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*Feb. 8.
*Mar. 11.

ALICE WYNNE (DEFENDANT).....APPELLANT;

AND

JOSEPH P. WYNNE (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Will—Execution—Testamentary capacity—Evidence—Reading of the will—Requisition of witnesses—Probate—Res judicata—Art. 851 *C.C.*

The day before his death, the testator made the following will: "I this day will my entire estate and all other effects to my wife Alice Wynne," the appellant. He was suffering from Bright's disease, and, to alleviate pain, morphine was administered each day at 11 a.m. and 8 p.m. The evidence of the attending doctor was that the effect of the narcotics would last two or three hours after the injection had been given. The circumstances of the execution of the will were related by the appellant. The testator was at first opposed to making a will, because he thought he would get better and also that it was unnecessary as he was of the opinion that his estate would go to his wife without it; but later on, he agreed to do so. Two days before his death, the will was drafted in pencil by an intimate friend of the deceased, copied by the appellant and shown to the testator at about 5 p.m. and again the next morning. The testator assented to it. Between 2 and 3 o'clock on the afternoon of the same day, the appellant handed the will to her husband who signed it without assistance. The appellant and the two witnesses to the will testified that the deceased was then *compos mentis*.

Held, Duff J. dissenting, that the evidence sufficiently establishes that the will expressed the true wishes of the testator and that he was *compos mentis* at the time of its execution, the more so as the will was simple and the disposition by the testator of his property to his wife was reasonable under the circumstances.

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

Before the execution of the will, the appellant requested the attendance of two witnesses; and when they were at the testator's bedside, she asked them aloud if they "would witness the execution of the will." The appellant then handed her husband the will and he signed it. Then the witnesses immediately signed in the presence of the testator.

Held, that the signature by the testator implies both knowledge by him of the fact that he was executing his will and a request to the witnesses to act as such; and this implicit recognition is a sufficient compliance with Article 851 C.C. Duff J. expressing no opinion.

Per Mignault J.—Probate of a will, not being conclusive of its validity is not *res judicata* even against a party who appeared and objected to the probate.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of the trial judge, Surveyer J. and maintaining the respondent's action.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

W. F. Ritchie K.C. for the appellant.

L. P. Crépeau K.C. for the respondent.

THE CHIEF JUSTICE.—Under the circumstances of the case, the disposition of all his property to his wife was not unreasonable, but on the contrary was such a disposition as the testator without any injustice to any one might fairly have made.

I am inclined to think the learned Chief Justice of the Court of King's Bench placed a much broader construction upon Doctor Anderson's evidence than its language warranted. I think the doctor, in giving the evidence he did, intended to limit his opinion as to the mental condition of the testator to the time that he was under the effect of the injection of morphia and not to extend it to the time when this effect had worn off.

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Accepting the evidence of the wife as I do, though she was the sole beneficiary, and also that of the two witnesses to the testator's signature, I cannot entertain a reasonable doubt of the capacity of the testator, when he signed the will, to do so or that the will embodied his real wishes and intentions.

I think this evidence shews the requirements of article 851 of the Civil Code to have been complied with. See *Faulkner* v. *Faulkner* (1).

I would allow this appeal and restore the judgment of the trial judge upholding the will.

IDINGTON J.—This is an appeal from the judgment of the majority of the Court of King's Bench of Quebec reversing the judgment of the Superior Court which affirmed the validity of the will in a suit which was first launched to set aside the probate as irregularly obtained, but by amendment of the pleadings involved the validity of the will itself, on the ground that the testator was *non compos mentis* at the time when he is alleged by respondent to have executed the said will.

The deceased signed a will of which the following is a true copy:—

Montreal, P.Q., November 2nd, 1918.

I this day will my entire estate and all other effects to my wife Alice Wynne.

Witness

That was attested to by two witnesses, called in for the purpose, on an occasion when the deceased was suffering from a severe illness. To ameliorate the said suffering the doctor in attendance had been in the habit of administering narcotics twice a day, at eleven o'clock in the forenoon and eight o'clock in the evening.

(1) [1920] 60 Can. S.C.R. 386.

