SUSIE SMITH .....APPELLANT;

AND

CHARLES T. NEVINS AND OTHERS...RESPONDENT.

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*Feb. 7, 8, 11, 12.

*Apr. 22.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Will—Probate—Appeal from probate judge—Burden of proof—Weight of evidence—"The Probate Courts Act," N.B.S., 5 Geo. V, c. 23, s. 113

The general rule of legal procedure that the burden of proof is on the party who asserts the affirmative of the issue applies in the case of a will offered for probate.

The Judge of Probate having refused to admit the will to probate on the ground that the execution of it had not been established by satisfactory evidence, his judgment was affirmed by the Appeal Division of the Supreme Court, who held affirmatively that the will was a forgery.

Held, reversing the Appeal Division, Duff J. dissenting, that the weight of evidence was in favour of the validity of the will, which should be admitted to probate.

Per Duff J.: The onus was upon the party propounding the will to establish its execution, and remained upon him throughout, and it was the duty of the trial judge to pronounce against the will if, after considering the whole of the admissible evidence adduced, he was not judicially satisfied that the will had been duly executed; and that there was no sufficient reason for reversing the concurrent findings of the trial judge and the Appeal Division that the testimony of the proponent and of the attesting witnesses was not credible.

A New Brunswick statute provides that "the Supreme Court (on appeal) shall decide questions of fact from the evidence sent up on appeal notwithstanding the finding of the judge in the court below."

Held, per Duff J., that this provision does not authorize the Supreme Court to deal with an appeal as if it were the court of original jurisdiction but it must proceed as on a re-hearing.

Judgment of the Appeal Division (51 N.B. Rep. 1) reversed, Duff J. dissenting.

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick (51 N.B. Rep. 1) affirming the ruling of a Judge of Probate who refused probate of the will offered by the appellant. The matters of law to be dealt with on the appeal are indicated in the above head-note.

J. F. H. Teed for the appellant.

Daniel Mullin K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Mignault and Malouin JJ.

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The Chief Justice.

THE CHIEF JUSTICE.—This is an appeal arising out of an application made by the executors to the probate judge of St. John N.B. for proof in solemn form of the last will of the late Charles Nevins of that city.

The learned judge heard a great deal of evidence, some of it very much in point, and some, I say it with deference, not so. He reached the conclusion that the persons setting up the will "had failed to establish its authenticity."

From that judgment an appeal was taken to the Appellate Division of the Supreme Court of New Brunswick. That court was composed of the Chief Justice of New Brunswick, the Chief Justice of the King's Bench Division and Mr. Justice Grimmer. Their judgments differed in their conclusions.

The Chief Justice of New Brunswick held that the signature to the will alleged to be that of Charles Nevins, the testator, was a forgery. The Chief Justice of the King's Bench held that the signature was the genuine signature of the testator, and Grimmer J. held that he was not disposed to differ from the finding or conclusion of the probate judge, but that he would concur with him that the parties setting up the will had "failed to establish its authenticity." He also agreed with the judgment of the learned Chief Justice of New Brunswick.

From this judgment of the Appellate Division of the Supreme Court of New Brunswick an appeal was brought to this court.

At the conclusion of the argument I inclined strongly to the opinion that the appeal should be allowed. Since this I have read over most assiduously all the evidence pertaining to the main question—whether the will was a forgery or not—and I have reached the conclusion and the firm conviction that the will in question is the genuine will and that the signature thereto is the genuine signature of the testator Charles Nevins.

There is not to my mind any ground for contending that the instructions proved to have been given to Mr. Kerr for the drawing up of his will by Charles Nevins were not correctly understood by Mr. Kerr and dictated to his stenographer, Miss Tobin, and properly transcribed by her. Miss Tobin made several copies of this will, all of which have been accounted for. The will propounded by Messrs.

King and Kerr as being the last will of Charles Nevins was stated by Miss Tobin on examination to be one of the copies of the will which had been dictated to her by Mr. Kerr. She recognized the paper on which it was copied as being the same as used in Mr. Kerr's office, and the style of type as that of the particular make of machine which she used there.

That particular copy was taken by the testator from the office of Mr. Kerr some days after his instructions had been carried out. It is quite clear to me that the testator signed that will and that his signature thereto was witnessed by Messrs. Mowatt and Cox.

I have had the advantage of reading the judgments prepared in this case by my brethren Idington and Mignault JJ. and as I do not differ with them on any of the salient points on which they have based their judgments, I do not think it necessary or useful to repeat their reasons here.

I have, therefore, come to the clear conclusion that this appeal should be allowed and that petition for probate in solemn form of the propounded will of the testator should have been granted by the probate judge.

As to costs, I am of opinion that all costs as between solicitor and client up to the time of the filing of the first allegations should be paid out of the estate. Subsequent costs, including the costs in this court and the appellate division should be borne by the respondents, except the stenographer's bill which it was agreed should be paid out of the estate.

IDINGTON J.—This is an appeal from the Supreme Court of New Brunswick which upheld the judgment of the judge of the St. John Probate Court, refusing to grant probate of the alleged last will and testament of the late Charles Nevins who had lived many years in St. John and carried on the business of a commission broker dealing in metals, coal and lumber.

He was about sixty-eight years of age at the time of his death, had been a widower for many years and in later years had lived with his widowed sister, Mrs. Givan, who was his only near relative, and he had known the appellant for nine years or more and intimately for five or more years.

He and appellant had many monetary dealings in these

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later years. They met accidentally on the street in St. John when she told him she was going to see Mr. Kerr, a solicitor, on some business, and he said he would go there with her. When there he said he wished to give Mr. Kerr instructions to draw a will for him, the now deceased.

Mr. Kerr took notes of his instructions and when they got to a point where appellant's monetary dealings with deceased were being developed, whereby he was instructing said solicitor to bequeath to her certain sums due her for money lent, she produced her bank book, pointed out therein the items and the solicitor marked same with an "X."

She then retired into the stenographer's room and awaited deceased ending his instructions.

These items of borrowed money, amounting together to $3,452, above referred to, with interest from dates named, and another item of Victory Bonds, to the amount of $2,000, which the deceased bought for her with her own money, as explained to the solicitor, were kept in a bank safety deposit box.

The will, according to said instructions, was to bequeath to her said sums of borrowed money and interest thereon, and said bonds, and as drawn did bequeath same.

The deceased also explained to the solicitor that he and appellant were engaged to be married and that circumstance was also set forth in the will, which was dictated by Mr. Kerr same day to his stenographer, Miss Tobin, who, by her typewriter, wrote accordingly the will now in question strictly in accordance with the said and other instructions given.

It turned out that the stenographer's room was rather cold and she and appellant moved into a warmer room used jointly by Mr. Kerr and one Linton, then therein.

They were able to hear what was going on if inclined to listen.

The said solicitor, his stenographer, appellant and Mr. Linton, all testify to what they each knew of the making of said will, and their proof thereof is so conclusive that no serious question can be raised as to its being, in respect to the items specifically referred to above, and in all other respects, exactly what the deceased intended as his will.

He called a day or two later, and got from said solicitor the copy evidently intended for execution, but, instead of executing it then and there, took it away with him to read and consider.

The deceased was on very intimate terms with one Mowatt, a druggist, where appellant had been an assistant clerk as bookkeeper and otherwise for nine years previously.

The said will provided amongst other minor items a legacy of one thousand dollars to said Mowatt and, by paragraphs 10 to 13 inclusive, as follows:—

10. Save as aforesaid I give and bequeath to my sister Mrs. Mary Givan all my personal property on the following conditions, namely:— the principal of my said estate covered by this section is to be kept intact and I hereby instruct my executors to pay over to my said sister, Mary Givan, the income arising therefrom for her sole use and support. In case, by any extraordinary circumstance, the income becomes insufficient to properly support my said sister I hereby authorize my executors to use their best judgment in disposing of or realizing on such portion of the principal sufficient to meet such extraordinary circumstance.

11. On the death of my said sister I give and bequeath all my estate to the said Susie Smith.

12. I nominate, constitute and appoint my life long friend George King of Chipman and Francis Kerr, barrister-at-law, of the city of Saint John, executors of this my Last Will and Testament.

13. It is my wish and desire that my executors, and particularly my friend George King, in case I should die before my intended marriage to the said Susie Smith, that she shall be carefully considered by them and protected by them. She has worked hard, is not in good health and I wish her to live the remainder of her days in as much ease and comfort as possible.

On the 3rd of March, 1921, the deceased called on the said Mowatt at his said drug shop, and, in a store room back of the shop, was assisting him in checking over some goods, as he was accustomed to do there, when one Cox, a partner in the drug business, but carrying it on in another shop in same town, called and passed through the first-mentioned shop to see Mowatt on some business, and shortly afterwards, whilst all three were there alone, deceased pulled out of his pocket a paper which he said was his will and asked them if they would witness it for him.

