IN THE ESTATE OF GEORGE HARMES, DECEASED

ERNEST W. HINKSON.....APPELLANT;

AND

PAUL HARMES AND THE CUSTODIAN OF ENEMY PROPERTY. } RESPONDENTS.

1942
*May 19, 20, 21
1943
*Feb. 2

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Will—Validity—Will prepared by one who benefits under it—Attitude of suspicion to be taken by the Court—Onus to remove suspicion—Evidence—Findings at trial.

Where a will is prepared by one who benefits under it, it should be viewed with suspicion and the Court should be vigilant and jealous in examining the evidence in support of the instrument and should not pronounce in its favour unless the suspicion is removed and unless it is judicially satisfied that the paper propounded is the true will of the deceased.

In the present case (where a beneficiary under a will had prepared it and conducted its execution) the trial Judge pronounced in favour of the validity of the will. His judgment was reversed by the Court of Appeal for Saskatchewan, [1942] 1 W.W.R. 385, which held (Martin,

*Present:—Rinfret, Kerwin, Hudson and Taschereau JJ., and Gillanders J. *ad hoc*.

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C.J.S., dissenting) that the trial Judge had failed to assume adequately the attitude of suspicion required by the rule above stated, and that, under the circumstances in question and on the evidence, a finding in favour of the validity of the will was not justified. Appeal was brought to this Court.

Held (Hudson J. dissenting): The appeal should be allowed and the judgment of the trial Judge restored. He was, as shown by a careful reading of his judgment, well aware of said rule of law and had it in mind when considering the evidence. His findings, made in face of contradictory evidence and based on the credibility of the witnesses, should not lightly be disturbed. Reasons of Martin, C.J.S., dissenting, in the Court of Appeal (cited *supra*) approved.

Per Hudson J., dissenting: Under the circumstances of the case, the onus was heavily on appellant, and, on the evidence, he had completely failed to remove the suspicion created by those circumstances; and had failed to establish that the deceased fully understood what he was doing in disposing of his property in the terms of the alleged will. The trial Judge failed to realize the strength of said onus.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1).

The Canada Permanent Trust Company, the executor named in a document purporting to be the last will and testament of George Harmes, late of the City of Regina, in the Province of Saskatchewan, deceased, petitioned the Surrogate Court of the Judicial District of Regina, Province of Saskatchewan, for an order for proof in solemn form of the said will.

The will had been prepared by Ernest W. Hinkson, the appellant, while present with the deceased, and he (the appellant) conducted its execution. He was not a relative of the deceased. He was the residuary legatee under the will. The will was dated April 3, 1941. The deceased died on April 4, 1941.

It was ordered that proceedings be taken to prove in solemn form the alleged will or such part or parts thereof as might be established in evidence. By a subsequent order it was directed (*inter alia*) that at the trial of the proceedings the question of the validity of the will, in whole or in part, be determined, including the following issues:

(*a*) the testamentary capacity of the said deceased at the time of his purported execution of the said alleged will;

(*b*) the due execution of the said alleged will by the said deceased;

(1) [1942] 1 W.W.R. 385.

(*c*) the knowledge and volition of the testator as to the contents of the said alleged will so far as knowledge and volition are necessary to the validity thereof;

(*d*) the allegation of Paul Harmes and the Custodian that the execution of the said alleged will was procured by the undue influence of the said Ernest W. Hinkson.

The validity of the will was contested by Paul Harmes (a nephew of the deceased, and a beneficiary under the will) and by The Custodian of Enemy Property (on behalf of next of kin of the deceased, residing in Greece), who were the respondents in the present appeal.

The trial Judge, Hannon J.S.C. (Judge of the said Surrogate Court), held the will to be valid. He found as follows (as recited in the formal judgment):

(*a*) That the said George Harmes, deceased, duly executed the said alleged will on the 3rd day of April, A.D. 1941;

(*b*) That at the time of the making and execution of the said alleged will the said deceased had sufficient testamentary capacity to make and execute the same;

(*c*) That the said alleged will was made and executed with the knowledge and volition of the said deceased;

(*d*) That the allegation of Paul Harmes and The Custodian that the execution of the said alleged will was procured by the undue influence of the said Ernest W. Hinkson has not been established;

and that the said will of the said deceased is valid and has been duly proven as a whole, and is entitled to be admitted as a whole to probate;

and he decreed probate of the will, as a whole, in solemn form of law.

The said Paul Harmes and the said Custodian appealed to the Court of Appeal for Saskatchewan, which, by a majority (Mackenzie and MacDonald JJ.A.) allowed the appeal, and (by the formal judgment) set aside the judgment of Hannon J.S.C. (except certain paragraphs as to costs, stay of proceedings, and administration of property) and ordered and adjudged that the whole of the alleged will was invalid and be not admitted to probate and that the application to prove it in solemn form be dismissed.

The majority of the Court of Appeal held that the trial Judge failed to assume adequately the attitude of suspicion rendered necessary by the circumstances in question and that, under those circumstances and upon the evidence, a finding in favour of the validity of the will was not justified.

