities; they were not directed toward any particular person or persons; nor could he say how long they lasted, but the implication is that they did disappear. He did not know of any worry about the will of 1927 nor of her desire to make a new one. But he rejected the view that these evanescent creations were associated morbidly in the true sense of mental disorder with such matters and that they were such as might influence her in making her will.

That was the opinion also of Dr. Gillies who, though he saw her only once, made an examination specifically directed to competency; and although she mentioned "hearing voices", nothing in her behaviour or speech betrayed or even indicated delusions or hallucinations in any way related to or connected with the property or the will. That her attention could be held to that field of her thought, over the whole of which his questions led her, and evoke no indication of delusionary ideas or sense irregularities that are said to have poisoned it and driven her to the change in beneficiaries she made, would seem to justify Dr. Gillies' confident assertion that at the time of that examination she was suffering from no such derangement. Whatever their character, they were dissociated phenomena.

Mr. O'Brian observed the same behaviour under similar questioning in relation to the same matters, full understanding, good memory, no sign of disorder. Dr. McKay's affidavit says that "at times she was very disturbed" but there can be no doubt, from the evidence, that at the time of making the will, if that language means "insanely disturbed", it was not then descriptive of her condition.

The deceased quite evidently had become deeply sensitive to the implications of her religious beliefs, and although under the pressure of straitening circumstances feelings of resentfulness had been aroused, when their cause had been removed and her mind become relaxed and reflective, that sensitiveness fastened upon and no doubt magnified

the deviations from the rigid duty that then appeared so plain to her. But throughout this period she seems to have had an adequate awareness of herself, including her remorse. It was not that she heard voices from the grave; they appeared to her to be "as if from the grave", she "felt sometimes she was going out of her mind", "the day sometimes seemed night and the night day", "she was at times in great torment", "there was no hope for her in the next world" and that she "would see neither her husband nor his sister" there. But here she was recounting objectively these experiences: the subjective had not been victimized by any of them. It was a case of repentance for shortcomings in the closing years of her life.

Mr. Farris stresses the heavy onus on the respondents under the law laid down by *Banks* v. *Goodfellow* (1) and in particular the language of Cockburn C.J. at page 572:

> Where delusions are of such a nature as is calculated to influence the testator in making the particular disposition, as was the case in *Waring* v. *Waring* (2) and in *Smith* v. *Tebbitt* (3), a jury would not in general be justified in coming to the conclusion that the delusion, still existing, was latent at the time, so as to leave the testator free from any influence arising from it; but in the present case the disposition was quite unconnected with the delusions, and consequently there is no reason to suppose that the omission to call the attention of the jury to this specifically can have affected the verdict.

He suggests that what Lord Haldane says in *Sivewright* v. *Sivewright* (4):

> The question is simply whether he understands what he is about. On the other hand, if his act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But, in that case, if the testator is not generally insane, the will must be shown to have been the outcome of the special delusion. It is not sufficient that the man who disposes of his property should be occasionally the subject of a delusion. The delusion must be shown to have been an actual and impelling influence.

must be qualified, but it appears to me to be quite within the principle of the earlier case. Once there is shown the existence of a delusion which is calculated to influence the testator in making the dispositions of a will, then the Court must be convinced that in fact the delusion had no such effect. What then is the test by which we can say that a

(1) (1870) L.R. 5 Q.B. 549.
(2) (1848) 6 Moo. P.C. 341.
(3) (1867) L.R. 1 P. & D. 398.
(4) 1920 S.C. (H.L.) 63.

1946
O'NEIL
v.
THE ROYAL TRUST CO. AND McCLURE
Rand J.

delusion is so calculated? Obviously its nature and subject matter, and its relation in the mind of the testator to the matters material to testamentary disposition. Here, assuming that in the two respects mentioned there were real delusionary notions, they cannot be said, by themselves, to be so calculated and it does not appear that in her mind there was any connection between them and such matters. It is conceivable that the worry over what she looked upon as a moral dereliction gave rise to them—and there is a strange absence of evidence that from the making of the will until her death she was in the slightest degree disturbed —but they were not associated with such matters in her complaints, and nothing in her behaviour indicated that they were so associated either consciously or unconsciously in her mind. It was not fear but moral anxiety that actuated her. The principle, therefore, of *Banks* v. *Goodfellow* (1), on the facts, is strictly applicable and satisfied and we are remitted to her general capacity about which there is no question.