There was no very suitable place for such purpose, or anything but a rough table or counter of uneven surface used for the handling of goods upon. Enough space on that was cleared off on which to do the signing which had to be done standing up or leaning over, for there was no

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chair to sit upon, and the table or counter was only about four feet in height.

Both Mowatt and Cox swear deceased pulled a fountain pen out of his pocket and signed his name and they signed as witnesses, and he took the will away with him.

The testator died suddenly a week or so later. No signed or unsigned will, such as deceased had put in his pocket at Kerr's office, could then be found, it is alleged.

It turned out that in the previous autumn deceased had bought, for a hundred dollars, a safe which had formerly been the property of a well-known lawyer, who had been, previous to the said sale to the deceased, appointed to the bench, and had no longer use for it.

It seems to me most conclusively proven by most respectable people, that not only was the said safe so bought by deceased, but also that a small room on the ground floor of the rear part of the dwelling where the appellant lived and which had been very much out of repair, had been repaired for the special purpose of having said safe put there by deceased, or those he employed for the purpose, and that it was accordingly moved and placed there some time before the will was made.

It seems quite clearly proven also that the deceased and appellant were preparing for the occupation of part of the dwelling house where she had lived for many years and observant friends understood what such movement of the said safe meant. She had fallen ill just after this and hence progress was delayed.

Unfortunately the search made for deceased's will after his death was misdirected. They discovered from Mr. Kerr that such a will had been drawn by him, but could not find the copy taken away for consideration, and probable execution. Manifestly those concerned in such pursuit did not direct their efforts very well, or they would have gone further, discovered the contents and traced up the people named in the will as beneficiaries and, assisted thereby, have made further progress.

Mr. King, an old friend of deceased, and named as one of the executors of the will, lived at some distance from the city and had only occasional chances for doing so, and yet he seems to have been selected as the person who should have to make an application for letters of adminis-

tration to the deceased's estate, called on appellant and told her of having discovered that a will had been drawn, but that it never was executed.

I respectfully submit he was too hasty.

Much has been made of appellant's statement, after he left, to men working there, when she seemed enraged at the declaration that no will had been executed.

It seems she was somewhat dull of hearing, and throughout no regard is paid to that. Perhaps she misunderstood the real effect of what was told her for evidently she may have had in mind an attempt to beat her out of her money lent, and bonds as well, and then have concluded they were trying to beat her.

On that occasion or the next, Mrs. King going upstairs with the appellant, noticed the safe, where placed as related above, and was told by appellant then and there that it belonged to deceased, but no further remarks then ensued about it.

However, it seems to have occurred to Mrs. King either as a feature by itself, or in connection with the missing will, as something worth thinking over.

Mr. King puffed that aside as unworthy of consideration for he answered "Nevins could have no use for a safe," and so, apparently other wise heads also conceived, and so it was argued before us, despite what followed.

I was tempted to inquire from counsel what the cost annually was of a safety deposit box, in the bank vault, such as he had, and was told at least five dollars a year.

Why should he not have at his home a safe he could get costing only a hundred dollars, or about the same annual cost, and have it on hand for everything?

Such a thought seems never to have occurred to those pretending to search for the will—the missing will or even the copy if never signed—for it was not returned to Kerr. Nor was it ever seen again unless that be it which was executed, as sworn to by the said witnesses.

It does not seem to have occurred to appellant at first that the safe should be looked into, but later, thinking it over, she seems to have suggested that. She swears she had on several occasions said to those concerned in the search for the will, to look into the safety box and the safe, and, getting no response, at last said to Mr. King, that if

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the safe was looked into it might open some people's eyes.

That led to due and proper search and the discovery of the will in said safe under such circumstances as satisfy me that it was placed in said safe by deceased after its due execution as sworn to by the witnesses thereto.

There is abundantly clear evidence that appellant could not tell the combination of the lock by which it was closed. She says that deceased had told her, but she could not remember it. Indeed it would have been a remarkable thing if she could having no experience in its use. The first number of the combination she thought was 28, but the next two numbers she failed to recall. This was told to a party of three of Mr. King's friends who went to see appellant, and the safe.

Better experts than she in said party, tried but failed and they and Mr. King agreed to get an expert named Iddiols to put him to open it next day.

He managed to do so after an hour and a half working at it but, in accordance with his instructions, did not open it or even turn the bolts back.

Mr. Sanford then acting for Mr. King and under his instructions tells what then happened, after hearing this over the phone from Iddiols, as follows:—

> Mr. MacRae and I went down. Miss Smith let us in and took us downstairs. Mr. Iddiols said he got the combination to work. He said he had not opened the door and had not even turned the bolts back. In the presence of us four he opened the door and pulled the bolts back. There was nothing in any of the compartments as far as you could see in looking in. There was a little cash box in the centre, and he pulled that out and I looked in and found a plain, white envelope. This white envelope was tied with what is known as baby ribbon, very narrow white ribbon. It was tied lengthwise and around and knotted and in the loop of the ribbon there was a plain gold ring. I untied the ribbon and opened the envelope and took out the document which has been spoken of in court as the will of Charles Nevins.
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> Q. Was Miss Susie Smith present?
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> A. Yes. I brought it down to the office and telephoned or wrote Mr. King that we had found the will and at his convenience we would apply for probate. He came down some few days after that, and we presented the will for probate to Your Honour, and it was proved on the evidence of Mr. Cox, one of the witnesses. I think Mr. King still has the envelope with the ribbon and the ring.

That will having thus been discovered and thereafter presented by the executors thereof for probate there ensued this litigation. For Mrs. Givan, after the death of her brother, had made a will of her own and died, long before

this discovery, and thereby had practically bequeathed, on the assumption that her brother had died intestate, both estates to be distributed in such a way as directed amongst respondents herein.

The respondents herein are Charles T. Nevins, the executor of said last mentioned will, and a number of legatees thereunder.

There is one of these, I rather think the executor of said last mentioned will, who had been for many years, though a cousin of deceased Charles Nevins, on unfriendly terms with him.

Hence, possibly, this savage piece of litigation.

The will now in question was being proved in solemn form and in course thereof allegations of forgery and undue influence were set up. At first the latter seems to have been withdrawn, or not relied upon, but long afterwards resorted to again, probably in despair, for there is nothing to support it.

I see not the slightest reason for relying upon such allegation of undue influence, and submit that the only issue herein is forgery or not.

The respondents procured the evidence of one Hazen, an expert of some six years' experience, from Montreal, which, at first blush, might have some consideration given it.

But upon reading the evidence of Mr. Hingston of Boston an expert of a lifetime and very prominent in his profession, I must say he sweeps aside by the reasons he gives any value to be attached to the evidence of Mr. Hazen.

He seems to me to have had much more ample material, secured no doubt at his suggestion, in the way of specimens of the handwriting of deceased upon which he could rely for the conclusions he came to.

Moreover the first named expert upon being recalled in rebuttal has to admit that in giving his testimony on his first examination he had made a serious mistake in claiming to have been an expert witness in a noted case in Newfoundland, which Hingston, who was there, denied. To his credit, however, he frankly admits he was mistaken, and had confused some of his first studies as an expert in studying that case in Montreal with his actual presence in Newfoundland at the trial there.

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That circumstance of making such a mistake must in weighing their respective evidence as between them, go a long way to deciding in favour of accepting that of Hingston, as I do. In short there is, when their evidence is compared, nothing left for respondent to rely upon in regard to the question of comparison of handwriting except the appearance of the signature of the testator in the abbreviated form he used for his Christian name. He usually wrote it "Chas.," and in the signature to the will in question one may be led to read it as if spelled " Ches."

Assuming so, and, as Hingston frankly admits it is capable of being so read, how can that help when we are shown a number of cases wherein undoubtedly his signature looks as if the abbreviation were " Ches." instead of " Chas."?

More than that—is the rough table or counter upon which the signing of the will was done, without a chair or stool to sit upon, and the need for having to stoop down or lean to one side, not to be considered?

But above all, to my mind, the suggestion of a witness being a wilful forger and making and leaving there a misspelt name, is too absurd for my acceptance.

And when we are asked to find that two respectable citizens have signed as witnesses their signatures at the wrong side, where no professional will forger would ever have directed them to sign, the accusation seems rather ridiculous.

No one has attempted to compare the handwriting of these signatures of the witnesses with that of the testator. If they did they would find it impossible for either of them ever to have attempted to forge that of the testator.

To accuse two respectable citizens, long friends of the testator, of such a crime seems to me only to have been begotten of hatred and malice such as one may be permitted to suspect from the evidence originated on the part of some one of the cousins despised by the deceased.