It is urged that the pain and suffering thus alleviated rendered the deceased *non compos mentis* although the document was signed between two and three o'clock in the afternoon, and the doctor admits the acute effects of the narcotics would only induce from two to three hours sleep.

The deceased was sitting up and signed the document on a pad handed him by the appellant when in that position, which with his frail state of health amply accounts for the shaky appearance of his signature.

If the appellant's story is true, it was drafted by a pencil in the hand of an intimate friend of the deceased, the previous day, copied by her and shewn to her deceased husband the same day about 5 p.m. when he assented to it, at an hour when the influence of the narcotic injected at eleven a.m. must have almost entirely passed.

The learned trial judge accepted her entire story as true, and that of the witnesses who had attested the signature as true.

To hold such a will invalid for the technical reasons assigned by the learned judges of the Court of King's Bench, disregarding all the attendant circumstances, as evidence of an effectual compliance with the requirements of the law, would, as Mr. Justice Martin suggests, render invalid many apparently good wills.

In many of the essential features of the case, necessary to consider herein, it has a remarkable resemblance to the case of *Lamoureux* v. *Craig* (1), save that in my own view and that of others considering the facts in that case there was much to give rise to a

(1) [1913] 49 Can. S.C.R. 305.

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suspicion that the will was neither what the testatrix had previously intended or might have been expected to intend, and that the signature of the testatrix was thought by some of us to be illegible. In this case there was nothing but what one would expect to find, and what was consistent with the duty of the testator.

Moreover there was such a simplicity in the words used in question herein that all that which needed to be understood by him signing was so susceptible of comprehension at the slightest glance that, if any consciousness at all were left, they must have been understood by any one capable of executing the document as undoubtedly the deceased was.

In the *Lamoureux Case* (1) the deceased had rejected one will submitted to her for reasons she assigned and, when her vitality had been reduced below what the alleged testator here in question possessed, she had presented to her a will which needed the possession of very acute faculties to comprehend whether or not her wishes had been observed.

I quite agree with Mr. Justice Surveyer that if the will in that case, as the court above held, overruling us, was maintainable, certainly this is much more so.

I need not enlarge; for the learned dissenting judges in the court below have so fully and carefully covered the ground with more extended notes in all of which I concur, as to render it needless for me to repeat same herein.

The appeal should be allowed with costs here and in appeal below and the judgment of the learned trial judge restored.

(1) 49 Can. S.C.R. 305.

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DUFF J. (dissenting).—This appeal, in my opinion, should be dismissed. The onus rests upon those who propound a will of establishing that it was the will of a competent testator.

After fully examining the evidence I cannot resist the conclusion that the medical evidence points clearly to incompetency and I can find nothing in the other evidence relied upon to counterbalance the effect of this.

The appeal therefore, in my opinion, fails not merely because I am not satisfied that the conclusion reached by the majority of the court below is wrong but because as a result of an independent examination of the evidence I think the weight of evidence supports that conclusion.

ANGLIN J.—Two distinct issues are presented on this appeal—one as to the testamentary capacity of the testator, the other as to compliance with the requirements of Art. 851 C.C. in the execution of his will. The learned trial judge determined both in favour of the appellant, the sole beneficiary. The Court of King's Bench decided both against her by a majority of three judges to two.

The evidence of the doctor who attended him is relied on to establish the testator's incapacity. But, with great respect, I think it far from conclusive. It is not clear that he refers to incapacity other than that caused by the administration of narcotics. As to that he says it would not last more than two or three hours after the injection had been given. Three and a half hours appear to have elapsed between the last previous injection and the execution of the will. The appellant who was present at the execution says her husband was then "perfectly all right; he knew

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what he was signing." Robert Mellor, one of the witnesses to the will, says the testator recognized him and the other witness, James, and that he did not seem to be in a dazed condition but on the contrary "seemed to know what he was doing." In answer to an inquiry as to his health by Mellor he replied "not well; not well." James did not address him but thought the testator knew who he was. The appellant tells us that her husband sat on the side of his bed, that she gave him a writing pad which he put on his lap and then signed the will without other assistance. This statement is not contradicted. In fact it is corroborated by Mellor except that he thinks a table was used and not a writing pad. The signature itself, while somewhat shaky, is remarkably good for a man who died the next day from Bright's disease. The trial judge evidently believed both the appellant and the witness Mellor and, so far as one can judge by reading their testimony in print, it seems to be perfectly candid and entirely credible.