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Martin, C.J.S., dissented and would dismiss the appea holding that the trial Judge was, as shown by a carefu reading of his judgment, well aware of the rule of la requiring an attitude of suspicion in the circumstance and had it in mind when considering the evidence; tha the trial Judge had an opportunity of observing th demeanour of the witnesses and judging of their credibilit and honesty in a way that no appellate tribunal coul have, and his findings that Hinkson was a truthful witne and that the deceased was of testamentary capacity an signed the will of his own volition and with a knowledg of its contents, should not be disturbed; that, in view c the circumstances in connection with the life of th deceased, the will was not an unnatural one; and tha upon the evidence, the will was properly executed, an when the deceased executed it he was of testamentar capacity and fully aware of what he was doing; an that the will was entitled to be admitted to probat failing affirmative proof of the allegation that the decease was prevailed upon to execute it by the undue influenc of Hinkson; and that there was no evidence to suppor the allegation of undue influence.

Ernest W. Hinkson appealed to this Court.

E. C. Leslie K.C. for the appellant.

S. R. Curtin K.C. for the respondent The Custodian c Enemy Property.

R. M. Balfour for the respondent Paul Harmes.

The judgment of Rinfret, Kerwin and Taschereau JJ. wa delivered by

RINFRET, J.—In my opinion, this appeal should b allowed and the judgment of the trial judge should b restored.

The case went to trial on the following issues:

1. The testamentary capacity of the deceased at the tim of the execution of his will;

2. The due execution of the will;

3. The knowledge and volition of the testator as to th contents of the will, so far as they were necessary to th validity thereof;

4. The allegation that the execution of the will was procured by the undue influence of the appellant.

On all these issues, the learned trial judge decided that the will was duly proven in solemn form as a whole; and he directed that probate should issue to the executors named therein.

In the Court of Appeal, the Chief Justice of Saskatchewan, in a very elaborate and exhaustive judgment, was in favour of confirming the trial judge and of dismissing the appeal, which, however, was allowed as a result of the judgments of Mackenzie and MacDonald, JJ.A.

In this Court, there does not seem to have been any question about the issues concerning the testamentary capacity of the deceased or the due execution of the will; but the argument was mainly, if not exclusively, directed to the two other issues.

The will was written by the appellant, who benefits under it; and, under such circumstances, the principle is that it should be viewed with suspicion and that

> the Court should be vigilant and jealous in examining the evidence in support of the instrument and should not pronounce in its favour unless the suspicion is removed and unless it is judicially satisfied that the paper propounded is the true will of the deceased.

In *Riach* v. *Ferris* (1), Crocket J., speaking on behalf of the Court, after a review of the authorities, stated that the testator, in that case, was shown to have been

> of sound and disposing mind and memory when he executed [his will] * * * and that that will was consequently entitled to be admitted to probate, failing affirmative proof of the defendants' allegation that he was prevailed upon by fraud and undue influence on the part of [the beneficiary] to execute it.

And the Chief Justice of this Court, after having declared that he entirely agreed in the conclusion of Crocket J. as well as in the reasons by which this conclusion was supported, added a statement, with regard to cases of wills prepared under circumstances which raised well-grounded suspicions, to the effect that the law on the subject was well established and was best and completely stated in a passage of Lord Davey in *Tyrrell* v. *Painton* (2):

(1) [1934] S.C.R. 725.

(2) L.R. [1894] P. 151, at 159-160.

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

In the present case, the reason expressed by the majority of the Court of Appeal for interfering with the judgment of the Court of first instance was that, in the view of the learned Judges, the trial Judge did not pay sufficient attention to the rule of law above stated.

With due respect, we cannot agree with that impression of the trial judgment. Like the Chief Justice of Saskatchewan, we are convinced, "from a careful reading of the judgment, that the trial Judge was well aware of the rule of law and had it in mind when considering the evidence of Hinkson as well as that of the medical men and the nurses."

Applying the rule, the learned trial Judge stated that, on the whole, the appellant left on him "an impression of honesty as a witness" and "that he was worthy of credence". Moreover, he thought "the evidence tends strongly to establish that [the appellant] was to the end a close and staunch friend" of the deceased, which cogently goes to show that the will was not an unnatural one.

The important point about these findings of the trial Judge is that he made them in face of contradictory evidence, that he believed the appellant and that his conclusions were based on the credibility of the witnesses. He found that the appellant was a truthful witness, that the deceased was of testamentary capacity and signed the will of his own volition and with a full knowledge of its contents.

Findings such as these, based as they are on the credibility of the appellant and of other witnesses, should not lightly be disturbed. "It must be an extraordinary case in which the appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial Judge who has seen and watched them, whereas the appellate Judge has had no such advantage." (Lord Wrenbury in *Wood* v. *Haines* (1); *Powell* v. *Streatham* (2) per Lord Sankey, at p. 250, and Lord Wright, at pp. 265-266).