And that brings up another side aspect of the case for the respondents launched into a campaign of vile slander against his affianced which sets him down, if true, as a fool which I do not think he was. Nor do I think his old friend George H. King thought he was.

I am glad to find that the last-named gentleman and

Mr. Kerr stand aside and take no part herein, but simply hold the stakes.

Now what the respondents stress most in alleging somebody, they do not say or point to whom exactly or in what way, as bringing about such a conspiracy as produced this alleged forgery, is the omission of Mowatt to tell of having witnessed such a will of his friend Nevins.

I have already pointed out wherein I think the executors to the will were rather remiss in their search for its discovery and now I submit these respondents ought to have been fair in such reflections.

The executors were simply ordinary human beings and were, like others of same kind, engaged with their own business. So also were the witnesses. Mowatt had gone on a fishing trip which occupied some of his time, and he was, in any event, a silent, reticent, reserved man, unlikely to speak.

He simply says that from March to May slipped by and he saw no call on him to consider such a subject, especially, I submit, if on a fishing expedition meanwhile.

He frankly says he did not realize time was so passing. Why should he? It is not shown, or until recently, that before this litigation he had any interest in the will. Why should he bother about it?

I am afraid I have already spent too much time on a rather absurd ground for forgery and perjury.

In connection with this Mowatt incident I must not overlook the peculiar circumstances that King tells of a phone message from Mowatt that he wanted to see him on business and he responded by going to Mowatt's store and talking there about Nevins, the deceased, but came away without hearing of any business, or asking Mowatt what the business was that he wanted to see him about. Mowatt denies this phone. But how can the pot call the kettle black in that incident? Why did King not ask what he was phoned for?

What about Cox? The slanderers who pretend that he was party to a forgery, and perjury, have nothing to rest upon except that he, a most respectable witness, as attested by the learned trial judge, had, they allege, years ago used money entrusted to him in a way he should not have done.

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If his story is correct, and there is nothing to correct it by but his own version and according to that he acted within his absolute rights, advised the party entitled to said money of what he was doing with it and got his assent, and continued to the time of the trial to act under same power of attorney. Nothing but a campaign of wilful slander can account for the production of such evidence as a basis for the pretension set up of his being not only capable of forgery and perjury, but an actual forger and perjurer.

The respondents failed to call the man who had given the power of attorney so acted upon and, unless they were prepared to do so, I submit they ought never to have tendered such evidence or have been allowed to do so.

Decent treatment of witnesses is a most essential element in the due administration of justice.

Cox never had anything to do with the testator's estate, or interest therein, or reason for joining in any conspiracy involving a forgery. Why should he commit perjury? He was well acquainted with the testator and could not be mistaken as has, I imagine, been the basis of attack in such sort of cases.

Then there is the evidence of Roy McCollum, a drug clerk in the Mowatt shop for a year—from some time in September, 1920, to October, 1921. He testifies to seeing the deceased Nevins there so frequently that he became well acquainted with him and his habit of helping Mowatt in the back shop, which he calls the paint shop. And on one occasion, shortly before his death, the deceased came in, asked him for Mowatt, and was told that he was in the back shop, and he passed through to see him and stayed there. An hour or so later, Roy had occasion to go out to the back shop to consult Mowatt about some of the front shop business, and found Mowatt, Cox and Nevins all together, and no one else there.

This is strong corroborative evidence of what Mowatt and Cox tell, and none the less so, seeing he was not in Mowatt's employment when giving it, and never had any interest in the questions now raised herein.

There is much made of the rough way the date—March 3rd—is inserted, and doubt sought to be cast thereon.

The typewriter had written in type the usual words:

In Witness Whereof I have hereunto set my hand and seal at the city of St. John aforesaid the day of A.D. 1921.

Then, whenever it was executed or forged, the words "March 3rd" were written in the blank space between the words "day of" and "A.D. 1921" instead of in the two blank spaces respectively the word "third" and "March".

Can anyone imagine a professional forger, or any other kind of forger, finishing up his work thus? I cannot. But I can conceive of the testator writing in such an uneasy position thus hurrying up the finishing of his work.

And I have no doubt the testator did it. And its present aspect confirms that as anyone forging would be particular to leave no ground for suspicion.

And I am the more convinced when I find the witnesses accused of forgery and perjury make no pretence of having actually seen the testator write the date but quite properly assume he did so.

Forgers, or conspirators to a forgery, would have been quite prepared to swear to anything. Nor do I think they would have put a ring or ribbon round the envelope in which the will was found.

When he took the will, unsigned, from the solicitor's office his last words there were a joke on his longevity and apparently he was in excellent health and vigor, and just as likely to play a practical joke on wife thereby when married and a new will would be needed.

When, I may ask, did this conspiracy to forge a will take place, and how was it brought about?

It surely could not have been until after the death of the testator, and if so how and why should the 3rd of March be recalled as the date to be inserted?

There was an attempt made by the respondents to suggest that the safe in question had been bought by appellant because she had at some time preceding its purchase made inquiries from some persons who were offering a second-hand safe for sale.

She denies ever needing or inquiring about a safe for herself, but on an occasion when some one or other safe was offered for sale, she and Mr. Mowatt had some conversation as to the desirability of his shop being supplied

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with one and incidentally she did, on his behalf, ask prices thereof. He concluded then that for all his business it was not worth his while to so invest, and the matter stopped.

He also swears to the truth of that explanation if such be needed in face of the overwhelming evidence of others concerned in the sale of the safe, already referred to as being bought by Nevins the deceased.

Turning to the accusation of conspiracy as against appellant who, it is insinuated by counsel for respondents, formed one of the conspirators to forge the will produced, because there are so many witnesses who have contradicted her (for the most part on matters entirely foreign to this alleged forgery) I submit her conduct throughout is quite inconsistent with having been a party to such a conspiracy as alleged.

She was informed by Mr. King at an early date that a will had been found, but that it had never been executed. At first blush, if the evidence of those she spoke to after Mr. King had so told her is to be taken in another sense than I have indicated above, she may not have accepted the view of Mr. King as correct, but soon after seems to have supposed it was, for she at many times after that, had referred to the will as not being signed. And no less than five witnesses are brought to testify that on as many different occasions, she had referred to it as not being signed, and bemoaning the fact. And up to the time of its discovery that seems to have been her attitude. And she had even got one of the copies made and sent it, immediately before the finding, to a cousin of deceased living in England, telling the same story.

Surely all this is quite inconsistent with her ever having been a party to any conspiracy to forge a will. On the contrary her conduct seems to have been quite inconsistent with any such conception and enures, or should enure, to her benefit.

She swears repeatedly to having told those concerned, when discussing where to look for the executed will, that search should be made in the safety deposit box in the bank, and in the safe.

Some statements are made by Miss Maxwell as to what she said in her presence, but anything material relative to the will is flatly contradicted by appellant.

Her moral character is attacked in a way that, I submit, ought not to have been permitted, seeing the high esteem in which she evidently was held by the deceased Nevins who had such ample opportunity of knowing all about her character for so many years.

He seems to have been a man of good character, quite unlikely to have held her fit to be his wife if any foundation for the stories and insinuations made, and improperly permitted I submit, in evidence as traceable back to an incident of ruffianism many years previously by some mischievous person inserting an alleged marriage notice in a St. John newspaper, evidently designed to set the gossiping people in said city talking.

Miss Maxwell, who seems to have had a rather lively imagination and a reckless way of speaking, tells a rather improbable story of Nevins, the deceased, having told his sister that he would never make a will, and then adds, she has heard him say this hundreds of times, apparently within the few weeks she was nursing his said sister.

The fact is that he had made a will some years before as Mr. King knows and tells us of without disclosing the contents.

That fact alone renders that part of her story as highly improbable. And the statement added thereto that she had heard him repeat it a hundred times stamps her to my mind as an unreliable witness.

Again she attempts to say that he had denied that he would ever marry, though on the face of it no one but some very imaginative person could take it as other than a joke, or a jocular way of speaking.

Again her highly improbable story of what Mr. Mowatt said when he called to see Nevins, of whose illness he had heard, and was told that he had died, is contradicted by Mowatt. I would prefer either his evidence or appellant's to anything she testifies to and wherein she is contradicted by them, or either of them, or any other respectable witness. Indeed there is not one of the witnesses testifying to anything material herein that has impressed me so unfavourably as Miss Maxwell of whom I know nothing but what appears in this case. There is presented the argument that she is interested in the result and some other facts to her detriment, but I see no need for dwelling thereon.

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In setting forth so much as I have done relative to her stories I am sorry counsel for respondents saw fit to put her improbable stories in the forefront of his factum and thereby render it necessary for me to deal so lengthily with the facts in order to explain why I refuse to accept her obviously unreliable version.

