THOMAS ADAMS (PLAINTIFF).....APPELLANT; 1896

AND *Oct. 20, 21.

DUNCAN McBEATH (DEFENDANT).....RESPONDENT. 1897

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA. *Jan. 25.

Will—Undue influence—Evidence.

In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis.

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

1896

ADAMS v. MCBEATH.

APPEAL from a decision of the Supreme Court of British Columbia (1) reversing the judgment at the trial in favour of the plaintiff.

The action was brought to set aside the will of Samuel Adams, deceased, uncle of the plaintiff Thomas Adams, bequeathing all his estate, worth about $10,000, to the respondent a stranger in blood to the testator. The will was alleged to be invalid on the ground of undue influence on the part of the beneficiary.

The testator, Samuel Adams, was at the time of his death about 84 years of age. He had no relatives in Canada, the plaintiff and another nephew residing in England. He lived entirely alone, did his own cooking and took care of his house himself. On November 9th, 1891, a neighbour became uneasy at not having seen him for three or four days and summoned a friend of his (the testator's) to go into the house and see if anything was wrong, and he having done so the old man was found lying on the floor of his kitchen in a helpless condition having fallen in a fit or seizure of some kind and remained there for nearly three days. He was put in bed and assistance summoned. The respondent, with whom he had been somewhat intimate, came to see him and on the following day took him to his own house where he remained until his death.

The testator came to respondent's house on Tuesday November 10th, and on Wednesday he asked respondent to have a will drawn up in his (respondent's) favour. Respondent went to a solicitor and instructed him to prepare a will leaving all testator's property to him (respondent). The solicitor drew the will and went to the house, read it over to the testator and asked him if he understood it; on his replying in the affirmative the will was executed, the solicitor and a brother-in-

(1) 3 B. C. Rep. 513.

law of the respondent being the witnesses. The testator lived for a week after the execution of the will.

On the trial a number of letters written by the testator to the plaintiff were put in evidence, the correspondence beginning in 1878 and continuing at intervals down to June 1891. In the earlier letters the testator informed the plaintiff that he intended leaving him the property he owned and in 1884 he said in one letter "there will be no necessity for me to write to you again, as you now know what my intentions are, unless you should change your place of residence." After that there was no evidence of testamentary intentions in his letters and towards the end of the correspondence he once wrote expressing his satisfaction at plaintiff having entered an institution in Liverpool where, as he expressed it, "you were very fortunate in getting into that institution, as you will never want anything as long as you remain in it."

Shortly before the last illness of the testator he had a will drawn up leaving his property to the plaintiff, but it was never executed.

The doctor who attended him in his last illness testified that he was perfectly capable of attending to business and that his mental faculties were unimpaired.

The trial judge held that the will was invalid and made a decree setting it aside. The full court reversed this judgment holding that the evidence showed capacity in the testator, failed to prove undue influence, and satisfied the court that the testamentary intentions in favour of the plaintiff, contained in his earlier letters, had been abandoned. The plaintiff then appealed to this court.

Moss Q.C. for the appellant. The will having been executed under peculiar circumstances the onus is on the defendant, who is the sole beneficiary, to prove the testator's capacity. *Tyrrell* v. *Painton* (1).

(1) [1894] P. D. 151.

1896

ADAMS
v.
McBEATH.

The solicitor should have drawn the testator's attention to the fact that he was disinheriting his relatives and obtained positive evidence that he knew the full effect of his action. *Hanwood* v. *Baker* (1); *Wilson* v. *Wilson* (2); *Boughton* v. *Knight* (3).

The evidence sufficiently establishes that the testator did not express his own intention when he executed the will and was not in the mental condition required by law for such an act. See *Currie* v. *Currie* (4); *Baptist* v. *Baptist* (5).

S. H Blake Q.C. for the respondent. The respondent is only required to produce reasonable evidence to satisfy the court that the will was executed voluntarily and with knowledge of its contents. *Barry* v. *Dutlin* (6); *Brown* v. *Fisher* (7).

The evidence of the doctor as to the testator's mental condition, and that of the witnesses who knew the circumstances under which the will was executed, make a stronger case in favour of this will than many of those reported in which the courts have refused to undo the act of a testator. See *Martin* v. *Martin* (8); *Ashwell* v. *Lomi* (9); *Parfitt* v. *Lawless* (10).

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—On the 18th of November, 1891, one Samuel Adams died at Victoria, B.C. On the 11th of November, a few days before his death, he had executed a will, by which all his property, consisting both of realty and personalty, and amounting in value to about $10,000.00, was given to one Duncan McBeath, the defendant and respondent in this case. The will

(1) 3 Moo. P. C. 282.
(2) 22 Gr. 82.
(3) L. R. 3 P. & D. 64.
(4) 24 Can. S. C. R. 712.
(5) 23 Can. S. C. R. 37.
(6) 2 Moo. P. C. 480.
(7) 63 L. T. N. S. 465.
(8) 12 Gr. 500; 15 Gr. 586.
(9) L. R. 2 P. & D. 477.
(10) L. R. 2 P. & D. 462.

1897

ADAMS
v.
McBEATH.

Sedgewick J.

was duly proved on the 24th of November and McBeath took possession of the property coming to him under it. On the 18th of October, 1892, this action was instituted, the plaintiff being the nephew of the deceased, for the purpose of setting aside the will and for the distribution of the estate as if the testator had died intestate. The suit was tried before Mr. Justice Crease, without a jury, and judgment was entered for the plaintiff. Upon appeal to the Supreme Court of British Columbia, (consisting of McCreight, Walkem, and Drake JJ.), the judgment of Mr. Justice Crease was unanimously set aside. This is an appeal from that judgment.

It was not contended at the argument that there was any lack of testamentary capacity on the part of the testator. The only ground upon which it was contended that the will in question was invalid was that it had been obtained by the sole beneficiary, the respondent upon this appeal, by exercise of undue influence upon the mind of the testator, and that the will in question did not represent his actual wishes in regard to the final distribution of his property; and the sole question at issue in this appeal is whether there was, as a matter of fact, any such undue influence.