I agree with Bird, J. A. in his estimate of the weight to be given the statements in the affidavit upon which the case against capacity rests. The evidence as a whole establishes the freedom of her mind from any effect of abnormal elements at the critical time; and she then directed the distribution requested in her husband's will, which in substance she had done nine years before. We are asked to find that reflection on her moral failure had given rise to insane fears that dominated her rational faculty in testamentary judgment; but whether it is to be taken that the will was made at a time free from disturbance, that it was not one of those "times" at which she was "very disturbed", or that her intelligence and moral sense rose above and clear of the influence of any such ideas that might have lurked in her mind, I am unable to do that.

I would dismiss the appeal with costs.

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia dated 25th June, 1945, allowing an appeal from the judgment of Wilson J. which had dismissed an action brought by the respondents

(1) (1870) L.R. 5 Q.B. 549.

for the purpose of proving in solemn form a will of the deceased, Elizabeth Amelia Brown, dated November 28, 1929.

The trial judge arrived at his conclusion largely upon his view of the effect of the evidence of one of the medical witnesses of the respondents, Dr. J. G. McKay. The Court of Appeal, however, even on the basis that Dr. McKay's opinion was in reality that the deceased lacked testamentary capacity, held that the other evidence was sufficient to satisfy the burden cast upon the respondents to satisfy the conscience of the Court that the document propounded was the last will of a free and capable testator.

Upon the argument before us it was common ground that the testatrix had capacity to understand the nature of the act of making a will and its effect as well as the extent of the property of which she was disposing. The contention of counsel for the appellant was that the lack of testamentary capacity lay in want of sufficient comprehension and appreciation of the claims to which effect ought to have been given and that this was due to the existence of insane delusion. It was not contended that the case was in any sense one of total insanity.

In these circumstances counsel are at one that a burden of proof rests upon those propounding the will but they disagree as to the nature of that burden. Mr. Farris also complains that the Court of Appeal gave too much weight to the opinion of the lay witnesses. His contention is that in a case of this sort the evidence of medical experts is of paramount importance and that in any event no one, whether a professional or a lay witness, was justified in the circumstances in concluding that the delusions from which the testatrix suffered "could not" affect her testamentary capacity and that therefore the respondents must fail.

The leading authority in cases of this sort is of course *Banks* v. *Goodfellow* (1). Mr. Farris lays emphasis on certain passages in the judgments in that case and in *Smee* v. *Smee* (2), and submits that a testator suffering from delusion lacks capacity to make a will if the delusion is capable of affecting the making of the will and that in

(1) (1870) L.R. 5 Q.B. 549; 39 L.J. Q.B. 237.

(2) (1879) L.J. 49 P.D. & A. 8.

1946

O'NEIL v. THE ROYAL TRUST CO. AND MCCLURE

Kellock J.

such case no inquiry is to be made or can satisfactorily be made as to whether the will was actually affected by the delusion.

In an Ontario case, *McIntee* v. *McIntee* (1), the trial judge, Riddell J., held on a consideration of the authorities, including *Skinner* v. *Farquharson* (2), and *Jenkins* v. *Morris* (3), that

> whatever may be the law elsewhere, I think I am bound by authority to go into the question—not could the delusions possibly have an influence upon a disposition to be made by the testatrix?—but did the delusions influence or affect the disposition actually made.

The learned judge points out that in *Skinner* v. *Farquharson* (2), Taschereau J. said at p. 60—

> If the deceased's delusions had influenced the disposal of his property the respondent's contention should perhaps prevail. But that is a question of fact.