The will itself is reasonable, having regard to the testator's circumstances. It consists of only sixteen words—a simple devise to the widow of the entire estate and effects, which are said to amount to about $12,000. The appellant tells us it was drafted in pencil the day before its execution by Mr. Tuck, an intimate friend of the testator, with his approval if not by his express instructions, that she copied this draft and shewed the copy so made to her husband the same afternoon and again the next morning and that he approved of it as expressing what he wished on both occasions.

Taking all these circumstances into account, while, had the will been lengthy or the dispositions at all complicated, I should have doubted the testator's

capacity to appreciate it, I am satisfied that the evidence of the appellant and the witness Mellor sufficiently proves that he had capacity on the afternoon of its execution to make a will such as that prepounded.

The only objections to the sufficiency of the execution under article 851 C.C. which call for attention are that the testator did not refer to the document prepounded as his will or acknowledge his signature to it in the presence of the witnesses and did not request them to attest the will. Compliance with all other formalities prescribed by that article is fully established.

Mellor tells us that when he and James came to her husband's bedside Mrs. Wynne "asked if we would be witnesses and put our signatures on his will; she said it aloud to both of us." The will was then placed before the testator and he signed it, as already described, in the presence of Mellor, James and Mrs. Wynne, and Mellor and James "immediately" signed as witnesses in his presence and in that of each other. The signature by the testator thus made requires no other acknowledgment as the learned Chief Justice of Quebec points out; and, with great respect, it implies in my opinion both knowledge by him of the fact that he was executing his will and a request to the witnesses to act as such. This implicit recognition of the document as a will and request that the witnesses should attest the signature of the testator are, I think, a sufficient compliance in these particulars with article 851 C.C.

I would for these reasons allow the appeal and restore the judgment of the learned trial judge. The respondent should pay the appellant's costs in this court and in the court of King's Bench.

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BRODEUR J.—La présnte action était originairement instituée dans le but de faire mettre de côté le jugement qui avait été rendu par le Protonotaire de la Cour Supérieure qui déclarait que le testament de John Francis Wynne avait été dûment vérifié. Cette action en annulation du jugement de vérification alléguait que les formalités voulues n'avaient pas été remplies et que la preuve qui avait été faite était mensongère.

Il appert, en effet, par la preuve qui a été faite en la présente cause, que l'affidavit du nommé Tuck sur lequel le Protonotaire avait basé sa décision rapportait des faits absolument inexacts. Ainsi il jurait qu'il était présent lors de la signature du testament par le testateur, tandis que la preuve incontestable démontre que cette assertion est inexacte. La défenderesse, qui soutient la validité du testament, est obligée d'admettre dans sa défense que cette partie de l'affidavit Tuck était erronée et elle plaide que cette erreur provenait du fait que l'avocat qui avait préparé l'affidavit n'avait pas compris parfaitement les informations qui lui avaient été données.

Le jugement de vérification aurait certainement été cassé sans la preuve additionnelle qui a été faite en la présente cause. Cette preuve est que le testament avait été préparé au crayon de mine par Tuck lui-même sur les instructions du testateur, qu'il aurait été transcrit à l'encre par la femme de ce dernier, que le testateur l'aurait signé ensuite en présence des deux témoins Mellor et James dont les noms apparaissent sur le testament, et que le lendemain le nommé Tuck y aurait lui-même apposé sa signature comme témoin. Il est incontestable que cette signature de Tuck ne donnait aucune valeur au testament, mais pouvait-elle avoir pour effet de le rendre nul si

autrement il était valide? Certainement non. La cour pouvait donc, dans ces circonstances, déclarer que le testament, vu la preuve additionnelle faite, était dûment vérifié.

Le demandeur a alors compris la faiblesse de sa position et il a demandé à amender sa déclaration pour alléguer que le testateur n'était pas *compos mentis* lorsqu'il a signé son testament.