For these reasons, which I find much more completely developed by the Chief Justice of Saskatchewan in his able judgment with which I fully agree and to which I find

(1) P.C. (1917), 38 O.L.R. 583. (2) [1935] A.C. 243.

nothing to add, I would allow the appeal and restore the judgment of the trial Judge. The costs of all parties to the appeal to the Court of Appeal should be taxed on the scale applicable on appeals from the Court of King's Bench and be paid out of the estate, the taxation of the costs of The Canada Permanent Trust Company to be on a solicitor and client basis. The costs of all parties to the appeal before this Court should be paid out of the estate.

HUDSON, J. (dissenting)—The proceedings in this case originated in a petition by the Canada Permanent Trust Company for proof in solemn form of a will alleged to have been made by the late George Harmes, deceased. In this petition it was alleged in part:

> 3. That your petitioner was informed by the said Ernest W. Hinkson that the said will was prepared by the said Ernest W. Hinkson, the blanks in the printed form of the said will being filled in by the handwriting of the said Ernest W. Hinkson, who conducted its execution by the said deceased and that the said Ernest W. Hinkson is not a relative of the said deceased. The total value of the property to which he would be entitled under the residuary devise in the said will (exclusive of succession duty) would be approximately the sum of $52,000. Your petitioner is desirous of having the said will proved in solemn form, or in the alternative of having such part or parts of the said will proved in solemn form as may be established in evidence.

The beneficiaries under the will, other than the said Ernest W. Hinkson, were either relatives of the deceased or educational or charitable institutions in the Provinces of Saskatchewan and Alberta.

The validity of the will was contested by the present respondents, Paul Harmes, a nephew of the deceased, and the Custodian of Enemy Property, representing other next of kin, at present residing in Greece.

After a somewhat lengthy trial before the Judge of the Surrogate Court of the Judicial District of Regina, that learned judge declared the will to be valid and ordered probate thereof to issue to the Canada Permanent Trust Company, named as executor.

On appeal this decision was reversed and the will declared to be invalid, Chief Justice Martin dissenting.

The evidence was on some points conflicting but in respect of a large part of the material facts is not open to dispute.

Harmes, the deceased, was born in Greece, came to America as a youth and finally settled in Regina where he

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lived for many years and accumulated the estate which is now in question. He had little education but was evidently shrewd and intelligent.

Hinkson was a barrister and solicitor residing in Regina for about thirty years and practising law there for about twenty years, but was not Harmes' solicitor.

The trial Judge held that these two men were very good friends and I see no reason to question this finding.

About the 1st of March, 1941, Harmes became ill and was taken to the Grey Nuns Hospital in Regina, where he was found to be suffering from uraemic poisoning. He did not improve under treatment and eventually his doctors decided that an operation was advisable. This operation took place on the 1st of April. It was successful in the sense that he had practically no shock, but his kidneys were too far gone and he received no help at all. His condition rapidly became worse.

On the 3rd of April the will in question was signed and its validity must be in large part determined by the events of that day which may be stated as follows:

At noon, Hinkson, who had made frequent visits to the hospital during the preceding month, came in to see Harmes and says his condition "wasn't any too good." "He didn't seem to be improving as fast as he had hoped he would be improving after the operation."

At about 2.00 p.m., another friend of Harmes visited him at the hospital. This was a Mr. Hendricks who was Manager of the Bank of Montreal at the branch where Harmes did his business. During Harmes' illness Hendricks had been keeping an eye on his affairs and also on two or three occasions discussed with him the matter of making a will. Hearing that Harmes was ill, he called up Dr. Kraminsky and told him that he wished to see Harmes about making a will and some other business affairs and asked him if he would be permitted to see him. The doctor replied that he might see him but he did not know whether Harmes would be in a position to discuss business or not, that he was a very sick man, that he might find him so that he could discuss things with him temporarily and that he might not, the thing to do was to go and see. When Mr. Hendricks arrived, he found Harmes in very poor condition. He said that he thought he succeeded in arousing him so that

he knew who he was, but found it very difficult to converse with him, and, after a very few minutes, gave up trying to do so. He had a power of attorney which he asked Harmes to sign, but Harmes was unable to do this. The power of attorney was then torn up and Hendricks went away.

At 3.00 p.m. there is a note on the hospital sheet made by the nurse as to Harmes' condition: "Listless, does not respond readily and irritable."

Between 4.30 and 5.00 p.m., Hinkson went in to see Dr. Kraminsky, who was Harmes' attending physician, for the purpose of inquiring just what was wrong. He says that the doctor told him that Harmes had practically committed suicide, that he should have had medical attention five years previously, and he said that he was not in good condition at all and that he might live for weeks, he might live for months, he might only live for days, and then during the conversation he told him that Mr. Hendricks of the Bank of Montreal had just phoned him.