The rather peculiar requirement of the New Brunswick statute, 5 Geo. V, 1915, c. 23, s. 113 that "the Supreme Court (on appeal) shall decide questions of fact from the evidence sent up on appeal notwithstanding the finding of the judge in the court below" has induced me to read the entire evidence and consider same quite independently of the findings of the learned trial judge, and all the other material in the three volume case presented to us.

I cannot agree with the reasons assigned by the learned Chief Justice Sir Douglas Hazen.

I agree in the main with the reasoning of Chief Justice McKeown, but Mr. Justice Grimmer seems to accept the findings of the learned trial judge without reading the evidence.

I do not, seeing I agree with the reasoning of Chief Justice McKeown, save as to the jurisprudence of New Brunswick as to expert evidence, think it necessary to review the judicial decisions he cites. I so except, for the reason that I am not familiar with that part of it, and in my view need not consider it.

I cannot agree with the view taken by the learned trial judge of the law. Indeed, with all due respect, I submit that it is owing to his erroneous conception of the law relative to suspicion that so much evidence based on old-time scandals has been improperly admitted.

But, as the sole question to be decided is one of fact and that fact is whether or not this will was executed by the deceased, or is a forgery as contended for by the respondents, I do not think we can be very much helped by decisions in other cases further than to correct the misapprehension of law just referred to, and that, I think, Chief Justice McKeown has done so well that I need not repeat same here.

For there is, I repeat, no case made of undue influence or want of understanding on the part of the testator. The will is inherently unassailable on the facts presented and

by the provision for testator's sister in priority to his intended and then the residue to her on the sister's death, seems to be a will in which there is nothing to complain about.

I have had the opportunity of reading the notes of my brother Mignault and, agreeing therewith as I do, if there is any question of fact in either his judgment or that of Chief Justice McKeown which I have failed to mention herein, I accept their respective holdings as correct.

Having, for the reasons aforesaid, come to the conclusion that the will as presented to the Probate Court was the last will and testament of the late Charles Nevins, I am of the opinion that this appeal should be allowed with costs to the appellant and all parties supporting the will here and in the courts below incurred from and after the filing of the allegation opposing the proof of the will in solemn form, to be paid by the respondents.

The costs of all parties in the application to prove the will in common form as well as the costs of proving the same in solemn form up to the time of filing the allegations, to be paid out of the estate.

Thus far, I think, would be the usual judgment in such a case as this if the majority of the court agree in the result my brother Mignault and I have come to. But I see that Hazen C.J., and McKeown C.J., in the court below, agree in finding, although arriving at opposite conclusions as to the disposition of the appeal there, that there was an agreement between counsel for all parties, although denied by Mullin, that the stenographer's costs should come out of the estate.

They each refer to some affidavits which I do not find any reference to in the printed case before us except this from said judge's notes of judgment.

If they are right in said finding I should think it ought to prevail here and the stenographer's work, said to amount to a thousand dollars, or thereabout, should be, as they directed, paid out of the estate; that is the entire estate of Charles Nevins, unimpaired by anything that has happened since this litigation arising out of the allegations giving rise to it.

Since writing the foregoing I have found the affidavits in question as to payment of stenographer's expenses out

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of the estate, and have no doubt the judgment should, in that respect, be the same as in the Court of Appeal.

DUFF J. (dissenting).—This is an appeal arising out of proceedings in the Probate Court of St. John, N.B., which were instituted by the petition of George King and Francis Kerr for proof in solemn form of an instrument alleged to be the last will and testament of the late Charles Nevins, in which they were named as executors.

From the pleadings and the evidence adduced at the hearing, there emerges one and only one issue, an issue of fact, and that is whether the document put forward by the petitioners was in fact executed by Charles Nevins as his last will and testament. The judge of the Probate Court decided adversely to the petition and his judgment was sustained by the Supreme Court of New Brunswick by a majority of two to one. From this judgment the appellant, the principal beneficiary under the terms of the instrument, appeals.

Before proceeding to discuss the evidence, it is of some little importance to state unambiguously the rules governing the burden of proof and to ascertain the principles by which the Supreme Court of New Brunswick, on an appeal from a judgment of the judge of the Probate Court, in a proceeding taken to establish a will, must be guided in dealing with issues of fact. By s. 113 of the New Brunswick statute, 5 Geo. V, 1915, c. 23, it is enacted that upon the hearing of such an appeal,

> the Supreme Court shall decide questions of fact from the evidence sent up on appeal, notwithstanding the finding of the judge in the court below.

Hazen, C. J., in the court below calls attention to the fact that in the statute as originally enacted, instead of the word "notwithstanding," the word "irrespective" appeared; and the Supreme Court of New Brunswick in 1881 held that under that reading it was the duty of that court on appeal entirely to disregard the finding of the judge of the Probate Court and "to give to it no weight whatever". In the present case the Supreme Court has apparently acted upon the view that the change by substituting "notwithstanding" for "irrespective" did not in any way alter the sense of the words or the effect of the enactment. With, I need hardly say, the greatest respect for the views of the judges of the Supreme Court of New Brunswick, especially

in relation to the construction of a New Brunswick statute, I am unable to agree with this. The change, made as it was after the deliverance of the Supreme Court in 1881 in the case cited by the Chief Justice, *Alexander v. Ferguson* (1), is in my opinion significant; and I am unable to escape the conclusion that it was made with the deliberate intention of declaring the law in a sense different from the rule laid down on that occasion. The statute, as it now stands, requires the Supreme Court to deal with an appeal as on a re-hearing, and also requires the court, when it has arrived at its conclusion, to give effect to the conclusion, notwithstanding the judgment of the trial judge. In effect it appears to me that the rule thus laid down does not materially differ from that which governs a court of appeal in deciding questions of fact on appeal from a judge who has tried the issues without a jury. The language is similar to that considered by the Privy Council in *Ruddy* v. *Toronto Eastern Railway Co.* (2), in which s. 209 of the Railway Act came up for construction. By that section the court is directed upon appeal from arbitrators, "to decide any question of fact upon the evidence taken before the arbitrators, as in the case of original jurisdiction." I do not think the effect of these words would be altered by the addition of the phrase, "notwithstanding the finding of the arbitrators," because obviously the Court of Appeal, having come to a conclusion, is to give effect to its conclusion, notwithstanding the sense of the judgment appealed from.

This, however, is not to say that in reaching a conclusion, the court charged with the duty of deciding the appeal is to proceed in entire disregard of the views and findings of the tribunal of first instance. As Lord Buckmaster, in delivering the judgment of the Judicial Committee in *Ruddy's Case* (2) says (pp. 193-4), such a statute

> places the awards of arbitrators * * * in a position similar to that of the judgment of a trial judge. From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

(1) 21 N.B. Rep. 71.

(2) 33 D.L.R. 193.

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As touching the burden of proof, there are some general principles which it seems desirable to restate. The first is accurately expressed in paragraph 605 of the Treaties on Evidence written by Mr. Hume Williams and Mr. Phipson in Lord Halsbury's collection in these words:

> In legal proceedings the general rule is that he who asserts must prove—a proposition sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue.
>
> This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.
>
> In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him.

This rule is quite consistent with another rule, in which the burden of proof is used in a different sense—a sense sometimes described as the minor, or secondary, sense—and in this sense the burden of proof does shift in the course of the trial according as the evidence preponderates on one side or the other, as well as in obedience to certain presumptions. The burden of proof in this sense is said at any stage in the progress of the trial to rest upon the party who would fail if no further evidence were given.

It is pertinent to observe, in view of the discussion which has occurred in this case, that the party on whom the burden of proof rests in substantive law, the party whose duty it is, in order to succeed, to establish the affirmative of the issue, must fail if, when all the evidence is produced, the minds of the jury or other tribunal of fact, are in a state of real doubt as to the effect of the evidence. The subject is most elaborately and ably developed in c. 9 of the late Professor Thayer's Preliminary Treatise on Evidence at the Common Law and the point is put with succinctness and precision by the late Master of the Rolls in *Abrath* v. *North Eastern Railways Co.* (1), in these words:

(1) 11 Q.B.D. 440.

It is contended (I think fallaciously) that if the plaintiff has given *prima facie* evidence which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention appears to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the proposition ought to be stated thus: the plainiff may give *prima facie* evidence which, unless it be answered, either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour; the defendant may give evidence, either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider, upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer. * * * Then comes the difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able, by the additional facts which he has adduced, to bring the minds of the jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

As might be expected, these principles have been applied in litigation arising in connection with disputed wills, and in such proceedings the rule by which the courts are governed is strictly in accordance with the general principle. It is accurately stated and applied by Sir John Nicholl in *Saph* v. *Atkinson* (1), and is fully expounded in the judgment delivered by Baron Parke on behalf of the Judicial Committee of the Privy Council (Sir John Nicholl sitting as a member of the Board) in *Baker* v. *Batt*, (2):

The case is of some importance to the parties, as it relates to property considerable in amount; but not, as was strongly contended at the bar, as involving a novel principle of decision upon conflicting evidence, by which the necessity of expressly deciding upon the truth or falsehood of particular testimony is avoided. No rule has been acted upon in the court below which has not been long observed, not only in Ecclesiastical Courts, but those of Common Law.