La Cour Supérieure a renvoyé l'action du demandeur et ce jugement a été renversé en Cour du Banc du Roi. La vérification du testament n'a pas été, vu la preuve faite, le véritable sujet du litige; mais la discussion a porté sur la capacité du testateur et sur les formalités requises par la loi pour rendre un testament valide.

Le testateur était évidemment dans un grand état de faiblesse. De fait, il est mort le lendemain.

Le témoignage du médecin qui le soignait n'est pas très favorable à ceux qui réclament que M. Wynne était capable de tester. Il avait perdu espoir de le guérir et alors tout le traitement consistait à lui administrer soir et matin des drogues destinées à apaiser ses douleurs. L'effet de ces drogues était de le plonger dans le sommeil ou de le rendre inconscient pour une couple d'heures. Quand il a exprimé ses dernières volontés à son ami Tuck et à sa femme, il paraissait comprendre parfaitement ce qu'il faisait. Les témoins du testament jurent qu'il paraissait comprendre ce qu'il faisait quand il l'a signé en leur présence. Il n'a dit alors que deux ou trois mots qui portaient sur son état de santé; mais on ne saurait dire qu'il ne comprenait pas la portée de la signature qu'il donnait. Il pouvait être encore

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un peu sous l'influence des drogues qui lui avaient été administrées environ deux heures auparavant; mais le maintien qu'il avait et sa réponse à la question qui lui avait été faite par l'un des témoins dénotent un état d'esprit qui me paraîtrait incompatible avec l'incapacité.

Si on n'avait que la preuve des témoins du testament, il serait peut-être assez difficile de dire que le testateur savait que le document qu'on lui faisait signer était l'expression de ses dernières volontés, car la demande que la femme du testateur a faite aux deux témoins de signer le testament n'a peut-être pas été entendue par le testateur; mais par le témoignage de la femme, qui a été accepté par le juge, quoiqu'elle fût contredite sous certains rapports, nous avons la preuve bien complète et bien certaine que le testateur savait qu'il signait un testament.

Les circonstances d'ailleurs rendent probable le fait que ce testament doit représenter la volonté du défunt. Le testateur et sa femme, la légataire universelle, avaient été mariés depuis plus de vingt-cinq ans et ils n'avaient pas d'enfants. Il était assez naturel que le mari laissât à sa veuve, qui avait près de soixante ans, les quelques biens qu'il avait pour lui permettre de vivre confortablement le reste de ses jours.

Cette cause ressemble sous bien des rapports à celle de *Craig* v. *Lamoureux* (1) qui a été décidée par le Conseil Privé. Les faits de la présente cause paraissent plus favorables à la validité du testament que dans cette cause de *Craig* v. *Lamoureux* (1). Je reconnais bien le danger qu'il y a de maintenir des testaments sur le témoignage du légataire lui-même. Mais la décision du Conseil Privé dans la cause de *Craig* v. *Lamoureux* (1) favorise la validité des testaments dans des cas semblables à celui-ci.

(1) 49 Can. S.C.R. 305.

Quant aux formalités, je crois qu'elles ont été observées, surtout du moment que l'on accepte le témoignage de la légataire universelle. Le testament exprimerait la volonté du testateur. Il aurait été signé par lui en présence des deux témoins qui auraient également signé en sa présence. Il est bien vrai qu'il n'y a pas eu de demande expresse et formelle par le testateur à ces témoins de signer, mais comme ils ont signé en sa présence et immédiatement après lui il me semble que cette circonstance constitue une réquisition suffisante pour assurer la validité du testament.

L'appel devrait être maintenu avec dépens de cette Cour et de la Cour du Banc du Roi et le jugement de la Cour Supérieure rétabli.

MIGNAULT J.—The plaintiff, respondent in this court, complains of the will, in the form derived from the laws of England, of his brother the late John Francis Wynne, bequeathing his entire estate to his wife, the present appellant.