In considering this question, the statement of a few obvious principles in regard to wills in general may not be out of place. In the first place, a document purporting to be a will executed in the manner prescribed by the statute, is *primâ facie* a valid instrument. The onus of setting it aside is, in every case, upon him who asserts the contrary; but a will apparently valid upon its face may be invalid for many reasons. The testator may not have testamentary capacity to execute the will. That being established the will ceases to have any effect as a testamentary in-

1897

ADAMS
v.
MCBEATH.

Sedgewick J.

strument. Or the testator, although possessing sufficient testamentary capacity, may, in the expression of his wishes, be improperly influenced by outside parties to such an extent that the will in question does not represent his will or wishes, but the will and wishes of the party unduly influencing him.

That, as I have said, is the contention in the present case, and that the will therefore is bad. Lord Cranworth, in *Boyse* v. *Rossborough* (1), at page 49, says :—

> One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed.

And again, at pp. 50, 51 :—

> The most I can find, if indeed that can be found, is evidence to show that the act done was consistent with the hypothesis of undue influence ; that the instrument, though apparently the expression of his genuine will, might in truth have been executed only in compliance with the threats or commands of his wife or that he had been led to execute it by unfounded prejudices artfully instilled into or cherished in his mind by his wife against those who would otherwise have been the probable objects of his bounty.
>
> But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis.

I am of opinion that this case can, and ought to be, determined upon the application of this principle laid down by Lord Cranworth. The evidence in the present case is, I admit, consistent with the contention that McBeath exercised an improper influence upon the mind of the testator, but the evidence is equally consistent with the hypothesis that he did not. I have been unable to find, apart from the fact that the testator

(1) 6 H. L. Cas. 2.

left all his property to a person not a blood relative, a single scintilla of evidence to show that any improper influence was exercised upon him at all. The argument is:—There must have been undue influence; there must have been fraud or artifice, or improper representations on the part of McBeath, otherwise the testator would not have made the will he did; and they argue that the evidence showed a settled determination on the part of the deceased for many years to leave the property to his nephew, the appellant, and that that resolution, broken as it was by the execution of the will, could only have been broken under the overmastering pressure of McBeath at a time when the testator was approaching death and was completely under the control of McBeath. A careful perusal of the evidence, and particularly of the letters which the testator wrote to the present appellant, has convinced me that the intention of the testator to devise his property to the plaintiff underwent a change a considerable time before his death. The plaintiff had become a life inmate of a mariners' home near Liverpool, England, and the deceased's later letters contain reiterated statements to the effect that he might consider himself as provided for for life. I admit that under ordinary circumstances where a person possessed of property wills it wholly to a stranger, having at the same time a wife or family, or near relatives, in respect to whom he stands under a certain kind of moral obligation, that fact alone would afford some evidence, though not conclusive, that some malign influence had been brought to bear upon the testator to perform what would naturally be considered an unnatural act, but I must confess that in the present case there does not appear to be any incongruity or anything to shock one's natural sense of justice or propriety. The testator was a bachelor; had been living alone for many years

1897

ADAMS
v.
MCBEATH.

Sedgewick J.

of his life at Victoria; had no friends or relatives living with him or taking care of him in his declining years. He happened for only a short time to see one of his nephews in London, England, a great many years ago, and that nephew had eventually become, what I understand to be, a pauper in an alms-house. There never had been any love or affection, or confidence, as far as I can see, between them, and to my mind there was nothing unreasonable or unnatural in his leaving his property to kind friends whom he had met and known for years in his home at Victoria. From his point of view, it would be more probable that his property would be more properly dealt with by his friends about him whom he had known for many years and who had always acted kindly towards him, than by distant relatives whom he had never seen, or whom having seen, were more likely to do more harm than good were he to bestow upon them his bounty.

It was urged at the argument that a letter which the respondent wrote to the plaintiff after the death of the testator was convincing evidence of undue influence on the part of the respondent. That letter, as I have said, was written after the death of the testator, and is not relevant except in so far as it may show that its writer was not a man of truth. It otherwise has no bearing upon the issue as to whether there was or was not undue influence. No doubt there would be a desire on the part of McBeath, when he had reason to believe that the will might be attacked by the plaintiff, to write to him. The letter in question may not be strictly accurate in its minute details if one examines every word of it in a critical way. It is, however, substantially accurate and does not, in my view, in any way affect the credit or veracity of the respondent.

Stress was laid upon the fact that McBeath, the beneficiary, was the person who gave instructions to the solicitor who drew up the will, and it was contended that in consequence the full burden was placed upon the beneficiary to prove that that transaction was a proper one. I am not disposed to question that proposition. It has, in my view, however, been shown that the disposition that the testator made of his property was a reasonable and proper one, a disposition which might have been made, and which I believe was made, without any improper influence operating in favour of the beneficiary. The testator had a right to give his property to whom he pleased. It was, in my view, as reasonable that he should give it to a kind-hearted friend and companion whom he had known for years, and who, when he was unable to take care of himself, had kindly cared for him, as to give it to a comparatively unknown and distant relative whom he had never seen for many years, who had never shown him any evidence of affection or regard, and who had eventually become a ward of an eleemosynary institution.

The conduct of Mr Hall, the solicitor who drew the will, has been much criticised. All that is necessary for me to say is that there is nothing in the evidence to show that he departed from the line of professional duty. He was under no obligation, as has been contended, to explain in detail to his client the effect of the will. There could be no question as to what its effect would be. All the property of the testator would go to McBeath and none of his relatives would share in it. The solicitor was under no obligation to explain what the testator knew, or must have known, assuming testamentary capacity to exist. Whether he should have allowed McBeath to be in the room when the will was being executed is a question which must

1897

ADAMS v. McBEATH.

Sedgewick J.

depend upon circumstances. I gather from the evidence that in the present case his presence in the room at the time of the execution of the will was in a certain sense a necessity, and nothing further need, I think, be said upon that point.

I have not considered it necessary to go more elaborately into the details of the evidence. The learned judges of the court below have done this with great power, and I adopt what they have said with so much ability upon the subject.

In my opinion the appeal should be dismissed with costs.