He found internal evidence in the will before the Court that the delusions there in question had not in fact influenced the result. Davies J. in the same case at page 86 refers to *Jenkins* v. *Morris* (3) and to the head-note which states

> the mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it even though the delusion is connected with the subject matter of such disposition or contract; it is a question for the jury whether the delusion affected the disposition or contract.

In *Jenkins* v. *Morris* (3), which was a case of a lease, Hall V. C. at page 680 has this to say on the point—

> It was in the course of the argument before me said that *Banks* v. *Goodfellow* (4) was only applicable where the delusion was wholly unconnected with the subject-matter of the disposition. I do not find the rule of law laid down with this qualification, although no doubt in the course of the judgment, the disposition being wholly unconnected with the delusion, and the delusion not being calculated to influence the particular disposition, were mentioned. It is manifest that where the delusion is connected with the disposition, such connection may in some cases shew beyond question that the testator had not testamentary capacity, whilst in other cases, if not in itself conclusive against testamentary capacity, it might have much weight in determining the point. I have not, however, to determine whether in every case where a delusion exists which is connected with the thing disposed of there can or cannot be testamentary capacity to dispose of that thing. The delusion may be trivial, and whether so or not the conviction of a jury or judge may, unless forbidden by law, be that it did not affect the disposition.

(1) (1910) 22 O.L.R. 241.
(2) (1902) 32 Can. S.C.R. 58.
(3) (1880) 14 Ch. D. 674.
(4) (1870) L.R. 5 Q.B. 549.

Reference may also be made to the judgments of the Lords Justices in the Court of Appeal.

With respect to the decision in *Jenkins* v. *Morris* (1), Viscount Haldane in *Sivewright* v. *Sivewright* (2), said at page 65—

> Their view was that the jury had been rightly directed that the mere existence of a delusion was not sufficient to avoid a deed, even though the delusion was connected with the subject-matter. It was a question for the jury whether the delusion had influenced the bargain, and the jury had thought otherwise. The delusion was not conclusive against capacity, although the fact of its existence might well be evidence bearing on this question. It is not necessary for us on this occasion to discuss the fashion in which the principle was applied in *Jenkins* v. *Morris* (1); the importance of the case lies in the way in which it lays down the general principle that the delusion need not be held fatal, even if not wholly unconnected with the subject-matter.

These authorities dispose of the contention above mentioned.

The husband of the testatrix had predeceased her in 1919, leaving him surviving his widow and a sister who in turn died in 1927. By the terms of his will the husband, John Brown, appointed his wife and the Royal Trust Company executors and left the testatrix a legacy of $2,000, plus an annuity of $150 per month, with a general power of appointment by will. In default of appointment the estate was to go to the sister for life and after her death to two grand nieces of John Brown, namely, the respondents, Ellen and Eva McClure. The will contained the following clause:

> I earnestly request my wife to make a will leaving the entire estate to my said sister Esther Jane Brown for her life and after her death to my grand nieces Ellen and Eva McClure.

In the year 1920, shortly after the husband's death, the testatrix made a will substantially carrying out the request of her late husband. She later became dissatisfied with the terms of her husband's will and in 1927 executed a new will, leaving her own property and exercising her power of appointment over her husband's estate in favour of her own niece and nephew, the appellants, the Sutcliffes. On July 12, 1929, the testatrix was admitted as a voluntary patient into a sanitarium owned and operated by Doctor McKay, and remained in this institution until her death

(1) (1880) 14 Ch. D. 674. (2) 1920 S.C. (H.L.) 63.

1946

O'NEIL
v.
THE ROYAL TRUST CO. AND McCLURE

Kellock J.

on the 24th of July, 1943, with the exception of one week in November, 1929. By the will here in question, which was executed on the 29th of November, 1929, the testatrix devised and bequeathed her own estate to the respondents, the McClures, and also exercised in their favour her power of appointment over the estate of her husband.