Q. That would be the Bank of Montreal in the Wheat Pool Building?

A. Yes, in the Wheat Pool Building—had just phoned him that afternoon, also inquiring as to the condition both physically and mentally of George Harmes and wanted to know if he would—if he was in a fit condition to have his will made, and Dr. Kraminsky told me at the time that, yes, he was quite sure that he was in a good condition to have his will made but for Mr. Hendricks to have that attended to right away. And I said, "Well," I said, "I am also a personal friend of the deceased and interested in his welfare and," I said, "I don't know whether Mr. Hendricks will have the will made or not, but," I said, "I know that during my conversations with George Harmes that he had certain wishes and certain bequests and," I said, "what do you think about me going out there?" And "well," he said, "it would be all right," he said, "if you wanted to see that the will was made," he said, "I will tell you something, as I told Mr. Hendricks, to have the thing attended to immediately."

Q. Did he say why?

A. Yes, he said—he said that the nature of the disease was such that if he should sink into a state of coma that he wouldn't then be in a position to do anything regarding the making of a will.

Immediately after leaving the doctor's office Hinkson went to a stationer's store and purchased a will form. He then proceeded to the hospital and was admitted to Harmes' ward at 5.20 p.m. About 7.00 p.m. Hinkson left the hospital, the will having been signed in the presence of two nurses who were the witnesses.

By the terms of the will, there are specific bequests to relatives of the deceased, including a nephew, Paul Harmes,

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who is one of the respondents, and to a number of charitable organizations and to the University of Saskatchewan. The specific bequests aggregate $14,000. The residue of about $52,000 was bequeathed to the appellant, Hinkson.

The will was drawn by Hinkson in the room with Harmes and no one else knew its contents until after Harmes' death. Two nurses came in to witness the execution but the will was not read over in their presence. The only evidence as to the instructions for and preparation of the will is that of Hinkson, the residuary beneficiary.

The specific bequests to relatives and institutions were of the kind one might expect a man in Harmes' circumstances to make.

According to Hinkson, over an hour was spent in discussing these various bequests, and then Harmes asked him: "Well now, how much does that total up to?", and having been told, he replied: "Well, that is enough." Hinkson then said: "Well, what about the balance of your estate? You have got your hotel down here and you have got the Diana, and you have got this other place out here on Fifth Avenue, the block out there, what about them?" Mr. Harmes said: "I am going to leave those intact." "Now to this day I have been trying to figure out what he meant by 'intact' and I haven't—I haven't been able to explain that."

Then followed a lengthy discussion about the disposition of the residue. Hinkson says he made a number of suggestions which were discussed and disapproved by Harmes. Eventually, Hinkson says: "If you don't want to act on them, have you made up your mind what you want to do with the balance of your estate,"

and he thought it over for a few minutes and he said, "Well," he said, "you have been the best friend that I have got and", he said, "you can have it." And I said, "Why, George," I said, "that wouldn't be—that wouldn't be right," I said, " for me to accept it."

There was some further discussion and then Hinkson said:

Yes—and I protested and I said, "George, it wouldn't be right for me to accept that," I said, "you could still double or treble these bequests that you have already made and" I said, "you could give a good big share of it to the Dominion Government," I said, "some more to charities and", I said, "if you wanted to leave me a little bit of it," I said, "that would be in order." "But", I said, "to leave me the whole thing," I said, "it wouldn't be proper, it wouldn't be right," and we discussed the matter that way and I said, "Well now," I said, "George,

rather than complete the will to-night", I said, "we had better leave it go until to-morrow," and he said "No," he said, "we will to-night." "Well," I said, "now George, you may be too tired," I said, "to continue." "No," he said, "I am all right" he said, "go ahead."

After some further discussion,

"Now," I said, "George," I said, "have you made up your mind about the—about the balance?" "Yes," he says, "I have made up my mind." "Well," I said, "I will tell you what I will do then," I said, "George, if you feel that way about it," I said, "I will put my name in here on the will form and", I said, "if you want to change your mind over night," I said, "I will come back with another will form to-morrow," and it was either while I was saying that or right shortly afterwards that I believe the nurses came into the room to witness the—

This was evidence given by Hinkson in chief. In cross-examination it was made perfectly clear that the will was made at Hinkson's instance. He admitted that on the twelve or fifteen occasions on which he had visited at the hospital previously, no mention had been made of any will and no suggestion had ever been made by Harmes of any intention of making a will until he, Hinkson, brought in the printed will form on the afternoon of April 3rd. He admitted that Harmes was a very sick man and that he knew that he would never come out of the hospital alive. He was asked:

Q. And it was solely on account of your efforts that this will was made?

A. I expect so.

He said the will was completed at about ten minutes to seven and that the two nurses came in at about seven o'clock, or just prior thereto. He was asked:

Q. All right now, the two nurses came in about seven and then what took place?

A. Well, I would say just prior to seven o'clock, may be about five minutes to seven, and they wanted to know if we were ready to have the will signed and I said, yes, we are just ready. So the deceased had—he had slipped down from his pillow and was lying down further in the bed and one nurse got on one side of the bed and one on the other and they locked their arms around his shoulders and kind of eased him up and put a couple of pillows under him, raised him up and—

* * * *

Q. And after they had propped him up into a sitting position what—

A. I said to the deceased then in the presence of the nurses, "now" I said, "George" I said, "you had better wait until to-morrow," I said, "before you sign this will" and I couldn't think that the mental capacity that he had shown that night and the brilliance of his intellect, that he would be a dead man the next night. If anybody had told me I would never have believed it. So I couldn't see that there was any hurry about

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it and it would be far better to wait until the following day to have him sign the will—and he said "no", he says, "give me the will now," he says, "I will sign it now."