GWYNNE J.—This is an appeal from the judgment of the Supreme Court of British Columbia reversing a judgment of Mr. Justice Crease upon the trial before him without a jury in an action instituted by the above appellant against the above respondent for the purpose of rescinding letters of probate of a will purporting to have been executed by an old man, the uncle of the appellant, in favour of the respondent which had been caused to be prepared by the respondent himself in terms dictated by him. The sole question involved in the action was whether or not the will in question can, under the circumstances appearing in evidence, be held to be in fact and in law the true last will and testament of the deceased. None of the relatives of the deceased resided in British Columbia. The will purports to have been executed on the 11th November, 1891, and letters probate thereof were granted on the 24th of that month.

It will be desirable to draw attention to the law relating to cases of wills prepared or procured to be prepared as this will was, by the respondent the sole beneficiary thereunder. Lord Cairns in the case of *Fulton* v. *Andrew* (1) uses the following language :

(1) L. R. 7. H. L. 460.

It is said that it has been established by certain cases to which I will presently refer that in judging of the validity of a will or part of a will, if you find that the testator was of sound mind, memory and understanding, and if you find further that the will was read over to him, or read over by him there is an end of the case, that you must at once assume that he was aware of the contents of the will and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My Lords I should in this case as indeed in all other cases greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by acts of parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the legislature has, in the shape of an Act of parliament, distinctly imposed that rule.

He then lays down the rule which does apply as laid down in *Barry* v. *Butlin* (1) in the language of Baron Parke when delivering the judgment of the judicial committee of the Privy Council, thus:—

The rules of law according to which cases of this nature are to be decided, do not admit of any doubt so far as they are necessary to the determination of the present appeal and they have been acquiesced in on both sides. These rules are two: the first that the *onus proband* lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator. The second is that 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. These principles to the extent I have stated are well established; the former is undisputed, the latter is laid down by Sir John Nicholl in substance in *Paske* v. *Ollat* (2); *Ingram* v. *Wyatt* (3); and *Billinghurst* v. *Vickers* (4); and is stated by that very learned and experienced judge to have been handed down to him by his predecessors and this tribunal has sanctioned it in a recent case namely *Baker* v. *Batt* (5).

Then upon a question arising as to whether any fraud does or does not appear in procuring the execution of a will he says on p. 463.

(1) 2 Moo. P. C. 480.
(2) 2 Phillimore 323.
(3) 1 Hag. Ecc. 388.
(4) 1 Phillimore 187.
(5) 2 Moo. P. C. 317.

1897

ADAMS
v.
MCBEATH.

Gwynne J.

It is very difficult to define the various grades or shades of fraud, but it is a very important qualification to engraft upon the general state of things that the reading over of a will to a competent testator must be taken to have apprised him of the contents. If Your Lordships find a case in which *persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared for their own benefit a will disposing in their favour of a large portion of the property of the testator, and if you submit that case to a jury it may well be that the jury may consider that there was a want on the part of those who propounded the will, of the execution of the duty which lay upon them to bring home to the mind of the testator the effect of his testamentary act, and that that failure in performing the duty which lay upon them amounted to a greater or less degree of fraud on their part.*

Lord Hatherly in the same case p. 469 says :—

A matter which appears to me deserving of some remark and upon which the Lord Chancellor has already fully commented is *the supposed existence* of a rigid rule by which when you are once satisfied that a testator of a competent mind has had his will read over to him and has thereupon executed it, all further inquiry is shut out. No doubt these circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator. *Still circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory and also having read over to him that which had been prepared for him and which he executed as his will. It is impossible, as it appears to me, in the cases where the ingredient of fraud enters to lay down any clear and unyielding rule like this.*

Again he says p. 471 :—

There is one rule which has always been laid down by the courts having to deal with wills and that is that a person who is instrumental in the framing of a will and who obtains a bounty by that will is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of comprehending it. *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 upon them the onus of shewing the righteousness of the transaction.*

In the introductory words of his judgment p. 468 Lord Hatherly had expressed his full concurrence in the

observation which had been made by Lord Cairns. It is plain therefore, I think, that concurring as he did with Lord Cairns' observations as to fraud, his Lordship considered that the non-establishment, by a party who had been instrumental in procuring a will to be made in his favour, of the righteousness of the transaction to the complete satisfaction of the tribunal, whether a judge or a jury, before which the question was tried constituted fraud in procuring the will so as to avoid it, although it might be impossible to lay down with certainty the precise mode by which the fraud had been effected.

Where the will is an inofficious one, that is to say one in which, like the one now under consideration, natural affection and the claims of near relationship have been disregarded, the person propounding the will must make out a case of full and entire capacity in the testator at the time when the paper was framed, and it will not be sufficient in order to do this to make out that he was of capacity to answer a few common questions or to make a few casual remarks or *even to concur and express some loose wishes and ideas as to altering his will and so on; he must satisfy the court that he was equal and alive to, and comprehended the full import of what he was doing at the time*, seriously important as what he actually did must be admitted to be. This is the language of Sir John Nicholl in *Montefiore* v. *Montefiore* (1). In *Baker* v. *Batt* (2), the language used is

> If the person benefited by a will himself writes or procures it to be written the will is not void as it would have been by the civil law, but the circumstance forms a just ground of suspicion and calls upon the court to be vigilant and jealous and requires clear and satisfactory proof that the instrument contains the real intention of the testator.

In short the fact of the will being made in favour of the person who has prepared it or procured it to be

(1) 2 Addam 354. (2) 2 Moo. P. C. 321.

1897

ADAMS
v.
MCBEATH.

Gwynne J.

written is *primâ facie* evidence of fraud, which must be displaced to the satisfaction of the tribunal before which the case is tried *by clear and satisfactory proof*, and when the will is an inofficious one the evidence required must of necessity be of a much stronger and more conclusive character than that which might be sufficient where the party so claiming under the will was a relative of the testator.

In *Parker* v. *Duncan* (1) Sir James Hannen, following the rules as laid down by the House of Lords in *Fulton* v. *Andrew*, (2) adds the following:

> *It is the duty of any man who* expects *that a will is about to be made in his favour to see that the testator receives proper and independent advice* and he should take care that the testimony called in support of the will should not be that of himself alone but that it should be independent and impartial. A person (that is a testator) is entitled to have his mind perfectly free and untramelled and when one is so very ill (referring to the testator in that case) *he will do anything to get rid of importunity.*

And in *Brown* v. *Fisher* (3), after quoting at large the rules to govern courts in the case of a will prepared by and executed in favour of the person who prepared it, as laid down in *Fulton* v. *Andrew* (2), he concludes his judgment thus:—

> On the whole of the evidence *I find that the doubt and suspicion with which I was bound to watch this case in accordance with the passage I have read* (from *Fulton v. Andrew* (2)) *have not been removed*, and it has not been affirmatively established, as the plaintiff was bound to establish it, that the deceased knew and approved of the contents of this document.