For if the party upon whom the burden of proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of evidence where there is, fails to satisfy the tribunal which is to decide of the truth of the proposition which he has to maintain, he must fail in his suit. And thus in a Court of Probate, where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied, that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate. And it may frequently happen that this may be the result of an inquiry (in cases of doubtful competence in particular) without the imputation of wilful perjury on either side; or it may be, the judge may

(1) 1 Addams, 162. (2) 2 Moore P.C. at pp. 319-20.

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not be satisfied on which side the perjury is committed, or whether it certainly exists.

In *Harwood* v. *Baker* (1), the Judicial Committee dismissed an appeal from a judgment of the Prerogative Court of Canterbury pronouncing against a will on the ground that

> the party propounding the will had not satisfactorily proved, as he was bound to do, that the paper in question did contain the last will and testament of the deceased.

Cresswell J., in delivering the judgment of the Court of Common Bench in *Sutton* v. *Sadler* (2), speaking for a court which included Willes J., referring to the last mentioned decision, said:

> The result must be the same where the party propounding does not rely on a *prima facie* case, but gives the whole of his proofs in the first instance. The onus remains on him throughout; and the court or jury who have to decide the question in dispute must decide upon the whole of the evidence so given; and, if it does not satisfy them that the will is valid, they ought to pronounce against it.

It is argued, indeed, that these principles have no application where no question of competence is involved and the issue is the simple issue of the execution or non-execution of the instrument. But in truth, in this last mentioned case the conclusion follows *a fortiori* from the considerations upon which the principle rests. A simple issue of fact as to whether an alleged testator, A, has or has not penned the words which purport to be his signature is one which, in point of law, is quite incapable of being decomposed into a series of secondary issues; although, of course, logically and as a matter of reasoning, the decision upon that issue may turn upon the view of the tribunal as to the weight to be attached to some particular part of the evidence.

Some facts are not seriously disputed. Nevins had been on very friendly relations with the appellant for some time, and his attentions to her had given currency to a rumour among his friends that he was to be married to her. And it must, I think, be taken as established that he did give instructions to Kerr, one of the executors named in the disputed instrument, for the preparation of a will, and that the document now propounded was in consequence of those instructions prepared by Kerr and in due course delivered to Nevins. The instrument, it is important to

(1) 3 Moore P.C. 282. (2) 3 C.B., N.S. 87.

notice, contains, first of all, an acknowledgment of an engagement to marry between the appellant and Nevins, and contains, moreover, a declaration of trust in respect of certain Victory Bonds which, I conclude from the evidence of the appellant, were not bought for her, although she says he told her that he had purchased some Victory Bonds in her name.

Although the fact that this document was prepared seems to be established, it seems to be equally clear that among those of Nevins' friends who might have been supposed to know of the execution of a will, and particularly of this document prepared by Kerr, there was a belief that the instrument so prepared had not been executed. The evidence is overwhelming that the appellant herself—she admits it, indeed, quite unreservedly—fully believed that Nevins, although intending to make her his testamentary beneficiary, had died before carrying his intention into effect. Again, although the fact that this document had been prepared was made known to Mr. King shortly after the death of Nevins, and although he informed Mowat of the preparation of the document and of the fact that he was named as a legatee in it, and although later he informed Mowat that since no will had been found, at the request of Nevins' sister he was about to apply for letters of administration, neither Mowat nor Cox, the other attesting witness, disclosed either to Mr. King or Mr. Kerr the fact that a will had been executed until after the lapse of something like ten weeks from the death of the supposed testator. The alleged signature, while it bears a general resemblance to the undisputed specimens produced, is in some respects strikingly different from them. Undeniably there is an appearance of care and elaboration in the production of it which presents a striking contrast to the free sweep of the writing in the enlarged authentic specimens. Moreover, it is clear that in all the admittedly authentic specimens submitted, the third letter in "Chas." is written as an "a," while the corresponding letter in the disputed signature presents all the appearance of an "e"; and I think the two handwriting experts are right in agreeing that they can give no explanation of this discrepancy, upon the assumption that the writer of the genuine signatures was the author of the disputed one.

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Not a single specimen of the handwriting of Nevins is produced in which this third letter is formed as in the signature attached to the will, without a break or a sign of arrest in the progress of the stroke indicating an intention to form an "a," and it may fairly be assumed that no such specimen could be found. I may say at once that from a comparison of the disputed signature with the genuine specimens produced, and considering the evidence of the two experts and of Mr. King, who was very familiar with Nevins' handwriting, I should conclude with little hesitation, if the case turned upon the evidence as to handwriting alone, that the signature in question was not the signature of Nevins.

The trial judge and the majority of the judges of the Supreme Court have considered that these facts in themselves present very serious obstacles in the appellant's way. And undeniably the failure of Mowatt to disclose the fact of the execution of the will to Mr. King or Mr. Kerr was a very significant omission, and I must say in my opinion an omission which is left quite without explanation. The will, according to the evidence, was executed on the third of March. Mowatt must have known that the appellant, as well as the executors named in the will, being aware of the fact of its preparation, were deeply concerned upon the question whether Nevins had died without executing it; and yet, with so many reasons and occasions for speech, he remained silent.

Mowatt's alleged failure to make any disclosure to the appellant on the subject is accounted for by her counsel by reference to the circumstance that neither Mowatt nor Cox read the document or was informed of the contents of it at the time of execution. This circumstance can have little or no weight, in view of the fact which the evidence demonstrates, that the appellant herself was fully aware of the contents of the document as prepared, and discussed the contents of it freely with others; and it is quite incredible that Mowatt had not become aware of what these contents were.

Then there is the evidence of Miss Maxwell, who says that both the appellant and Mowatt, on hearing of the death of Nevins, in addition to such manifestations of grief as might have been expected, spontaneously ex-

pressed, in words quite unmistakable, their disappointment in not having procured Nevins' signature to some paper which it was very important he should sign. The learned trial judge says he has no reason to disbelieve Miss Maxwell, and although his language upon the point might have been more explicit, it is quite evident, I think, that he accepted her evidence as against that of Mowatt, who at first confined himself to asserting that he did not remember the occurrence related by her; while it is quite plain that he has no hesitation as between Miss Maxwell and the appellant in rejecting the appellant's denial. The importance of Miss Maxwell's evidence is brought into relief by the evidence of the appellant and Mowatt. It might have been said that such expressions had reference to some document other than the will prepared by Kerr, but no such explanation was given, and if the denials of Mowatt and the appellant be rejected, it is impossible to say that the inference suggested by the respondents is not a reasonable one.

The appellant's knowledge of the preparation of the document, and her belief that Nevins had died before executing it, supply a very natural explanation of the expressions she used, if it was this document to which she referred; and no other explanation is forthcoming, nor is there any explanation of the language attributed to Mowatt. If Miss Maxwell is to be believed, the circumstances point rather directly to the conclusion that it was the document prepared by Kerr of which they were both thinking. That is the inference drawn by Hazen C.J., and if the inference is a valid one, it is obviously fatal to the appellant's case.

At this point the question naturally suggests itself whether, considering the relations between Mowatt and the appellant, and the appellant's distress over the non-execution of what she called "the will," as shown by the evidence of many witnesses, it is not improbable that he would have refrained from setting her mind at rest.

No little importance attaches to the circumstances connected with the discovery and the production of the document. Nevins had a safety-deposit box where he was in the habit of keeping his securities and other important papers. The will propounded was not found in this box,

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nor was any memorandum discovered there pointing to the existence of it. Neither Mr. King nor Mr. Kerr, the executors named in the disputed document, was informed that a will had been executed. Nevins' sister, Mrs. Givan, who died after Nevins and very shortly before the discovery of the document, was left in ignorance of the execution of it; so, also, was the appellant, who, if she is to be believed, saw Nevins more than once between the time of the execution of the will and his death. Mr. King, besides having been named as executor, was on terms of personal intimacy with him, and their business relations had lasted a great many years. The will was found in a safe which stood in a room in the house occupied by the appellant. There was a good deal of dispute as to whether this safe was the property of the appellant or of Nevins. There is evidence that Nevins had bought and paid for the safe, but considering the relations of the parties, and in view of the fact that the appellant had some time before been looking for a safe to purchase, there is nothing in this inconsistent with the contention put forward by the respondents that the safe really was the appellant's. I think the balance of probability inclines in that direction. In any case, admittedly the safe contained nothing but the disputed will. It is quite obvious that Nevins had never used it as a repository for his own papers. The appellant herself admits that Nevins had given her the combination; she says she had forgotten it. As I have already said, the learned trial judge has, on what I believe to be adequate grounds, pronounced the appellant an unreliable witness; and my view, after carefully weighing all the evidence as to this safe, is that the great weight of probability favours the conclusion that the appellant knew the combination and had access to it.