The wills of 1920 and 1929 were both drawn by Mr. C. M. O'Brian, who had also drawn the will of John Brown. He had been a visitor at the home of the testatrix before and after her husband's death and appears to have been on a basis of some friendship with them. The sister-in-law became ill in 1925 and in the following year became confined to her bed. She required close medical attention and considerable nursing care at the hands of the testatrix. During this period the latter told Mr. O'Brian that she considered it most unfair that she personally should have to stand the expense of Miss Brown's illness. She said to him that her husband ought to have left her his whole estate and that the provision he had made for her was quite insufficient. She said she considered the will "terrible."

When Miss Brown died the testatrix, being called upon to pay the funeral expenses, requested the Royal Trust Company, the co-executor with her of her husband's estate, to advance the necessary funds. Their refusal and an earlier refusal to advance her some $25 added fuel to the flames of her dissatisfaction. She had also been required to leave her home in order that it might be leased or sold which did not make her any the less dissatisfied. The result of all this is thus described by Mr. O'Brian:

Witness—So that the result of it all was that within a month or so after Miss Brown's death in 1927 she expressed herself to me that she didn't like the Royal Trust Company, she didn't want them as executors, and thought her husband's estate was being handled very badly, that is to say, so far as she was concerned herself.

Q. Did she do anything about it?

A. She came in in September or October of 1927 and got the 1920 will. She told me she had a right to leave Mr. Brown's property to whom she liked and that if she so desired she could leave it to her own grand-nieces the Sutcliffes. I told her that I considered the directions contained in Mr. Brown's will to be binding on her conscience and that if she didn't carry out the directions contained in his will she was doing something very wrong. She remarked to me that that was her own particular business. She took the will and we didn't leave on the ordinary cordial terms.

It was following this incident that the will of 1927 came into existence. Notwithstanding the circumstances the testatrix does not appear to have retained any particular dislike of Mr. O'Brian. He and his wife visited her on two or three occasions in the following two years, one of those at least being on the invitation of the testatrix.

Finally, as the result of a message from the testatrix, Mr. O'Brian, accompanied by a Mr. H. H. Watson, went to the sanitarium on November 28, 1929, taking with him some drafting paper, a copy of the 1920 will and, he thinks, a copy of the 1927 will also. He says that he had a discussion with the testatrix and that she appeared to him to be clear mentally.

Without detailing the evidence as to what occurred on this occasion it is sufficient to say that if the evidence of Messrs. O'Brian and Watson be accepted, (and the credibility of none of the witnesses is challenged) the opinion formed by Mr. O'Brian was well grounded. The reason given by her at that time for changing her then existing testamentary disposition was that she was under great mental strain owing to the fact that she, as she said, had deceived her sister-in-law as well as her husband in concealing from them the fact that she had accumulated several thousand dollars from housekeeping allowances given her by her husband and that she had not used these monies as she might have done to give Miss Brown proper nursing attention during her last illness. She went on to say that it was her firm desire to change the will of 1927 and to leave everything, not only her own estate, but the estate of her husband, to the McClures. Mr. O'Brian suggested to her that instead of drawing a new will she should execute a codicil to the will of 1927 but she would not have this. She did not want the Trust Company nor the executors named in the 1927 will to act, but requested Mr. O'Brian to act as her executor. During the course of the conversation the testatrix made several references to the fact that she had been a bad woman, that she had deceived her husband and sister-in-law and that she was tormented by her conscience and did not rest either night or day thinking about it. There was nothing, however, in the interview which indicated in any way to Mr. O'Brian that the testatrix was suffering from delusion.

1946

O'NEIL
v.
THE ROYAL TRUST CO. AND McCLURE

Kellock J.

Mr. O'Brian says he had suspected that there was something irrational about the testatrix in the spring or summer of 1928, but he does not give and was not asked any particulars and, as already stated, when he saw her in November, 1929, he thought she was perfectly rational. As to the concern which the testatrix expressed for not having spent the money which she had accumulated in engaging nursing assistance for the sister-in-law, Mr. O'Brian says that at one time during the sister-in-law's illness the testatrix had not engaged a nurse and that he had then thought she should have done so. A nurse was at some time engaged but whether it was before or after that time does not appear.