The testator at the time of the making of the will now in question was a very feeble old man. He had almost completed his 83rd year. He had been for the preceeding four years at least a great sufferer from rheumatism. He lived in a small house, wholly alone, doing himself all his household requirements. One George Barrett who lived near him and who saw him

(1) 62 L. T. N. S. 642. (2) L. R. 7 H. L. 460.
(3) 63 L. T. N. S. 466.

almost every day, and to whom the old man used always to apply for anything he wanted done about the house, as, to use Barrett's own language, "picking the apples, trimming the trees or anything," and who had seen him last in his house on Friday, the 6th November, 1891, gives this account of the condition in which he found him on the following Monday the 9th November. He says:—

About noon on that day Mrs. Rivers came to my house, told me she had not seen Mr. Adams for the last two or three days—she lived next door to him. I went with her to the house, got a ladder and climbed to his bedroom window, knocked at it, found he was inside *by the groans and noises he made.* After a time he got to the door and let me in; he was standing in his shirt just inside the door. I closed the door immediately when I saw what state he was in. He had one eye blacked and *he was in a very helpless condition,* and of course I closed the door and shut the other people out and went inside and asked him what was the matter and *he said he had a terrible time for the last three days and had not been able to get out of the house.* He had knocked his little stove down, I suppose by falling around the room, and he had a black eye. I put him into bed and straightened up the stove, and fetched the doctor; I knew he had to have one. I went for Dr. Milne, he came immediately—felt his pulse, his heart, and sounded him around one way or another and made a remark that *the clock was pretty well run down* and instructed me to get some whiskey and eggs, flannel and other things and wrap him up and get him warm. *His extremities were all cold.* I went and got some flannel and wadding and bound him up as warm I could. I stayed with him that night, I was the only nurse that night. He could not feed himself, he was comparatively helpless. I would have to lift him out of bed and into bed and he would want to get out about every twenty minutes. * * * Mr. McBeath the defendant came there in the evening. He remained probably two hours. I think he went away about 9 or 9.30. On Tuesday morning Mr. McBeath came about 7 o'clock. I asked him if he would stay a little while I went home and got some breakfast. He said he would stay until noon-time. I went home and went to bed until noon-time and then I came back again. Mr. McBeath was there at the time. I asked him what we should do with the old gentleman, whether it would not be better to take him to the hospital. He said: "*No, he is going to my house with me.*" *This was said in Mr. Adams' presence but I could hardly imagine he knew what we were talking about.* I don't think he understood what was said; I spoke to the old man about

1897

ADAMS
v.
MCBEATH.

Gwynne J.

going to McBeath's house afterwards. *I wanted him to go and asked him to go. He was not very willing to go at first. He did not like to leave the house. He thought I had made an excellent nurse but I persuaded him to go afterwards as I could not stay with him and nurse him,* and so by the influence of Mr. Kirsop and two or three others we got him to go there * * * He did not want to leave the house. He would much rather I am sure have stayed there from what he said.

Accordingly he was taken down in a carriage to Mr. McBeath's house. McBeath and Barrett went with him. When leaving him he bade good-bye to Barrett, saying "George I wont forget you" or something to that effect, to which Barrett replied "I will come down and see you again" which he did on Thursday the 12th.

George Kirsop when he heard of Adams' illness went up to his house with one William McDonald on Tuesday the 10th November. Kirsop in his evidence says:

When we got into Mr. Adams' house we saw Mr. McBeath there and Mr. Adams was supposed to be asleep in his bed. He was quiet. I never looked at him in fact. Mr. McBeath said he was asleep and I never made any inquiry any further. I had seen Mr. McBeath up to visit Adams occasionally when I lived there. Mr. McBeath said he would like the old man to come down to his house, that he and his wife would take care of him. I thought that was a very good thing *if we could get him to go. Then I told Mr. McBeath that Adams had not got any will made yet, that he had been promising me for three or four years to make his will, and if we should get him to go down with him, McBeath, and if he was capable of making a will to get him to make his will. I told Mr. McBeath if he could get him to make a will if he was capable it would save the Government from eating part of it up. I told him there was* $2,000 *in the savings bank and this property, and that everything that he had had to go to his nephews in Liverpool*; after I told Mr. McBeath this Mr. Macdonald and I left the house and at the corner met Mr. Barrett; we had a conversation and Mr. Barrett thought it would be better to take him to the hospital. Mr. Barrett asked me to get the doctor to persuade Adams to go to McBeath's. McDonald and I went to the doctors and the doctor said he would and I went back to Mr. Adams' house and told him what I had done. I told him the doctor was coming up to persuade him to go down with Mr. McBeath. We thought it was best as he wanted nursing like a baby. I said: "*It is the best thing you can do.*" He said: "*George* (meaning Barrett) *is a*

good nurse and he will take care of me." I left, *he would not consent to go,* and I went home and got my dinner.

The doctor went up as he promised to use his influence to get Adams to go to McBeath's, but when he got there he found the matter had been arranged and that Adams had consented to go.

Mr. McDonald, the person referred to by Kirsop testified as follows :—

I remember before the death of Mr. Adams meeting Mr. Kirsop and going with him to Mr. Adams' house. When we got there Mr. Adams was lying in the bed asleep and Mr. McBeath was there. There was a conversation between Mr. Kirsop and Mr. McBeath in my presence. Mr. Kirsop told Mr. McBeath that if he was to take him over to his house, *to get him to make a will if he was competent to.* Mr. Kirsop told Mr. McBeath that he was trying to get the old man to make a will for some years; and he intended what money he had in the bank, something near $2000.00, and all the property to go to his nephews in Liverpool, that the old man had so said.