Q. Now were these two nurses in the room when he said that?

A. The two nurses were right there. Whether they recollect it or not, I don't know, that is up to them, but that is exactly what he said.

Harmes then signed the will. Further question:

Q. Well now, during the time the nurses were in the room was the will read over to the deceased?

A. No.

* * * * *

Q. Well then when you wrote in your own name as the residuary devisee, did you read that out to him?

A. Yes; I said: "I put my own name here then in the residuary clause then."

* * * * *

Q. After you put your name into the residuary clause did you read that out to him? Or in any way indicate that you were writing it in?

A. Oh, I indicated it to him: I said, "I will fill it in here now, George, and", I said, "if you want to change your mind over night I will bring back another will form to-morrow and then", I said, "we will make out an entirely new will if you have changed your mind over night."

The witnesses to the will were two nurses: a Miss Sizer and a Miss Montgomery. Miss Sizer gave evidence that she was in attendance on Harmes throughout and that after his operation he grew weaker physically and that on the evening of April 3rd she was asked to witness Harmes' will at about 6.45 p.m. and that Hinkson was there. She said that Harmes was able to talk but did not want to talk, that he dozed most of the time, that after she entered the room when the will was to be signed Hinkson was writing on the document for from five to ten minutes, that she could not see what was written there. The document was not read over while she was there. She was asked:

Q. After he signed it did he say anything to you?

A. No, nothing to us. He was rather weak and tired, and I believe I do remember at the time that he wanted to wait and finish it the next day, or something, because he was tired. This gentleman said that they would wait until morning then because he did not feel like talking any more that night, and that is when he signed it.

* * * * *

Q. You say Mr. Harmes said he was tired and wanted to leave it until morning?

A. He seemed rather irritable because he did not want to be bothered talking about it any more that night.

Q. That is correct?

A. Yes.

Q. That was before he signed it?

A. That was before, I believe. I cannot remember whether that was before or afterwards.

Q. At all events Mr. Harmes suggested leaving it till morning?

A. He said he was tired; he didn't want to talk any more about it that night, and the gentleman said "All right, we will leave it until morning", or something like that.

Q. That would be correct as far as you can recollect, Miss Sizer?

A. Yes.

Miss Montgomery, the other nurse, also gave evidence, much to the same effect as Miss Sizer. She was asked:

Q. I would like you to state again your best recollection of the conversation between Mr. Harmes and this gentleman.

A. He held up the paper and he said "Will this be all for to-day, George?" It was something like that, and he nodded and grunted assent,—"

A. Yes.

Q. —that it would be."

And then you go on: "He"—referring to Mr. Hinkson—"He gave us to understand—

Mr. BASTEDO: It doesn't refer to Mr. Hinkson.

Mr. Curtin:

Q. A. He gave us to understand that it was to be signed that day. He was restless that day. So he gave him the pen and he signed it, and he said "We will finish the rest, the other little things, to-morrow or some other day."

Q. Who was it said this?

A. This other gentleman. Mr. Harmes didn't speak any more than the odd word.

Q. This correct?

A. From what I recall—yes.

Q. Was it your impression that this document was not finished, or that there was something else?

A. My impression was that there was more property to be looked up and that there was to be another will to be drawn up.

A little lower:

Q. Did Mr. Harmes appear to want to put it off until the next day?

A. He seemed very tired and did not want to finish it.

Q. He did not want to discuss it?

A. No.

Q. You did not hear the actual discussion?

A. No.

About 8.00 p.m. the doctors came and found Harmes' condition much worse and special nurses were then put on at their orders, and one of them, a Miss Evans, gave evidence on commission, most of which refers to the following day when Harmes was sinking very rapidly. Nurse Evans said that Hinkson came in the next day, that is the 4th, and introduced himself and said he was taking care of Harmes' affairs, that he had drawn up a will for Mr. Harmes that

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afternoon (this would appear to be a mistake for the previous afternoon), and that the will was under the bed pillow. Later in the afternoon, he came in for a moment and then left. The nurse got the will and handed it to him (Hinkson). After Hinkson left with the will, some question arose in Miss Evans' mind as to whether she had done right in giving him the will:

Q. Did you say anything about it?

A. Yes, I believe it was at that time that I asked Mr. Harmes if he knew the gentleman who had just left the room and Mr. Harmes replied that he was Mr. Hinkson, his lawyer.

Q. Did he say anything else?

A. He said either "he was" or "he is drawing up my will, but he doesn't know half my affairs." So then I didn't discuss it any further with him.