In January, 1930, proceedings were initiated for the appointment of a committee to manage the affairs of the testatrix and on the 6th of that month Doctor McKay made an affidavit which included the following paragraph:

(4) At the time of her admission she was restless, delusional and hallucinatory her delusions being of the persecutory character. She possessed hallucinations of taste believing she could taste poison in her food. She also had hallucinations of smell claiming that she could smell gas which was being forced into her room with the idea of doing her bodily harm.

At times she is very disturbed which is altogether due to these false ideas that she possesses. Owing to the delusions and hallucinations that were present, the said Mrs. Elizabeth Amelia Brown is incompetent to look after herself or her affairs.

An order was subsequently made on March 17, 1930, declaring the testatrix

by reason of mental infirmity arising from age or otherwise, incapable of managing her affairs

and appointing a committee of her estate, pursuant to the provisions of R.S.B.C. 1924, c. 149.

While this proceeding was pending, and no doubt because of it, Mr. O'Brian visited the testatrix on January 23, 1930, taking with him Doctor Gillies, who testified that in his opinion she was on that occasion competent. He says that there was no indication that the testatrix entertained any delusion and that had such been the case his examination would have revealed it.

At this interview the testatrix showed that she was perfectly aware of the three wills she had made and referred to them, as well as to the assets of herself and her husband's

estate. She said she now thought her husband's will a proper one, although at one time she had not thought so and she again expressed regret at not having taken better care of Miss Brown and for her concealment of the housekeeping moneys she had accumulated. She thought she might feel better if she was sure the McClure children would take. She was concerned, as she had been on November 28th previous, because Mr. O'Brian had drawn the will by hand, and she felt there might be trouble later and the McClures might be deprived of what she intended them to take. As described by Mr. O'Brian she went on to say that:

* * * she got very depressed at times; had a pain in the top of her head; that the day seemed to be the night sometimes, and the night the day; felt sometimes she was going out of her mind; that voices spoke to her at night as if from the grave; and she was at times in great torment. She felt she would never see Mr. Brown or Miss Brown; that she had done wrong; that she hadn't been fair to them; that there was no hope for her in the next world; that if she could only be sure the McClures would get the whole estate, she might feel better. She complained several times she wasn't well, but she read a little—newspapers and books—found it difficult to keep her mind on the subjects. She made some complaint about there being spots on her.

Mr. Farris stresses this part of the evidence, and apart from the other evidence it would require careful consideration. However, each case has to be considered on the evidence as a whole, and so considered, the evidence satisfies me that at the time of the making of the will here in question, the testatrix had sufficient capacity to meet the requirements of the authorities in a case of this kind. I now come to the evidence of Dr. McKay and the view of the learned trial judge regarding it.

Dr. McKay, the proprietor and medical superintendent of the sanitarium, which is a private hospital, said in chief that according to the testatrix she would be seventy-eight at the time of her death but that in his opinion she was actually between eighty-five and ninety. He describes how she was brought to the sanitarium by some friends and he says she was quite willing to stay there throughout her life. Mr. O'Brian also said that he had been consulted by the testatrix about going to the sanitarium and that he had advised her to go. According to Dr. McKay, when she first entered the sanitarium the testatrix had certain

1946

O'NEIL
v.
THE ROYAL TRUST CO. AND McCLURE

Kellock J.

peculiarities, that she was a "little erratic" on certain things and had certain ideas but not in any way directed "towards any person or persons". To particularize he said that she used to have an idea that there was either gas in her room or dusting powder and that she had hallucinations of taste and smell, but her delusions or hallucinations were never "very fixed at any time". In his opinion she was quite competent to make a will in November, 1929, and he gave in chief ample basis for that opinion. He said that the only worries he could recall the testatrix having had were worries regarding things she had done to her husband, that she hadn't treated him well and had not lived up to the request in his will. He stated that in his opinion the testatrix did not possess any delusions or hallucinations or illusions that would govern her one way or the other in making a will.

In cross-examination the affidavit already referred to was brought to the attention of the witness. He affirmed its correctness but said, as he had in chief, that as to the delusions they were of a minor character and were not fixed on any person or persons.