Certain letters were produced written by the old man to his nephew the plaintiff in the action between the month of October 1878 and the month of July 1891, shewing the friendly and indeed affectionate relations existing between the old man and his nephews in England and especially between the old man and the plaintiff in the action and his children. A few extracts will suffice. In a letter of the 28th October 1878 after mentioning his rambles over the world since they had last met, 30 years previously, he tells him of his arrival in Victoria, and he says :—

I would like to hear from you and know how you and your brother William are getting on, what business you follow for a living and also what family you have. I hope you will not think I am too inquisitive in asking you these questions—*I have a particular reason for doing so.*

In a letter dated 18th March, 1884, after telling him that he had been again rambling but had returned to British Columbia—he says :—

1897

ADAMS
v.
MCBEATH.

Gwynne J.

Dear nephew. I am very anxious to hear from you and to know how you are getting on ; *it might be to you or your sons an advantage* for me to have your address for I am now well up in years. I was 76 years old last January but my health is good. I am smart and active on my feet yet for a man of my age thanks to Almighty God for all his mercies towards me. I would be very glad to hear from you and how you are getting on, and also how your son is getting along and if he is still in business for himself and if he is married. You did not give me the christian names of your son and daughter in your letter. *I have a little property here but no friend or relative to leave it to at my death ; it is worth looking after.*

In a letter of July 25th, 1884, after acknowledging the receipt of a letter from the plaintiff of the 20th of June and telling him all about his property and his mode of life, he says :—

If you should change your place of residence at any time you will be sure to let me know of it *for it will be necessary for me to have it always and if anything should go wrong with me I will let you know it also, but if it should be the Lord's will that I should outlive you it will be necessary for me to know your son and daughter's place of residence. The place can be sold after my death if there is none of your family here before then and the money sent to you if you are living, and if not to your son and daughter.* There will be no necessity for you to trouble yourself about writing to me after you receive this as I have your address now, unless you wish to do so.

In a letter dated August 22nd, 1884, after acknowledging the receipt of a letter from the plaintiff and also at the same time one from his son-in-law (Mr. Hatfield,) he says :

Please let Mr. Hatfield know when next you see him that I am too old now to become a regular correspondent with him but if he wants to know anything particular about this country I will give him all the information I can with pleasure. I have *given you all the particulars about myself* and *this place in my last and you may be sure I will do what I promised you. There will be no necessity* for you to write to me again *as you know what my intentions are,* unless you change your place of residence.

Then in a letter of the 22nd of August, 1886, acknowledging another letter from the plaintiff, he says :

I was very sorry when I read it to know of your son's death as he was quite a young man and also an only son. He is a great loss to his

poor wife and family, but the will of God must be done but I think it would be a great loss to you if it was God's will to take your daughter Mrs. Hatfield away. Your son did not assist you in any way for the last four or five years of his life or at least since he was married but I believe it is not so with your daughter, for I think she has been a great comfort to you. I am glad to hear that her husband is so steady a man and doing so well * * * *I hope you do not think I have forgotten you as I do not write occasionally to you but you may be sure I do not, for you are seldom out of my mind.* I would like to know how your brother William is getting on and what he is doing for a living.

Then he repeats his story of his lonely way of living and in a P.S. says:

Please give my respects to Mrs. Hatfield and tell her I am well pleased to hear she has got so good a husband.

Then in a letter of the 7th January, 1887, after acknowledging the receipt of four portrait cards of his nephew the plaintiff and all his family, he adds:

I am very thankful to Mr. and Mrs. Hatfield for their kindness in getting you to have their portraits taken and sent to me. *I will not forget this to you or them.* I thought there was no person now living that ever bestowed a thought upon me *but yourself and my poor old sister Margaret* but I see by this that I have been mistaken.

In a letter of the 24th August, 1887, he congratulates the plaintiff upon his having got into an institution, a mariners' or sailors' home, *so as to be no longer depending on his son-in-law.*

Then in a letter of January 2nd, 1888, he commences thus:

This season of the year sets one thinking of old friends and old times and somehow I got thinking of you to-day and thought I would send you a few lines from the city of Victoria wishing you the compliments of the season.

He then again congratulates the plaintiff upon his having got into the institution. He then repeats the story of his lonely life and adds:

I have *not many visitors coming to see me, now that I am old their visits are few and far between.*

1897

ADAMS
v.
McBEATH.

Gwynne J.

He then mentions his suffering much from the rheumatism and expresses his fear that he will never get rid of it and concludes:

Please give my respects to Mr. and Mrs. Hatfield when next you see them.

Then in a letter dated October 18th, 1888, he says:

I still continue to live in a small house by myself and do my own cooking, which is not much. *I have not many visitors coming to see me but that does not trouble me much.* I have suffered considerable the last two years with rheumatic pains in my head, hands and feet; I have tried a great many remedies for it but cannot find anything that will improve them for me. I have to remain in the house most part of the time. I am not able to walk about the town as I used to do two years ago. I am getting old now and also very deaf, since I got the rheumatic pains *in my head.*

Then in a letter dated March 2nd, 1890, after giving a statement of his failing health and his still lonely life, he says:

I would like to know how your brother William is getting on *and also to have his address.* Please give my respects to Mr. and Mrs. Hatfield when next you see them.

In a letter of March 5th, 1891, he inquires about the plaintiff's son-in-law in the following terms:

I would like to know if it is your son-in-law's intention to continue on board the Liverpool and New York Packet. I think if he had a situation in some of the principal offices in New York he would do better; the next time you see him please to let him know I was inquiring about him.

Then in his last letter which is dated the 21st July, 1891, he says:

I have received yours of the 2nd instant in due time. *I am always well pleased to hear from you.* I think I have no relation now living that ever bestowed *a thought upon me but you.* * * * I wish you would let me know how your brother William is getting on and what he is doing for a living, and also I wish you would send me his address. I would like to know if it is your son-in-law's intention to remain in the situation he has at present, *I have a particular reason to know it.* * * * Please to send me Hatfield's address when next you write. * * * I am still troubled with rheumatic pains in my hands and

feet. I am now 83 years and six months old. The house I live in is a very comfortable one but very small. * * * I have not much furniture in it but just enough for my own use, *as I have no visitors coming to see me. Please give my respects to Mr. and Mrs. Hatfield when next you see them.*