Q. You didn't tell him you had given the will?

A. No, I didn't, he was very drowsy that day, didn't want to be bothered with anything.

Q. Not talking much except in things necessary?

A. No.

* * * * *

Q. And I am not sure that I got just what he wanted to see Mr. Harmes about—what he said?

A. He wanted to discuss a few details about the will, that he had drawn up the day before, that had been drawn the day before, and he asked me if I thought Mr. Harmes was in good enough condition to discuss it with him.

* * * * *

Q. Do you remember the exact words that Mr. Harmes used?

* * * * *

A. Mr. Harmes said: "That is Mr. Hinkson—he is a lawyer, he has just drawn up my will, but he doesn't know half of my affairs."

There were two doctors in attendance on Harmes: Dr. Kraminsky, from the time the former entered the hospital, and Dr. Good, a urinologist, who was engaged about two weeks later. Both of those doctors gave evidence at the trial. Neither one of them was present when the will was prepared or when it was signed. They agreed that Harmes was suffering from a severe case of uraemic poisoning and that this was progressive, particularly after the operation. On the effect of uraemic poisoning they are in substantial agreement. Dr. Kraminsky said that the disease manifests itself in a condition of fatigue in body and mind. It slows down the function of the brain without destroying intelligence. The patient can be roused for a time but soon lapses into unconsciousness. Dr. Kraminsky was asked:

Q. Could you give an illustration of how he would act when questioned? Could you give the court any idea, if you asked him a question, what might happen?

A. If you ask him the question he will answer it intelligently, but you keep on asking him questions, well his mind gets gradually tired and it interferes with the activity of the brain, the brain cannot answer the question because he is tired, he falls in a sleep, then he rouses a bit, and he rouses again and you will ask him another question and he will answer it intelligently, and before he is through with the answer he will fall off to sleep.

* * * * *

Q. Can you then, doctor, knowing the condition of the deceased on April the 3rd; can you conceive of him being able to carry on a sustained and continuous discussion of business matters for a period of half an hour? Now I say a sustained and continuous discussion.

A. No, not for half an hour.

Q. Not for half an hour?

A. I mean he will probably fall off to sleep before that.

Q. Yes—probably not for fifteen minutes?

A. No.

Q. Or not for five minutes?

A. Not more than that.

Dr. Good says that he saw Harmes every day from the 15th of March until death and is in general agreement with Dr. Kraminsky as to Harmes' condition. He says:

Q. Taking the last three days before his death; how would you describe the condition of the deceased during that time?

A. Well, at the visits that I made to him on those days, I found him in an apparent sleep, each time I went in. He could be roused to answer a question.

Q. That condition of sleep that you refer to, is that in the nature of a natural sleep or is it an unnatural sleep?

A. Oh, it is an unnatural sleep. It isn't a sleep really; it is a stupor.

* * * * *

Q. Would you express any opinion as regards his ability to concentrate his mind on a matter of business?

A. His condition at the time that I saw him was such that I would doubt his ability to concentrate satisfactorily for more than a very brief period.

Q. When you say a very brief period, doctor, can you give us any better idea as to just what the length of that period might be?

A. Well, again it would be difficult to answer it; but at my visits I could rouse him to ask him how he felt and whether he had any pain, and if I turned to speak to the nurse he would drop off again, probably a matter of two or three minutes. Most of my visits were brief and the questions I asked were not long—but after he answered me he would drop back again to his apparent sleep.

Neither of the doctors saw Harmes between 4.00 and 8.00 p.m., but at 8.00 p.m. one or both of them came in and found Harmes' condition so definitely worse that they

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ordered special nurses to be put in attendance. The next day, his condition was progressively worse although he could still be aroused for very short intervals. Eventually, in the evening, he fell into a deep coma and died at 11.30 p.m.

The onus is heavily on Hinkson.

He prepared the will and was the chief beneficiary named therein.

He was not asked to draw the will and, when learning of Harmes' condition, hastened to the hospital with a will form for the purpose of inducing Harmes to make a will.

No one was present with himself and Harmes when the will was drawn. No one else knew the contents of the will until Harmes' death. The will was not read over in the presence of the witnesses; nor is there any satisfactory evidence that it was ever read over to Harmes.

He had no claims on the bounty of Harmes. The bequest of residue was not a natural disposition of Harmes' property. Even Hinkson himself agrees with this. He said he protested:

> "George, it wouldn't be right for me to accept that," I said, * * * "if you wanted to leave me a little bit of it," I said, "that would be in order." "But", I said, "to leave me the whole thing," I said, "it wouldn't be proper, it wouldn't be right."

The deceased was so ill, according to the evidence of both doctors, that he had no interest in his surroundings. All he wanted was to be left alone and not disturbed. He did not even want to talk at all during the last few days. He just spoke the odd word when necessary to answer a question. His desire to sleep was overpowering, caused by the effect of the disease of which he was dying.

Hendricks, the banker who was familiar with Harmes' affairs and had before discussed with him the making of a will, about 2.00 p.m. found him quite unable to transact business. This was only three hours before the document here in question was drawn.