If that is so, it is difficult, if not impossible, to reconcile the conduct of the appellant with the hypothesis that her claim is an honest one. Instead of opening the safe and informing the executors what was there, she pretends ignorance, and suggests that a search in it might possibly lead to the discovery of a will; and this not until ten weeks had elapsed after Nevins' death, after letters of administration had been granted and Mrs. Givan, the grantee of a life-interest under the document, had died. I agree with

Hazen C.J., and the judge of the Probate Court that the condition in which the will was found, with the ribbon and the wedding-ring, is most probably accounted for upon the hypothesis that the appellant had access to the safe.

As against all this there is the testimony of the two attesting witnesses, Mowatt and Cox; and in weighing the value of their testimony it is, of course, very important not to forget that if the disputed signature is not that of Nevins, then Mowatt and Cox must have committed deliberate perjury. The learned trial judge does not in explicit terms find that these witnesses committed perjury. The expression he uses, however, satisfies me that he put no faith in their testimony. His words are:

> Though, because not driven to it, I am unwilling to find that either Mowatt or Cox did not tell the truth, the evidence of Mowatt especially was far from satisfactory;

and the conclusion at which he arrived was that the weight to be attached to their testimony was not sufficient to overcome the improbabilities arising from the facts proved with which the appellant's case was beset.

It is undeniable that apart from these improbabilities, circumstances were disclosed seriously reflecting upon the credit attaching to Mowatt and Cox as witnesses. The majority of the Court of Appeal have concurred with the trial judge in declining to give effect to their evidence.

With great respect for the view taken by others, I cannot help thinking that, to use the phrase of Lord Haldane in his judgment in *Nocton* v. *Ashburton* (1) it would be "a rash proceeding" to reverse the decision of the two New Brunswick courts upon this issue of fact with which, for so many obvious reasons, they were peculiarly qualified to deal, in the absence of some consideration of overwhelming weight demonstrating that in some definite way they have fallen into error.

As regards Cox, he, it must be admitted, assumes, in the light of his own evidence, a somewhat ambiguous character. A man of punctilious rectitude would not have used his friend's power of attorney for the purpose of providing money for his own needs, out of his friend's bank account, without first obtaining his friend's explicit permission; and

(1) [1914] A.C. 932.

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his admission that he did so is calculated to shake one's confidence in his explanations, which it was not open to the respondents to contradict, and to reflect a little upon that "irreproachable business standing" which McKeown, C.J., ascribes to Mowatt, who benefited by Cox's irregularity, and who, as an experienced business man, ought to have realized the grave nature of the impropriety Cox was committing.

As regards Mowatt, without discussing the subject in detail, it is sufficient to say that his relations with appellant were relations of indefinite possibilities. Then there is the extraordinary fact, which must not be overlooked, that Mowatt, after the issue had been joined, begged the appellant to discontinue the struggle. The reason assigned, that the scandal was injuring his business, would seem to be a trivial one, in face of the fact that, if his evidence is to be accepted, he, an honest man, with some reputation for business rectitude, was unjustly being charged with serious crime.

The learned trial judge and the majority of the Court of Appeal, as already observed, have held that the appellant has not acquitted herself of the onus resting upon her to prove that the alleged will was executed by Nevins. Two criticisms of some importance are directed against the judgment of the learned judge of the Probate Court. First it is said that he misdirected himself in laying down the rule that he must find against the will unless all suspicions arising out of the circumstances were removed by the appellant. I think this objection fails to do justice to the judgment of the learned trial judge. It is quite true he uses this form of expression, but it is sufficiently evident from his judgment, when examined as a whole, that by "suspicion" he means suspicion of that grave character legitimately arising from the facts proved, which would make it impossible for him to say that he was judicially satisfied that the affirmative of the issue had been established. It was very vigorously pressed upon us in argument that the trial judge could not decline to give effect to the evidence of Mowat and Cox without satisfying himself that they were committing perjury. Strictly, such a proposition cannot be maintained. The proposition that a

given witness is to be believed is an allegation of fact, and the party whose case depends upon the evidence being accepted must fail if the tribunal of fact has not sufficient confidence in the evidence of the witness to accept it as establishing the facts sworn to. No competent tribunal of fact, of course, rejects the sworn testimony of a witness from mere capricious or fanciful reasons; but it is, in point of law, quite unsound to say that once a witness has testified to the state of facts upon the existence of which the affirmative of an issue depends, the party calling him must succeed unless the other party disproves the testimony so given. He may equally succeed by so shaking the weight of the testimony as to bring the mind of the tribunal into a state of genuine doubt as to whether the testimony can be accepted as sufficient for the purpose for which it is offered. In the case before us, no tribunal of fact having the duty cast upon it to weigh the evidence of Mowatt and Cox could fail to take into consideration a feature of cardinal importance in this case, namely, that if the disputed signature was not the genuine signature of Nevins, then Mowatt and Cox were guilty of perjury. But this is a very different thing from saying that the plaintiff must succeed unless the tribunal is prepared to affirm that Mowatt and Cox were guilty of perjury. The trial judge was entirely right in asserting that he was not driven into that corner. It was sufficient for him if, all the circumstances considered, the considerations in favour of the conclusion that the signature was not a genuine one were as weighty as those in favour of the view that Mowatt and Cox were credible witnesses; if, in other words, he was not satisfied that they were not guilty of perjury. But it must be observed, and here I come to the point raised by the second objection, that the learned trial judge does not, nevertheless, leave us entirely in the dark as to his view in relation to the credibility of the witnesses heard by him. He expressly states, in respect of the evidence of Miss Maxwell, that he sees no reason to disbelieve her, and it is sufficiently evident, I think, as I have already said, that he accepts her evidence with regard to the important incidents above mentioned as against that of the appellant and Mowatt. I have already quoted his remark upon the criti-

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cal question of the general veracity of Mowatt and Cox, and, as I have said, he leaves no doubt upon the point that in his opinion the appellant is not a credible witness.

The appellant's argument does not convince me that the judgment of the New Brunswick courts can be reversed consistently with the principles which have governed this court in appeals from judgments upon issues of fact in which two courts below have concurred. But further, I am convinced that those judgments are well founded. Mowatt's silence, when his inclination, as well as his duty to everybody, would seem to have called upon him to speak; the belief of everybody, including the appellant, who might be expected to know, that no will had been executed; the place in which the will was found and the circumstances connected with the disclosure of its presence there; the conduct of the appellant and Mowatt on learning of Nevins' death pointing to a belief on the part of Mowatt, as well as of the appellant, that no will had been executed; Mowatt's desire, after the will had been impeached as a forgery, to give up the contest while resting under the imputation necessarily resulting from such a course; the character of the handwriting; all these circumstances, coupled with the relations of the appellant and Mowatt and of Mowatt and Cox, were before the trial judge and the Court of Appeal; and in view of them I think they were right in the conclusion that the evidence of Mowatt and Cox was not of sufficient weight to establish the validity of the will propounded.

The appeal should be dismissed with costs.

MIGNAULT J.—This is rather an extraordinary case. It began by proceedings by Geo. H. King and Francis Kerr for the probate in solemn form of the will of the late Charles Nevins, in his lifetime a broker of the city of St. John, New Brunswick, under which they were named executors. These proceedings were taken under chapter 23 of the New Brunswick statutes for 1915, section 48 of which directs that the probate judge shall first hear sufficient evidence to establish *prima facie* the validity of the will, and if such validity is established the judge shall so pronounce. Then if any party cited to appear before the court shall make request to have a witness examined, it

shall be the duty of the judge to hear any witnesses that may be in attendance upon the court or are produced by parties opposed to the will, not exceeding two, to be selected by the judge, and afterwards any person opposing probate may file allegations of the grounds on which he proposes to contest probate of the will, and upon such allegations being filed the judge shall hear the evidence adduced by any and all parties and decide the matter.

The course indicated by the statute was followed and the probate judge pronounced the *prima facie* validity of the will after the attesting witnesses had been heard. Then, at the request of counsel representing the respondents, two witnesses were called, and afterwards allegations were filed by the respondents and an inquiry commenced which is remarkable as well for its very great length as for the triviality of some of the matters inquired into. Out of this mass of relevant and irrelevant detail, which at great expense has been printed in the three volumes of the appeal book, I will extract the pertinent facts stating them as far as possible in chronological order.