In these letters the deceased never expressed a single sentence to warrant the conclusion that he had for a moment changed the intention expressed in some of them in the most explicit terms of leaving his property after his own death to his nephews and their children. It has been suggested that such an intention does appear in the congratulations which the letters contain upon the plaintiff's admission into the Sailors' Home. But the fact of the nephew having been admitted into that institution whereby his son-in-law was relieved from supporting him can surely afford no evidence of an intent to violate a voluntary, express declaration of intention as to the disposition by the uncle of his property after his death, or of his being no longer influenced by those strong sentiments of natural affection which pervade every letter to the last; however that no such conclusion can possibly be drawn from the congratulations is established beyond dispute by the evidence of the witnesses Kirsop, Williams, and Mrs. Noble, who, if those witnesses can be relied upon, prove that the deceased repeatedly expressed to them separately up to the time of his receiving the injury which he sustained on the 9th of November, 1891, such to be his intention. The learned judge appears therefore to have been perfectly justified in arriving at the conclusion as of a matter of fact that to the promises contained in those letters the deceased adhered without a single break or expression of change of intent. Yet, upon the day after he was carried in the wretched condition in which he was on the 10th of November to McBeath's house in utter disregard of all natural affection and of the sentiments to which he

1897

ADAMS
v.
McBEATH.

Gwynne J.

had always previously given expression verbally and in his letters he executed the will in question in favour of McBeath. It is admitted by McBeath that from the time of the deceased being carried to his house he never expected him to recover—he thought he would die at any moment—that the doctor had told him that he did not think he would get over it—that it would only be a matter of time, that he would be called away any time—in fact that he McBeath expected deceased's death at any moment and did not expect that he would ever get out of bed. Dr. Milne saw the deceased on the 11th November the day of the preparation and execution of the will—in the afternoon—he found the deceased still very feeble, in fact he was feeble all the time. The doctor could only make him hear by speaking very loud. He was very weak and suffering much pain; the doctor interrogated him as to his ailments and only as to them, and he answered him but only in monosyllables, yes, no; he was in such a weak condition and his pulse so weak and his heart so languid that on the 11th the doctor would not allow him to sit upright in bed. He directed that he should be allowed to lie down as much as possible. He was a man who in the doctor's opinion could not endure much pain. In the condition in which he was, although very weak and suffering much pain, the doctor thought him to be quite *compos mentis;* he could readily be persuaded to do what the doctor wanted. The doctor never heard that a will was contemplated to be made, or until after deceased's death that one had been made. About 5 o'clock upon this 11th of November, Mr. McBeath went to the office of a Mr. Hall, a young practitioner at law who was a stranger both to Mr. McBeath and to Adams, and he told Mr. Hall that the latter wished to make a will leaving all his property to him McBeath,

1897

ADAMS
v.
MCBEATH.

Gwynne J.

and asked him to prepare it. Hall accordingly while McBeath waited prepared the will, and when he had finished drawing it they both went down together to McBeath's house. While on the way or in Mr. Hall's office McBeath told Mr. Hall that Adams was alone in the world, had no relatives. When they got to the house they went into the sick man's room and McBeath in a loud voice said to Adams, "here is Mr. Hall a lawyer come with a will for you to sign." Mr. McBeath then, and his wife, went and lifted up Adams in his bed who during the process of being lifted up suffered much pain. With Mr. Hall's evidence as to what then took place the learned trial judge has so fully dealt in his very exhaustive judgment that I make no reference to it, further than to say that the will so prepared was signed before 7 o'clock and that during the whole time that Mr. Hall was in the sick room McBeath was also present, and assisting the deceased to sit up in his bed, to sign the will. Now from the cases already cited and others cited by the learned trial judge in his exhaustive judgment it is plain that the whole onus of removing by the most clear and satisfactory evidence, quite independently of McBeath himself, the doubt and suspicion as to the *bona fides* of the will and as to its not being the true and voluntary disposition of his property by the testator himself not only with full knowledge and appreciation of the contents of the will as appearing in it but uninfluenced in any way by McBeath, which doubt and suspicion the law attaches to the fact of the will having been prepared by and under the direction of McBeath, was cast upon him. The learned judge has found as a matter of fact in his most exhaustive judgment that the most material points relied upon by McBeath, namely the alleged promises by Adams to leave to him his property at his death and the instructions alleged to

1897

ADAMS v. McBEATH.

Gwynne J.

have been given to McBeath to get a lawyer to make a will in his McBeath's favour for Adams to sign depended wholly on McBeath's own evidence and that in the presence of the contradictory evidence to which the learned judge draws the fullest attention it was impossible to accept the evidence of McBeath as true. In fine he says, and it is to be remembered he is dealing with matters of fact and with credibility of witnesses examined before himself,

> instead of removing the suspicion the necessary inferences from all the circumstances and facts before the court point rather to their increase than their dissipation. The doubtful and contradictory evidence of McBeath, the prevarication of his wife of a vital fact to Mr. Noble, the descrepancies in the evidence of the McBeath's and Modeland's; the refusal of wife and sister-in-law thrice repeated to support McBeath in his statement of old Adams' instructions and promises in his favour in making the will; the absurd pretension of intimacy for years with a man who would tell him nothing of his age, nationality, relations, or of his property; the alleged promises to leave the property to McBeath in violation of the written promises of his life, to leave all to his nephews and their descendants * * * * * * have only increased rather than cleared away those doubts and suspicions with which the law insists upon regarding a will made under such circumstances as the present.

Then in another place, drawing attention to a statement of McBeath's that (at a time when from deceased's letter to the plaintiff it appeared that he was in California) Adams had said to him,

> that he had nobody to leave his property and he would just as soon leave it to me as to any one. Being asked upon this, did he say he had no one to leave his property to? He replied, yes sir, he said he had no friend to leave it to and would as soon leave it to me as to any one he knew of and he had no one else to leave it to?

What confidence, says the learned judge, can one place in such a witness?

He draws attention in another place to his statement of ignorance as to the property which the deceased possessed until after the will was made, and his contradiction of what Kirsop in Macdonald's pre-

sence had told him when he was taking Adams down to his house, and to what Williams also had told him about the will in pencil which the deceased had showed Williams in September 1891, whose testimony in rejection of McBeath's the learned judge believed, and then to the letter of the 28th December, 1891, to the plaintiff after his uncle's death which the learned judge characterised upon the evidence before him as being full of suggestion and suppression *i e*, *suggestio falsi* and *suppressio veri*. But it is useless to go through all the points in which the learned judge has found McBeath's evidence as unworthy of belief, and if unworthy of belief it is difficult to understand how the evidence of any of the other witnesses can remove the doubt and suspicions as to the *bona fides* of the will and as to its righteousness, as said by Lord Hatherley in *Fulton* v. *Andrew* (1).