According to Hinkson's own story, Harmes did not want to make a will. It was necessary to use persuasion, what the trial Judge speaks of as "probing", to settle the comparatively simple specific bequests, and these were all to natural objects of his bounty.

This process of "probing" had continued for nearly an hour and a half before the question of residue came up for discussion.

According to Hinkson, the discussion of residue took some time and it was only a very few minutes before the will was signed that Harmes eventually said: "You can have it."

At the time when the nurses came in to witness the will, Harmes was so far exhausted that he had slumped down into the bed and had to be raised up and supported by the nurses to be able to attach his signature to the will. His enfeebled condition is shown by the signature to the will.

One of the nurses, Miss Sizer, says that after she came into the room Hinkson was writing for possibly five minutes on the document. She also says that Harmes was rather weak and tired and that she believes she remembers at the time that he wanted to wait and finish it the next day, or something, because he was tired, and that Hinkson said that they would wait until morning then, because he did not feel like talking any more that night, and that is when he signed it. That he, Harmes, was rather irritable because he did not want to be bothered talking about it any more that night, and that Hinkson said: "All right, we will leave it until morning," or something like that.

Miss Montgomery, the other nurse, said that Hinkson gave Harmes the pen and he signed the will and that Hinkson then said: "We will finish the rest, the other little things, to-morrow or some other time," and that her impression was that the document was not finished and that there was something else, that there was more property to be looked up, and that there was to be another will to be drawn up, and that Harmes was very tired and did not want to finish it and did not want to discuss it.

The next day when Harmes was aroused into consciousness for a few moments, he had some recollection of the will and he said to Miss Evans, another nurse, that he recognized Hinkson and, in answer to a question put by Miss Evans, he said that Mr. Hinkson was a lawyer. "He has drawn up my will but doesn't know half my affairs." Miss Evans also said that Hinkson had come in for the purpose of discussing a few details of the will he had drawn up the day before.

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As against all this we have Hinkson's own statement that Harmes was bright and intelligent throughout.

None of these other witnesses were interested in any way and there is no reason to think that they did not give their evidence truthfully; nor is there any suggestion on the part of the learned trial Judge that these witnesses in particular were not truthful.

I have endeavoured to arrive at a conclusion disregarding the evidence which the trial Judge treated as unreliable.

In my opinion, Hinkson has completely failed to remove the suspicion created by these various circumstances, and I think that the Court should hold that Harmes, when his signature was attached to the document, did not understand that he was bequeathing to Hinkson the whole of the residue of his estate, amounting in value to over $50,000.

I do not propose to discuss the attitude of the learned trial Judge, beyond saying that it seems to me that he failed to realize that the onus was so strongly on Hinkson.

The principles of law applicable are well settled.

Williams on Executors, 12th Edition, page 27:

> It is said by Lord Coke, in the *Marquis of Winchester's Case* (1), that it is not sufficient that the testator be of memory when he makes his Will to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his property with understanding and reason; and that is such a memory which the laws calls sane and perfect memory. In order to constitute a sound disposing mind the testator must not only be able to understand that he is by his Will giving the whole of his property to the objects of his regard, but must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from participation in that property.

In *Brown* v. *Fisher* (2):

> The Court is to approach with suspicion the consideration of a will procured and propounded by a person taking a large benefit thereunder, * * *
>
> Where a beneficiary, who had procured and subsequently propounded a will, failed, under those circumstances, to satisfy the Court, by affirmative and conclusive evidence, that the testator did, in fact, know and approve of the contents of the will which he had actually executed:—

the Court, applying and acting on the principles of *Fulton* v. *Andrew* (3), refused probate.

(1) 6 Co. 23 a; 4 Burn, E.L. 49. (2) (1890) 63 L.T. 465.
(3) (1875) L.R. 7 H.L. 448.

In *Fulton* v. *Andrew* (1), Lord Hatherley held that, where a person propounded a will prepared by and benefiting himself, the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it.

In the Canadian case of *British and Foreign Bible Society* v. *Tupper* (2), the same principles were adopted. A promoter of and a residuary legatee under a will executed two days before the testator's death, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator who seemed to understand what he was doing, and as there was a doubt under the evidence of his testamentary capacity, the will was set aside. In that case, Mr. Justice Davies dissented except as to the part of the will dealing with the residue. He thought that the will might be upheld in its main provisions, but should be disallowed in respect of the residue.

This point has given me some difficulty. At first I was inclined to think that the specific bequests might be upheld, but I have come to the conclusion that Hinkson has failed to establish that the testator fully understood what he was doing, certainly when disposing of the residue, and possibly for some time before that.

In *Donnelly* v. *Broughton* (3), Lord Watson, who delivered the judgment of their Lordships, says at pp. 52 and 53:

> The principles applied by the Probate Court in England to a will obtained in circumstances similar to those which occur in the present case were explained by Sir John Nicholl in *Paske* v. *Ollat* (4). After stating that, when the person who prepares the instrument and conducts the execution of it is himself an interested person, his conduct must be watched as that of an interested person, the learned Judge goes on to say: "The presumption and *onus probandi* are against the instrument; but as the law does not render such an act invalid, the Court has only to require strict proof, and the onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances, which may increase the presumption even so much as to be conclusive against the instrument".