Cross-examining counsel proceeded on the view that a person who had been adjudged incapable of looking after his affairs under the provisions of the relevant *Lunacy Act* of British Columbia was *per se* incapable of making any testatmentary disposition. On that basis he cross-examined as follows:

Q. Now doctor, do you remember that on the 6th of January, 1930, you swore that owing to the delusions and hallucinations that were present, the said Mrs. Elizabeth Amelia Brown is incompetent to look after herself or her affairs? A. I only say this, Mr. McAlpine. I do remember the letter. I don't remember the document. I must have put it in there, and signed it, so I stand by it.

Q. So that on the 6th of January, 1930, she was in your opinion, incompetent to look after herself? A. Well, I signed it and don't go back on my signature.

Q. So that given the assumption that is so, if she were incompetent to look after herself, or incompetent to look after her affairs, she had not the testamentary capacity to make a will. A. I don't think, Mr. McAlpine, you have the right to combine those two features.

Q. Please don't tell me what my right is. My right is to ask you questions—

Mr. Robertson: And the witness has the right to answer the questions as he thinks.

Mr. McAlpine: The witness had no right to ask that and I say I have the right to ask that question.

The Court: I do not see, myself, why you cannot answer it. It is really a simple question. A. Well, I will answer it this way. If I put my name on there, I am liable for it. I mean I must have believed it at that time.

It would appear that the witness had answered the question which the learned trial judge appears to have thought had not been answered and that the witness did not agree that the two things were the same. All he appears to say in the above is that if he signed the affidavit he stands by what it says. In the cross-examination which follows counsel, however, proceeded on the basis that his own view that the two things were synonymous had been accepted by the witness.

Mr. McAlpine: Q. Now then, doctor, if you believed it at that time, you were then of the opinion that this woman was incompetent to make a will. Is that correct? A. No. I don't say that, because a will was not mentioned to me or anything of that kind.

Q. What has that got to do with it. You have sworn an affidavit that, owing to delusions and hallucinations that are present, the said Elizabeth Amelia Brown is incompetent to look after herself or her affairs. A. I say I signed it.

Q. Doctor, will you please listen. I may be stupid, and if I am in your opinion, please bear with me. I am asking you to answer a very simple question. If that was your opinion, on the 6th of January, 1930, it was your opinion that she had not testamentary capacity to make a will, whether you knew she had made one or had not made one. Is that right? A. I don't feel like answering that. But that must speak for itself, as far as I am concerned.

The Court: Doctor, I would like you to answer it. You are here to help me. You see, you said she was incompetent to look after herself or her affairs. Now, I would like you to tell me, if you can, whether or not that incompetency to look after herself or her affairs would not be incompetency to make a will. I think you can tell me that. A. That would be incompetency to look after her affairs.

Q. In your opinion she was incompetent to look after herself or her affairs. Does that also mean incompetency to make a will? A. I feel now, and I will ask you, at this time, if I may explain. I had a reason for giving that affidavit, which reason, of course, is for your lordship to hear. I felt that owing to my experience with these cases, I do certain things especially in the case of elderly people who have not any relatives to look after them, and I recommend as in this case, that a committee be appointed knowing she has no relatives, and I talked it over with Mr. Robert M. McGougan, who was then living, and I believe he had a committeeship or power of attorney, and I recommended that a committeeship be appointed to look after her affairs, and that is how I came

1946

O'NEIL
v.
THE ROYAL TRUST CO. AND McCLURE

Kellock J.

to make that affidavit, because I had done that for the protection of these people for many, many years, knowing the pitfalls that result when such is not done.

Mr. McAlpine: Q. Now, doctor, are you seriously suggesting to his lordship that you committed perjury? A. No.

Q. Now then would you mind telling me—I think you have already said that your memory is not very good as to the condition of this woman when she first came in, for the first three or four months. In the first place, I understand you to agree that it would be your opinion when she was incompetent to look after herself or her affairs, that she was insane, is that right? A. If I signed that, I signed that, and therefore I hold myself responsible for it.