Charles Nevins, the testator, had for many years lived in St. John. He was a widower, and, according to his own statement in the will, was engaged to be married to Susie Smith, the appellant, a spinster also residing in St. John and employed in a drug store kept by James Howard Johnson Mowatt. She also had some houses at Gondola Point, near St. John, which were rented to summer cottagers. Mowatt was an intimate friend of Charles Nevins as was also Mr. George H. King of Chipman, N.B., a member of the New Brunswick Legislature, and one of the executors. Another acquaintance of Nevins, and a business associate of Mowatt in another drug store, was one George E. Cox. Nevins resided with a widowed sister, Mrs. Givan, who died a couple of months after him. The estate of Nevins is valued at $16,000 or $17,000.

The recital of the pertinent facts may begin with a visit, some time in February, 1921, of Nevins and the appellant to the office of the latter's solicitor, Francis Kerr, of St. John, with whom Nevins was well acquainted. The appellant and Nevins had casually met on the street and when they reached the solicitor's office, Nevins told Mr. Kerr that he wished to give him instructions for the preparation

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of his will. Among other things he desired to acknowledge indebtedness to the appellant in some sums of money borrowed from her, and these amounts were checked off by Kerr in her bank book. Nevins had some Victory Bonds belonging to the appellant and he wished to acknowledge her ownership in these bonds. He therefore gave Kerr instructions for his will, the appellant being a part of the time in the outer office with Kerr's stenographer, Miss Alice Tobin. Kerr took note of Nevins' instructions and it was arranged that he would draft the will and Nevins and the appellant left the office together. Kerr then dictated the will to Miss Tobin who typed two or three copies. A few days afterwards Nevins returned, got a draft of the will, and, in answer to Kerr's inquiry whether he would then execute it, answered: "No, I don't look like a man that is going to die. I am good for fifty years yet, and I will take it away with me." He put it in his pocket and left Kerr's office. According to all the evidence, Nevins was then apparently in good health. His age is stated to have been about sixty-five years.

The draft will prepared by Kerr on Nevins' instructions made several bequests, viz:—$1,000 to the Provincial Memorial Home for Children of St. John; $1,000 to Howard Mowatt; his watch fob and stick pin to George King; all his interest in the Ashburn Lake Fishing Club to George King, Howard Mowatt and Francis Kerr; his gold watch to Charles Nevins, Jr.; to the appellant his diamond ring, a hand painted umbrella rack, a satin quilt and any pieces or articles she might want. Clauses 8, 10, 11 and 13 were as follows:

8. I direct my executors hereinafter named to hand over to Miss Susie Smith (who I am engaged to marry) two thousand dollars ($2,000) in Victory Bonds now in my safety deposit box in said Royal Bank of Canada, this city. These Victory Bonds are the property of Miss Smith purchased by herself with her own money and at her request held by me for safe keeping for reasons which I have explained to Mr. Kerr. I also direct my said executors to re-pay to the said Miss Susie Smith the sum of three thousand four hundred and fifty-three dollars ($3,453) which I borrowed from her on the following dates, viz: $2,000 with interest at 7 per cent on the fifteenth day of January, 1920; $1,300 with interest at 5 per cent on the fourth day of September, 1920, and $153 on the eighteenth day of January, 1921. I have gone over Miss Smith's bank books and had Mr. Kerr mark these different amounts with an "X."

* * *

10. Save as aforesaid I give and bequeath to my sister Mrs. Mary Givan all my personal property on the following conditions namely:

the principal of my said estate covered by this section is to be kept intact and I hereby instruct my executors to pay over to my said sister, Mary Givan, the income arising therefrom for her sole use and support. In case by any extraordinary circumstance, the income becomes insufficient to properly support my said sister I hereby authorize my executors to use their best judgment in disposing of or realizing on such portion of the principal sufficient to meet such extraordinary circumstance.

11. On the death of my said sister I give and bequeath all my estate to the said Susie Smith.

* * *

13. It is my wish and desire that my executors and particularly my friend George King, in case I should die before my intended marriage to the said Susie Smith, that she shall be carefully considered by them and protected by them. She has worked hard, is not in good health and I wish her to live the remainder of her days in as much ease and comfort as possible.

Finally the draft will appointed as executors George King and Francis Kerr.

Some time afterwards, which I take to be in the beginning of March, Mowatt was in a room leading from the back of his store called the paint shop, used for unpacking goods. It contained no chairs or other furniture, but only a table with a rough top. Charles Nevins was there with Mowatt helping him to check goods. While they were both in the paint shop Cox came in as he frequently did and about a half hour afterwards Nevins took a paper out of his pocket and told Mowatt and Cox that it was his will and asked them to sign it as witnesses. Nevins signed first with a fountain pen, leaning against the table, and then Mowatt and Cox signed as witnesses, this being done in the presence of the three of them. Neither Mowatt nor Cox knew anything, they state, of the contents of the will, but they both identify the document which they signed and which Nevins signed in their presence. After it was executed Nevins put it back in his pocket and Cox left shortly afterwards. A few days later Nevins had an attack of heart trouble and died quite suddenly early on the morning of the ninth of March.

This is in short the statement of Mowatt and Cox as to the signing of the will, and although Cox was excluded from the room while Mowatt gave his testimony, there is no discrepancy in what they say in connection with the signing of the will.

When Nevins died, the fact that he had instructed Kerr to prepare a draft will was disclosed. So far as Kerr and

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the appellant knew, this will had not been executed by Nevins. George H. King, Nevins' friend, was apprised of the preparation of the draft will and so far as he also knew it had not been executed.

George King, when he learned about this draft will, consulted Mr. Charles F. Sanford, K.C., of St. John. This was shortly after the funeral of Nevins and King told Mr. Sanford that a will had been drawn by Kerr of which he had a copy but that it had not been signed. He also told Mowatt that a draft will had been found under which he was a beneficiary to the extent of $1,000, but that it had not been signed by Nevins, on which and on the further information that King was taking out letters of administration of Nevins' estate Mowatt made no comment.

I may say here that the failure of Mowatt to disclose that he had witnessed a will for Charles Nevins—he only disclosed it to King a day or so before the will was found—is strongly relied on by the respondents as a ground for discrediting his testimony that he witnessed this will. It is said in extenuation that Mowatt was a silent and reticent man. Mowatt himself candidly admitted at a later period that this silence might appear strange, but it did not then seem so to him, for he thought that if Nevins had not destroyed the will it would be found among his papers. The respondents are no doubt entitled to any inference which may be drawn from Mowatt's failure to say anything about the will when he knew that letters of administration had been taken out, but my opinion is nevertheless that the silence or stupidity of testamentary witnesses should not militate against a will which the court believes was really executed by the testator. Moreover, Cox was never questioned about the draft will or Nevins' estate and no reticence on the subject is charged against him.

King looked among the papers Nevins had left in his safety deposit box at the Royal Bank and in Mrs. Givan's house and, finding no executed will, applied for letters of administration. He had also several conversations with the appellant to whom he had mentioned that an unsigned draft will had been found in Kerr's office. At one time the appellant showed Mrs. King a safe in a kind of outbuilding connected with the house in which she resided, which she said belonged to Nevins, but when told of this

by his wife King answered that he did not believe Nevins had a safe for he had no need of one. And he made no further investigations.

King was in St. John on Sunday, May 22, a week after Mrs. Givan's death, and Mowatt asked him by telephone to call at the drug store. He went there but says there was only general conversation as to Nevins, but apparently he did not ask Mowatt why he had telephoned for him. Mrs. King was with him, and went over to the appellant's house where King joined her and, according to his story, the appellant told him that if the safe were opened some people would get their eyes opened. The next day Mowatt said to King, who had stopped at the store: "Mr. King, Mr. Nevins left a will and I witnessed it." Mr. King asked him why he had not given him this information before he had been sworn in as administrator of the estate, and Mowatt's answer was that he didn't care to say anything about it.

That same day King called on the appellant with Mr. Sanford. The appellant stated to them that perhaps they might find a will in Nevins' safe above referred to. She said she did not know the combination, although Nevins had once mentioned it to her, but she thought the first number was 28. Sanford tried to open the safe and succeeded in finding the second number but could not discover the third, so he had a locksmith come the next day, the 24th of May, and the latter found the full combination but did not open the safe until Mr. Sanford arrived.

When the safe was opened an envelope was found in one of the drawers tied up with ribbon such as is used on candy boxes, and on the ribbon was a wedding ring. This envelope contained the will signed by Mowatt and Cox as witnesses and, according to their testimony, by Nevins. King and Kerr, who were named executors of this will, then initiated these proceedings for probate.

It is well to say here that the first allegations filed on behalf of the respondents on February 22, 1922, were to the effect that the signature of Charles Nevins was a forgery. Subsequently, on March 25, 1922, they filed additional allegations, to wit, that the alleged will was obtained by fraud, that at the time of the execution of the will the deceased did not know or approve of its contents,

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and that the execution of the said will was obtained by undue influence on the part of Susie Smith, chief beneficiary thereunder. Mr. Mullin at the hearing before this court abandoned these additional allegations as he had abandoned them before the appellate court.