In *Harwood* v. *Baker* (5), Mr. Justice Erskine says at p. 120:

> Both these gentlemen, therefore, seem to think that the deceased might have been sufficiently aroused from the state of torpor to which he had

(1) (1875) L.R. 7 H.L. 448.
(2) (1905) 37 Can. S.C.R. 100.
(3) [1891] A.C. 435; 60 L.J. P.C. 48.
(4) (1815) 2 Phill. 323; 161 E.R. 1158.
(5) (1840) 3 Moo. P.C. 282; 13 E.R. 117.

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been reduced by his illness, to assent to so simple a disposition of his property as that made by the Will in question; but that it would have been impossible to have made him comprehend the details of a more complex distribution.

But their Lordships are of opinion, that in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.

Sir John Nicholl in *Marsh* v. *Tyrrell* (1), says:

It is a great but not an uncommon error to suppose, that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. In *Combe's* case (2) the rule is laid down in these words: "It was agreed by the judges, that sane memory for the making of a Will is not at all times when the party can answer to anything with sense, but he ought to have judgment to discern and to be of perfect memory, otherwise the Will is void." It is not answering, that "she had been round Clapham Common", or "that her house was leasehold," or the like, even if the questions were answered correctly and the husband had not been present, that would be sufficient in the present case. So again, in the *Marquess of Winchester's* case (3): "By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

For these reasons, I would dismiss the appeal with costs.

GILLANDERS, J. (*ad hoc.*)—I am in accord with the reasons and conclusion expressed by the learned Chief Justice of Saskatchewan in his exhaustive judgment in the Court of Appeal. There is little that I need add.

(1) (1828) 2 Hagg. 84, at 122; 162 E.R. 793, at 806.

(2) Moore's Rep. 759. S.C. 8 Vin. Ab. 43, No. 22.

(3) 6 Coke 23 a.

The main question in the appeal is whether or not under the circumstances of the case the evidence is sufficient to remove the suspicion attaching to the alleged will and its preparation, and to satisfy the conscience of the Court that it is in fact the will of a free and capable testator. Under such circumstances as are present here, where the appellant prepared the will, conducted its execution, and takes under it a large portion of the deceased's estate, the Court should pronounce against the alleged will unless the evidence extends to clear proof that the disposition of the property was made with understanding and reason.

The principles to be applied have been discussed in many cases. In *Riach* v. *Ferris* (1) it was stated by Duff C.J., at page 726:

> That the law is well established and well known and that, as applicable to this appeal, it is best, as well as completely, stated in this passage from the judgment of Lord Davey (then Davey, L.J.) in his judgment in *Tyrrell* v. *Painton* (2).
>
> " * * * the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed."

In *Donnelly* v. *Broughton* (3), Lord Watson said:

> The principles applied by the Probate Court in England to a will obtained in circumstances similar to those which occur in the present case were explained by Sir John Nicholl in *Paske* v. *Ollat* (4). After stating that, when the person who prepares the instrument and conducts the execution of it is himself an interested person, his conduct must be watched as that of an interested person, the learned Judge goes on to say: "The presumption and *onus probandi* are against the instrument; but as the law does not render such an act invalid, the Court has only to require strict proof, and the onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances, which may increase the presumption even so much as to be conclusive against the instrument."

The principles so stated are not in question. The respondents here contend that the learned trial Judge improperly instructed himself in law in that he did not approach the evidence in support of the alleged will with the requisite amount of suspicion; that in any event the evidence did not extend to the clear or strict proof necessary under

(1) [1934] S.C.R. 725.
(2) L.R. [1894] P. 151, at 159-60.
(3) [1891] A.C. 435, 60 L.J.P.C. 48.
(4) (1815) 2 Phill. 323; 161 E.R. 1158.

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the circumstances to support the will but, on the other hand, that the circumstances disclosed by the evidence are conclusive against the instrument.

For the reasons set out by the learned Chief Justice in his dissenting judgment in the Court of Appeal, I think that the conclusion of the trial Judge upholding the will should be supported.

This conclusion should not be interpreted as approving the appellant's conduct in preparation and execution of the will. He was a solicitor of twenty years experience. When the testator proposed making him a substantial beneficiary the proper course to adopt was clearly to have called in an independent person to prepare the will and supervise its execution.

In the result the appeal should be allowed with costs as disposed of in Mr. Justice Rinfret's judgment.

Appeal allowed. Costs of all parties to the appeal to be paid out of the estate.

Solicitors for the appellant: *MacPherson, Milliken, Leslie & Tyerman.*

Solicitors for the respondent Paul Harmes: *Balfour & Balfour.*

Solicitors for the respondent The Custodian of Enemy Property: *Curtin & Grant.*