Q. I don't care what you hold yourself responsible for. What I want to know is—did you commit perjury. A. No.

Q. Well then, if you did not commit perjury, what you say in this affidavit of the 6th of January is true? A. Well, it must have been true.

Q. Well, what you said on the 6th of January, 1930, was, in your opinion—you said, owing to delusions, and hallucinations that are present, the said Elizabeth Amelia Brown is incompetent to look after herself or her affairs. That was your truthful opinion at that time? A. Probably it was. Q. If it was your truthful opinion at that time, then it means that, in your opinion, at that time, she was not competent to make a will, does it not? A. We would only be starting another argument, so I will admit it.

The Court: I could not see very well, how you could avoid that admission. I take it your affidavit is true, and you say she is incompetent to look after her affairs.

For my part I find very little value in the answer thus extracted from the witness. In my opinion the basis of the question was a false basis and this, being pressed forcefully to the witness, who considered himself in an embarrassing position as the result of his affidavit if the basis upon which counsel proceeded was not false, but true, resulted in the answer above quoted. I think it perfectly apparent that the real opinion of the witness was that the testatrix had testamentary capacity in November, 1929, and I also think that is the result on the evidence as a whole.

I have not referred to all the evidence and I do not think it necessary to do so. Its result I have already stated. With regard to delusion, I take the facts to be as stated in the affidavit of Dr. McKay, that the testatrix did have the hallucination that she could taste poison in her food and that she had also the hallucination that she could smell gas which had been forced into her room by somebody intending to do her harm. Neither with respect to taste

or smell, however, did she lay the authorship upon any definite person. In my opinion the testatrix was prompted in making the will of 1929 by a change of view as to her moral obligation and self-reproach with respect to her conduct in handling the housekeeping monies without taking her husband into her confidence. There was no delusion about either. Her frame of mind was based on solid fact so far as these matters were concerned. The argument urged with much force by Mr. Farris is that the "voices" the testatrix described in the interview of January, 1930, were in fact the voices of the husband and sister-in-law of the testatrix, that these voices reproached her for her conduct in their lifetime and urged her to give effect to the wish of the husband as expressed in his will and that will of November, 1929, was the result. I do not think that one should make these assumptions and conclude that this amounted to insane delusion which brought about the making of the will but that the will, made at a time when the testatrix showed full command over herself and full realization of all the elements necessary to competent will-making, was the logical product of existing facts which should justly have produced such a will from a perfectly rational testator.

With respect to the declaration of the incompetency of the testatrix to look after her affairs in 1930, it is perhaps unnecessary to say that the existence of such an order is not, *per se,* synonymous with lack of testamentary capacity. The statute under which the order was made, R.S.B.C., 1924, c. 149, provides for management and administration of the estate of persons with regard to whom it is proved (sec. 2 (d))

that such person is through mental infirmity arising from disease or age or otherwise incapable of managing his affairs.

In *Banks* v. *Goodfellow* (1), Cockburn C.J. refers with approval to a number of American authorities, including *Harrison* v. *Rowan* (2), a case in the United States Circuit Court for the District of New Jersey, where the presiding judge said

his capacity may be perfect to dispose of his property by will and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men

(1) (1870) L.R. 5 Q.B. 549; 39 L.J. Q.B. 237, at 246.

(2) (1820) 3 Washington 580, at 585.

1946

O'NEIL
v.
THE ROYAL TRUST CO. AND McCLURE

Kellock J.

at different periods of their lives have meditated upon the subject of their disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new.

In his evidence Mr. O'Brian testified that in his opinion Mrs. Brown had never been capable of looking after her own affairs since her husband's death. Those affairs involved sales of real estate, leases and investment of monies. His evidence indicates that his opinion was founded on nothing more than that the testatrix was not a business woman and not capable of conducting such business matters.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *E. A. Burnett.*

Solicitor for the plaintiff respondent: *C. M. O'Brian.*

Solicitor for the defendants respondents: *E. M. C. McLorg.*