The issue therefore is whether the will in question was executed by Charles Nevins, or, to the same effect, whether or not it is a forgery. Notwithstanding the opinion entertained by the probate judge that without pronouncing the will a forgery, and he did not find it such, he could refuse probate on the ground of suspicion, my view is that, unless we come to the conclusion that the propounded will is a forgery, the judgment of the probate judge cannot be supported. The will is either a genuine will, or it is a forged one with the consequence that Mowatt and Cox were guilty of perjury and conspiracy. I may add that Chief Justice Hazen and Chief Justice McKeown in the appellate court were also of the opinion that such is the issue in this case, for the former decided that the signature of Charles Nevins was a forgery and the latter that it was not. Mr. Justice Grimmer apparently shared the view of the probate judge who, if I may say so with deference, misdirected himself as to the question he had to decide, with the result that he made no finding upon the vital issue raised by these proceedings.

The factums of the parties discuss at length the question of the onus incumbent on a person propounding a will for probate. Granting that he must prove the authenticity of the will, and satisfy the conscience of the court that it was really executed by the testator, the question here is whether this proof has been made. Mere suspicions which do not bear on the fact of the execution of the will are in my opinion totally irrelevant, for that fact only, and not the question whether the testator knowingly and freely disposed of his estate by this will, is in issue here.

The testimony of Mowatt and Cox is direct and positive evidence that Nevins executed the will in their presence. Unless this testimony can be rejected or should be disbelieved, the factum of the will must be held to be established.

When the very voluminous testimony adduced on be-

half of the respondents is read, it would seem that it was imagined that the appellant was on trial. It is true that she is the chief beneficiary under the will, but again the issue is not whether the will was induced by undue influence but whether it was in fact executed. The probate judge may have been prevented from excluding much of this testimony—although I think he gave too great latitude to the respondents—for allegations of undue influence had been filed. But as these allegations are now withdrawn it is clear that evidence as to the character and conduct of the appellant is of no assistance. The fact that the appellant may have been discredited, does not prove that the will was never executed, for the factum of the will does not rest on her testimony. Moreover there are other legatees, such as the Provincial Memorial Home for children, and where the sole question is as to the execution of the will, they should not be prejudiced by an attack on the character of the appellant.

If the positive testimony of Mowatt and Cox that Nevins signed this will in their presence is believed, the will must be held to have been duly executed.

Whatever doubts may exist as to the testimony of Mowatt—and I will discuss these doubts in a moment—I am of the opinion that no reason exists for rejecting Cox's testimony. The probate judge says that Cox, whilst on the stand, impressed him rather favourably, a bit dull at times, but apparently not desiring to hold anything back. The only attack on Cox's testimony is that when he and Mowatt purchased a drug store on equal shares, as Mowatt was unable to pay up his whole share, Cox used some moneys belonging to a friend of his named Stewart for whom he held a power of attorney. This, Cox swore, was done with Stewart's full approval afterwards given, and Cox has returned him the whole amount taken by him. Cox still holds Stewart's power of attorney and enjoys, so far as appears, his entire confidence. He further says that Stewart had allowed him to make use of this money if he needed it, and there is no contradiction of his statement. I am of opinion that this attack on Cox's testimony entirely fails.

Mowatt perhaps is not in so favourable a position. I

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have referred to his reticence as to his having witnessed Nevins' will, although he knew that King proposed to apply for letters of administration of the estate. It was sought to prove that he, a married man, had entertained improper relations with the appellant, which both deny. Much evidence was adduced to contradict these denials. Mowatt also was often content to say "I do not remember," instead of answering yes or no, when questioned on matters which might have a discrediting effect on his testimony. But still he is unshaken as to the execution of the will in his presence, and is corroborated by Cox whose testimony cannot be rejected. If I were to hold that Mowatt falsely stated that Charles Nevins executed the will in his presence I would have to decide that Cox perjured himself when he also swore that the will was signed by Nevins in presence both of himself and Mowatt. This I cannot do. The testator, who has fulfilled all the formalities required by law, is entitled to the protection of the court. And many genuine wills would be rejected were it possible to defeat them by an enquiry into the past history of the testamentary witnesses often chosen by the testator somewhat at random. The question is whether I believe, whether my conscience is satisfied that Nevins really executed this will, and on the whole evidence I do believe that he did.

I have not overlooked the testimony of Miss Lillian Maxwell, which I cannot help thinking bears traces of evident exaggeration. She tells a somewhat extraordinary story, denied by Mowatt, that the latter, whom she had never seen before, said to her when he called at Mrs. Givan's house on the morning of Nevins' death, that he had a very important paper which he desired Nevins to sign and he had no idea he was so sick, and wished he had come sooner to get him to sign it. To say the least, it seems extraordinary that a man proved to be very reticent and silent, should have made such a statement to an utter stranger. Miss Maxwell would also have us believe that Nevins scouted the idea of marrying the appellant, and against this we have Nevins' statement, in the instructions given by him to Kerr for his will, that he was engaged to her. Miss Maxwell, who relates a great deal of similar gossip, is not without interest in Nevins' estate, for she is a

legatee under Mrs. Givan's will and if there were an intestacy this estate would go to Mrs. Givan's legatees. If I have to choose between Miss Maxwell's testimony, which only very indirectly bears on the factum of Nevins' will, and the positive statements of Cox and Mowatt as to its execution, I have no hesitation whatever in accepting the latter.

Moreover it cannot be disputed, without rejecting the testimony of Kerr who has been in no way discredited, that Nevins intended to dispose of his property as stated in this will. And Miss Tobin, being shown the will, says it was done on their typewriter and it is her paper. Moreover Roy McCollum, a youth employed, at that time but not at the time of the trial, in Mowatt's drug store, stated that one afternoon, some time before Nevins' death, Nevins and Mowatt were in the paint shop together, and that Cox came and joined them there and that the three of them remained about an hour. This is some corroboration of the testimony of Cox and Mowatt if it requires corroboration.

I confess that I am not much concerned about the expert evidence as to Nevins' signature on the will, for if the attesting witnesses are to be believed, opinion evidence cannot prevail against their positive testimony that Nevins signed the will in their presence.

Much was made of the fact that the will was found in a safe in an outbuilding of the appellant's residence, and that a wedding ring was fastened to the ribbon with which the envelope was tied. The safe was proved to be the property of Charles Nevins purchased by him from Kerr some months before his death. The reason why a wedding ring was left there can only be a matter of conjecture, but it could have been done only by a person having access to the safe and no one is shewn to have known the combination save Nevins and Kerr. The natural assumption is that Nevins placed the ring where it was found, his motive for so doing being obscure.

The date of the will, "March 3," which is written by hand, is another circumstance which was considered very suspicious. Mowatt and Cox say they did not write it or notice it when they witnessed the will. The opinion has been expressed that it is not in Nevins' writing, but only one of the exhibits written by him contains the word

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"March" and it affords a slender basis for the comparison of handwriting. This word however is in the will and whether or not it was written by Nevins, it is covered by his signature.

I have given the whole case my very best consideration, for it is one of considerable difficulty. It does not seem possible to return, as the probate judge did, a Scotch verdict of "not proven," leaving the case open for reconsideration should fresh evidence be discovered. What possibility is there of finding other more cogent evidence, if the positive testimony of the attesting witnesses does not suffice to turn the balance in favour of the will? My opinion is that the probate judge had no sufficient reason for disregarding the evidence of Mowatt and Cox as to the execution of the will. Whatever doubts or suspicions there may be, these doubts and suspicions do not bear upon the fact of the execution of the will, nor would they justify me in rejecting the testimony of the attesting witnesses.

I would therefore allow the appeal and declare that the will offered for probate was duly executed by Charles Nevins. I would order all costs, as between solicitor and client, of the probate proceedings to be paid out of the estate up to the filing of the respondents' first allegations, the costs subsequent to these allegations to be paid by the respondents who must also pay the appellant's costs in the appellate court and in this court. I think, however, on account of the consent of the parties as shewn by the affidavits filed, that the stenographer's bill should be paid out of the estate.

MALOUIN J.—I concur with Mr. Justice Mignault. I would allow this appeal and declare that the will offered for probate was duly executed by Charles Nevins. I would order all costs of the probate proceedings to be paid out of the estate up to the filing of the respondent's caveat including the costs of the stenographer who reported the proceedings in the probate court, on account of the agreement to that effect by the parties. The costs subsequent to the respondent's caveat, except the costs of the stenographer in the probate court aforesaid, to be paid by the respondents in this court.

Appeal allowed with costs.