As originally drafted, the respondent's action aimed at having the probate of this will set aside, and most of the fifteen paragraphs of the declaration were of the nature of an attack on the judgment of probate, while the conclusions asked merely that this judgment be set aside. By an amendment permitted at the trial, the respondent further alleged as paragraph 14a, that at the time he signed the will, John Francis Wynne was not *compos mentis*, and was unable to make a will and to acknowledge his signature on a will previously made. And by the same amendment he added to his conclusions the prayer that at all events the said will be annulled, resiliated and cancelled.

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It is not unimportant to point out that up to the time of this amendment the respondent had apparently completely misconceived what was his remedy against the will in question. The judgment of probate has, in Quebec, a purely relative and *prima facie* effect, not going beyond identifying and proving the document presented as a will, so that authentic copies of the same (the will itself not being in notarial form never becomes authentic) may be delivered to interested parties. But, as stated by article 858 of the civil code,

> the probate of wills does not prevent their contestation by persons interested.

And as far back as 1872, in the case of *Migneault* v. *Malo* (1), the Judicial Committee of the Privy Council held that a judgment of probate in the province of Quebec was not conclusive, and that the heir-at-law of the deceased, although he had been cited and opposed the grant of probate, could nevertheless impugn the will. It is therefore evident that the judgment of probate is not *res judicata*, even as to a party who appeared and objected to the probate, and consequently the respondent's allegations concerning this probate are entirely unnecessary, not to say irrelevant, in an action attacking the will.

Irrespective of these allegations, the respondent's declaration attacks Wynne's will on four grounds:—

1. The will does not satisfy the requirements of article 851 C.C.

2. The appellant handed the said John Francis Wynne a document all written out, which Wynne signed but did not read to the witnesses, and when he signed it J. C. James was the only witness present, Robert Mellor was called in as a witness after the document was signed, and Fred Tuck was not present at all.

(1) [1872] L.R. 4 P.C. 123.

3. Wynne never spoke anything about the paper he signed nor referred to it as being his will, and did not in any way acknowledge his signature to the said document as having been subscribed by him to his last will and testament.

4. On the 2nd of November, 1918, when Wynne signed the said document he was not *compos mentis*, and was unable to make a will and to acknowledge his signature on a will previously made.

It is noticeable that the will is not attacked for undue influence or fraudulent manoeuvres (*suggestion et captation*) by the appellant. What Mrs. Wynne did is material only when taken in connection with the alleged grounds of nullity, and I must express the opinion that if Mrs. Wynne's testimony be believed—and it was believed by the learned trial judge—she did nothing improper to obtain the signing of the will. It is very unfortunate that Fred Tuck died shortly before the trial—and inasmuch as he died of a lingering illness the parties should have obtained his testimony, or at least they should have shewn that he was incapable of giving it—but Mrs. Wynne says that her husband was under the impression, and so stated, that she would get everything without a will. She adds that Tuck told Wynne that he had better make a will and he agreed to do so, and as Wynne expressed the intention to leave everything to his wife, Tuck wrote out a very short form which the appellant copied and which eventually became the will attacked in this case. Like many persons, Wynne disliked the idea of making a will, but this certainly does not shew that the will in question was forced on him, and I cannot see anything in the evidence that could support a charge of undue influence, if such a charge had been made.

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Discussing now the grounds of nullity alleged by the respondent, and dealing first with the fourth ground, the learned trial judge found on the facts that the will was signed by Wynne when of a free and disposing mind, and of sound intellect. What gives great weight to this finding is that it necessarily reposed on the credibility of the witnesses, especially of Mrs. Wynne. Moreover the physician called, Dr. Anderson, did not prove a general state of incapacity of the testator. He said that Wynne, who was dying of Bright's disease, was suffering very great pain; that twice a day, at eleven in the morning and at eight in the evening he administered morphine to quiet him, and that the effect of the narcotic would last two or three hours. This will was signed after two p.m., and in view of the testimony of the witnesses to the will, James and Mellor, it seems impossible to conclude that the finding of testamentary capacity by the learned trial judge should be set aside.