As to the evidence of the doctor, after showing the very imperfect material upon which he based the opinion which he gave that upon the 11th November, 1891, the deceased was of perfectly sound mind and understanding to dispose of his property by will, and after citing passages of the law relating to wills made by a person *in extremis* as the deceased in this case was, as follows :

In examining the capacity of a person under these circumstances we should avoid putting leading questions which suggest the answer "yes or no." Thus a dying man may hear a document read over and affirm in answer to such a question that it is in accordance with his wishes but without understanding its purport. This is not satisfactory evidence of his having a disposing mind ; *we should see that he is able to dictate the provisions of the documents* and to repeat them substantially from memory if required. If he can do this accurately there can be no doubt of his possessing complete testamentary capacity. But it may be objected that many dying men cannot be supposed capable of such an exertion of memory. The answer is then very simple ; it is better that a person should die without a will, and his property be distributed according to the law of intestacy than that through any

(1) L. R. 7 H. L. 460.

1897

ADAMS
v.
McBEATH.

Gwynne J.

failing of his mind he should unknowingly cut off the rights of those who have the strongest claims upon him

he then shows that the doctor made no such, nor indeed any, examination of the deceased save of the most superficial character very far from establishing that an old man of the age of the deceased who had been for some years subject to the tortures of confirmed rheumatism in head, hands and feet, and who had been exposed to the frightful exposure, starvation and cold as the deceased had been exposed to for the three days preceding the 10th of November, could upon the 11th when in such a weakened condition of body, and *in extremis*, and dying as he then was, have had his mind quite unaffected by the physical tortures he had suffered and was still suffering, and in that perfectly sound condition required for the making of a will. The proper test to determine whether in the condition in which he was physically he had or not that mental capacity to make a will which in such a case ought to have been applied, never was applied.

Then as to the conduct of Mr. Hall who appears to have acted as being the solicitor of McBeath and not of the deceased, he points out that he did not, as he should have done if acting as the solicitor of the deceased, insist upon having a private interview with him, in which he should have put to him suitable questions to elicit what was the real intent of the deceased as to the disposition of his property, and from instructions so taken from the deceased himself and not from McBeath he should have prepared the will—and had he so done he would have been in a position to give evidence as to the capacity which he was not in, acting as he did.

The shortcoming of Mr. Hall was, he says, the want of experience in the ordinary practice of testing the capacity of a testator, ensuring the exercise of his free intelligence and bringing to his notice and

memory any relatives he might have intended to benefit in the disposition of his property. It is very possible that the recollection he twice mentioned of the defendant's having told him when he came to his office or on his way to the house that old Adams was alone in the world—that he had no relatives living—put all thoughts of possible relations out of his head.

Then as to the question testified to by Mr. Hall, "can I alter this," and the remark when told he could, "this ought to have been done long before," the learned judge asks what did the old man understand of it all in his feeble condition:

To my mind, says the learned judge "can I alter this," in view of all the circumstances, tells the tale, and, *this should have been done long before*, points the same way—what he wanted for years—*long before*, the letters to his nephew tell us, and the promises which, very likely, he thought he was carrying out through the medium of McBeath in favour of his relations.

There is, he adds, only one other alternative view, that, surrounded as he was in McBeath's by his family and relations, in this weak and feeble state in McBeath's arms and the other influences around him, when the question was put to him: Are you willing to leave everything to McBeath? what other answer could he give than what to him was far beyond the nature of a request.

And he concludes that the questions put by Mr. Hall to the deceased and his replies thereto were quite inadequate to remove the suspicion either of want of a clear understanding of the document or of *that form of coercion to which the surrounding circumstances in his view of them clearly point.*

In this judgment of the learned judge who tried the case, so far from finding anything which sitting in appeal I could pronounce to be clearly erroneous, I must say that I entirely concur. The question before the learned judge was one of fact depending upon the credibility of the witnesses and a due appreciation of the credible evidence given. The learned judge has, upon the most abundant evidence, found as fact that the deceased had for years and until the last moment

1897

ADAMS
v.
MCBEATH.

Gwynne J.

preceding the frightful sufferings which he endured during the three days preceding the 10th November, 1891, entertained the fixed intention of leaving his property at his death to his own relations, in conformity with that natural affection for them which he appears to have had in an eminent degree. When then on the day after he was taken to McBeath's house we find him signing a will which leaves all his property to McBeath, who can be regarded in no other light than a perfect stranger, a mere acquaintance with whom the old man was less intimate than he was with Barrett or Kersop and Williams to whom he had often spoken of his relations and repeatedly stated his intention of leaving his property to them at his death; and when we find that the only instructions given for the will were given by McBeath himself, who also interfered in the manner described by Mr. Hall, by holding up the old man in his bed until the will was signed, it is but natural and reasonable that we should demand what in the case of a will so prepared and made the *law requires to be given* by a *person in the position of McBeath in such a case*, clear and intelligent and sufficient reasons for such a sudden and so extraordinary a change of intention and the most clear satisfactory and independent evidence to remove the doubts and suspicions which the law casts upon such a will so prepared, doubts and suspicions not only as to the perfect testamentary capacity of the testator in the miserably reduced physical condition in which he was, but also as to the *bona fides* of the will and of McBeath, and that the physical weakness of the testator was taken advantage of by McBeath in whose power he was and that the testator was in some manner influenced by McBeath to make the will in his favour. The circumstances as detailed in the evidence which the learned judge has accepted as true were well calcu-

lated to give rise to the very gravest doubt and suspicions both as to the capacity of the testator and also as to the *bona fides* of McBeath.

The reasons suggested by him as to the testator's motives in leaving his property to him the learned judge who had the best opportunity of forming an opinion upon the evidence has pronounced to be incredible, and McBeath to be unworthy of belief; the learned judge has given most full and satisfactory reasons for his arriving at this conclusion.