I will now consider together the three first grounds of nullity which relate to the execution of the will itself. It is true that Mrs. Wynne handed her husband a document all written out, and that Wynne signed it but did not read it to the witnesses, nor was it necessary that he should do so. When Wynne signed the will, both James and Mellor were present and signed as witnesses in presence of the testator. No formal attestation clause was required and their signatures as witnesses sufficed. Tuck was not present at the execution of the will and signed it afterwards, but he cannot be considered as a witness to the will which however does not matter because two witnesses are sufficient. Wynne did not speak to the witnesses about the will and did not acknowledge his signature to them as having been subscribed by him

to his will. However, as Wynne signed in the presence of the witnesses James and Mellor, it is immaterial whether he acknowledged this signature which they saw him make. It was entirely unnecessary that he should do so.

So far the will stands the test of article 851 of the civil code which is as follows:—

851. Wills made in the form derived from the laws of England, whether they affect movable or immovable property, must be in writing and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence and under his express direction, which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request.

Females may serve as attesting witnesses and the rules concerning the competency of witnesses are the same in other respects as for wills in authentic form.

But it is said that the witnesses, who undoubtedly signed the will in the testator's presence, did not do so "at his request." Mellor testified as follows:—

Q. Who was present when you signed that will as a witness? A. Mr. James, Mrs. Wynne, myself and the deceased, the late Mr. Wynne.

Q. Who received you at the door? A. I think it was Mrs. Wynne; I am not sure. I walked right in.

Q. Did Mrs. Wynne talk to you about the will, then when she opened the door for you? A. No, only when we walked right up to the bed.

Q. What did she say then? A. She asked me if we would be witnesses and put our signatures on his will; she said it aloud to both of us.

Mellor also says that when he entered he asked Wynne how he was, and the latter answered "not well, not well." Both James and Mellor say that the testator recognized them.

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As to the signature of the witnesses at the request of the testator, undoubtedly this is a requirement of article 851 C.C., although it is not mentioned in the English Wills Act, 1 Vict., ch. 26, from which article 851 C.C. is derived. But it is to be remarked that when the will is signed or marked by another person than the testator, article 851 requires the "*express* direction" of the testator, while with regard to the signature of the witnesses at the request of the testator, nothing is said as to the form of this request. In my opinion, inasmuch as the legislature, in speaking of the direction or request of the testator, requires it to be expressed in one case and not in the other, it follows that this request can, in the latter case, be implied by reason of the circumstances surrounding the execution of the will. Here Mellor testified that Mrs. Wynne, when the witnesses and she had walked right up to the bed, asked them if they would be witnesses and put their signatures on the will, and that she said this aloud to both of them. The request she thus made to James and Mellor must have been heard by Wynne, who then signed the will and saw or could see the witnesses sign it in his presence. In my opinion, but I say this with every deference for the majority of the learned judges of the Court of King's Bench who thought otherwise, it would be pushing formalism too far to reject this will for the lack of an expressed request of the testator to the witnesses, and the more so as this is an essentially simple and popular form of will, which undoubtedly the legislature desired to render as easy as possible to the least educated of the population.

If it be contended that Mrs. Wynne who went for the witnesses and asked them to attest the will, had no mandate from Wynne to do so, I would answer

that evidently no express mandate was required. And the question really is whether Wynne intended to make a will and dispose in favour of his wife, and unless Mrs. Wynne's testimony be discredited, I must find that he did. The obtaining of witnesses, although essential, was not, under the circumstances disclosed by the evidence, a matter requiring any kind of mandate from the testator, for if we must take it as established that he wished to make a will, getting the witnesses necessary for the validity of the will was merely carrying out his desire.

It may be that this will is quite near to the danger point, but after full consideration I find myself unable to set it aside and nullify the very natural and reasonable disposition which Wynne made of his property, for he and his wife had been long married and had no children. Of course, Tuck's affidavit in support of the probate was untrue, as he did not see Wynne sign the will, although he probably could identify his signature. But nothing would now be gained by annulling the probate, for the testimony of James and Mellor shews that Wynne really signed the will. And, in my opinion, the attack on the will itself fails.

I would therefore allow the appeal with costs here and in the Court of King's Bench and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitor for the appellant: *W. F. Ritchie.*

Solicitors for the respondent: *Elliott & David.*