The learned judges of the Supreme Court of British Columbia sitting in appeal have thought that the evidence of Dr. Milne and Mr. Hall supplies all that is wanting in McBeath's evidence and in fact all that is at all necessary, but the learned trial judge has in his very exhaustive judgment shewn that in a case like the present the facts upon which these gentlemen formed their opinions are wholly inadequate to support the opinions formed and it is with the facts upon which opinions are formed and not the opinions themselves that we have to do. Those facts are of the most superficial nature possible. The opinions formed upon them might be allowed to pass without observation in the case of an ordinary will in which no doubt or suspicion existed as to the will being the voluntary expression of the intention as to the disposition of his property by a person of competent capacity; but in a case like the present where the greatest doubts and suspicions are by the law attached to the will which doubts and suspicions must be removed by the most clear and satisfactory evidence, the learned judge has, I think, shewn very clearly that neither the doctor or Mr. Hall applied the tests which the law and common sense required to be applied in such a case; neither the doctor nor Mr. Hall appear to have at all regarded the case as one which called for any special

1897

ADAMS
v.
McBEATH.

Gwynne J.

inquiry. In the doctor's evidence there are some facts however which might have led the doctor to see that there did exist some good reason for the doubts and suspicions which the law attaches to a will prepared and executed as was the one under consideration. He says that upon the 11th in the afternoon, before the will was signed (and of any intention to make a will at all the doctor had not any intimation whatever), he found Adams still suffering much—very feeble—very deaf—the doctor had to speak very loud to make him hear—the doctor interrogated him as to his ailments but only as to them—Adams answered intelligently—but only in monosyllables—Yes and no. He was a man, the doctor says, who could not bear much pain—that seemed to be the character of the man, however brave he might be otherwise—that is to say otherwise than in his then low suffering physical condition. In his then condition he could not stand much pain and the doctor could readily persuade him to do what he wanted. His pulse was very weak—his heart languid so much so that he would not allow him to sit up in bed and gave directions that he should be allowed to remain lying down perfectly quiet. Now in *Ingram* v. *Wyatt* (1) we find among the marks of senile imbecility constituting testamentary incapacity—"inertness of mind"—"paucity of ideas"—"timidity"—"submission to control"—"acquiescence under influence"—and the like. Two of these marks the doctor admits having observed without however inducing him to make any more than a cursory observation of the physical condition of the patient whom he knew to be on his death bed. The doctor's excuse must be that he never heard of any intention to make a will; a closer examination would, it seems not unlikely from the extremely low and painful condition

(1) 1 Hag. Ecc. 403

in which the old man was physically, very probably have shown some of the other marks of senile imbecility above mentioned. Now if the doctor found his patient in such a low condition that he could be easily influenced to do what was wanted, it is possible that Mr. McBeath had acquired the same knowledge, and the circumstances attending the signing of the will by Adams as detailed by Mr. Hall himself are open to the gravest suspicion; they were well calculated to blind Mr. Hall, a perfect stranger both to McBeath and Adams, (and may be for that reason that he was the lawyer employed) to the true nature of the transaction in which he was taking part. That a man in the miserably low physical condition to which the old man was reduced by the sufferings which he had endured and was still enduring could, *to avoid importunity*, be easily influenced to do anything which the man in whose house he was dying, and in whose power he was and to whom he would be indebted for whatever ease of body and peace of mind he should enjoy in his dying moments, should ask or suggest, we can readily understand, and assuming any influence whatever of importunity or otherwise to have been exercised by McBeath certainly his conduct upon entering the sick man's room with Mr. Hall was well calculated to attain his object while concealing his intent. Upon entering the room he called in a loud voice to the old man lying down quietly in his bed apparently asleep "here is Mr. Hall a lawyer with the will for you to sign;" then he proceeded directly to lift the old man up and with the assistance of Mrs. McBeath lifted him up and made him sit up straight in the bed, (which the doctor that day had forbidden) until the will was signed. While being lifted up Mr. Hall observed that the old man suffered much pain. Then the fact of the will having been made, having been not only sup-

1897

ADAMS v. MCBEATH.

Gwynne J.

pressed but actually denied by McBeath's wife who was a party assisting in holding the old man up until it was signed, and never spoken of until after the old man's death were facts which, together with the statements in the letter of the 28th December to the plaintiff, were well calculated to increase rather than remove the doubts and suspicions attending the transaction. Upon the authority of *Parker* v. *Duncan* (1) referred to by the learned trial judge among the numerous cases upon which he proceeded in forming his judgment, it was the duty of McBeath *upon his own showing* to have taken very particular pains to have provided the old man under his care and roof, and whom he admits he knew to be dying, with proper and independent advice in the preparation of his will; none was provided, for Mr. Hall cannot be said to have been, or to have acted as if he was, solicitor for Adams. There cannot be a doubt that Mr. Hall is right when he said that McBeath, either in his office or on the way down to the house with the will, told him that Adams was alone in the world without any relations, and that McBeath knew such statement to be false we cannot doubt to be established by the evidence of Kersop and McDonald which the learned judge has accepted and believed to be true while he rejected that of McBeath as unworthy of belief. What object can McBeath be supposed to have had in making this false statement to Mr. Hall unless for some purpose to blind him? Had this case been tried by a jury and had they arrived at the same conclusions as has the learned judge and had they rendered their verdict accordingly, such verdict could not possibly in my opinion be set aside either as being contrary to, or against the weight of evidence. The finding of the learned judge whose professional training has made him more competent to weigh evidence and appreciate

(1) 62 L. T. N. S. 642.

its value is surely entitled to equal weight with the verdict of a jury.

In fine I must say that I concur with the learned judge that the defendant in the action has wholly failed to remove the doubts and suspicions which the law attaches to the will by reason of its having been prepared under his direction; nay more that the defendant's untruthfulness in the many particulars in which the learned judge has found him to be unworthy of belief, rather tends to increase instead of removing those doubts and suspicions. The appeal therefore, in my opinion, should be allowed with costs and the judgment of the learned trial judge restored and affirmed, which, in my opinion cannot be reversed consistently with due regard being paid to the authority of the many cases cited by the learned trial judge as enunciating the law applicable to the case.

Appeal dismissed with costs.

Solicitor for the appellant: *Gordon Hunter.*

Solicitor for the respondent: *H. G. Hall.*