Harmes and Another Vs. Hinkson

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Court : Privy Council

Decided On : May-13-1946

Judge : Lords Macmillan, Porter, Simonds, Uthwatt &Amp; Du Parcq.

Appeal No. : Privy Council Appeal No. 67 of 1943 (From Canada)

Appellant : Harmes and Another

Respondent : Hinkson

Advocate for Pet/Ap. : E. Holroyd Pearce and R.M. Balfour (Canadian Bar), for Appellants; L. Mackenna Robinson and Heber Nethery (Canadian Bar), for Respondent. Solicitors for Appellants Charles Russell and Co.; Solicitors for Respondent Blake and Redden.

Judgement :

Lord du Paroq:

On 4th April 1941, one George Harmes died at the Grey Nun's Hospital in the city of Regina. Two days later, Mr. Hinkson, the respondent to this appeal to His Majesty in Council, brought to the manager of the Canada Permanent Trust Company at its office in Regina a document which purported to be the will of George Harmes. It was dated 3rd April 1941, and named the Trust Company as executor. On 2nd May 1941, a petition was presented by the Trust Company, as executor to the Surrogate Court of the Judicial District of Regina praying that the will might be proved in solemn form. Its validity had been challenged by the next of

kin, one of whom, Paul Harmes, is the first named appellant. The others, who lived in Greece, were represented in the ensuing proceedings by the second appellant, the Custodian of Enemy Property. In due course an order was made directing a trial to determine the validity of the will, and in particular the following issues: (a) the testamentary capacity of the deceased at the time of its execution, (b) its due execution, (c) the knowledge and volition of the testator as to its contents, (d) the allegation that the execution of the will was procured by the undue influence of Hinkson.

[2] The learned Judge of the Surrogate Court, after a lengthy trial, affirmed the will, and decreed probate in solemn form. On appeal, the Court of Appeal for Saskatchewan (by a majority, the Chief Justice dissenting) reversed the decision of the Surrogate Court. There was a further appeal to the Supreme Court of Canada. This appeal was heard by five Judges, Rinfret, Kerwin, Hudson, Taschereau and Gillanders JJ. By a majority, Hudson J. alone dissenting, the appeal was allowed and the decree of the Surrogate Court was restored. Paul Harmes and the Custodian of Enemy Property sought and obtained special leave to appeal to His Majesty in Council, and their Lordships, with the valuable assistance of counsel, who put their opposing contentions before the Board with much force and commendable moderation, have given anxious consideration to a case which has caused so striking a difference of judicial opinion.

[3] The facts need only be stated in the barest outline to show that the circumstances in which the will was made called for strict investigation. George Harmes was a dying man when he signed the impugned document. He was suffering from a disease which, though it may not impair the intelligence, induces mental torpor and, in the end, coma. The total value of his estate was about $65,000. Under the will, the respondent Hinkson, by a devise and bequest of the residue, was to benefit to the extent of somewhat more than $50,000. And it was Mr. Hinkson, a gentleman who by profession is a barrister and solicitor, who drew the will, with no witness present until, after the body of the document was complete, two nurses were called in to witness its due execution. "From the outset," said the learned Judge of the Surrogate Court, "the document is charged with suspicion," and no one has questioned this opinion. In order that the matter in

dispute may be properly understood, more of the facts must be stated, and something must be said of the two men who alone were concerned in the making of the will, George Harmes and Ernest Hinkson. George Harmes was born in Greece, of poor parents. When he was no more than fourteen years of age he left his native country for the United States of America, and there he lived until, about thirty years before his death, he left the United States for Canada, and settled in Regina. He seems to have had little education, but considerable aptitude for business. He had done well in trade, was the proprietor of a number of shops in which fruit and confectionery were sold, and had finally acquired a hotel which seems to have been favourably regarded, not least because of a popular beer parlour which was part of the establishment. Harmes is said to have been a genial and friendly man and many witnesses were called who counted themselves among his friends. He was a bachelor. His nephew, the appellant Paul Harmes, lived in Toronto, and he had two sisters, some nephews and a niece living in Greece. His nephew Paul had at one time assisted him in the management of his hotel, but he had lost touch with his kinsfolk in Greece and took little interest in them. He seems to have been a man of strong opinions, with, as was said, "a mind of his own." He died at the age of 57.

[4] Mr. Hinkson is a man of education, a university graduate who left the teaching profession for the practice of the law. He had lived in Regina since the year 1910, and for about twenty years had practised there as a barrister and solicitor. He is a married man, with two sons and a daughter. It is right to say that no suggestion whatever was made against either his professional or his general reputation, and that apart from any criticism that may be made of his conduct in this case, he must be regarded as a man of high character. The learned Judge was satisfied that the two men had been good friends. There was ample evidence, which he accepted, to show that their friendship was of more than ten years' standing although for some reason, possibly because Harmes had been in failing health, they had seen rather less of each other than usual during the two years which preceded Harmes's last illness. The friendship had been close and intimate. They had common interests, were both enthusiastic members of a fraternity called "the Knights of Pythias," met at many social gatherings, and had often been companions on sporting expeditions. What was more, Harmes had been made

free of the Hinksons' home, and had frequently been their guest, both at Regina and at their country cottage a Katepwe. One of the witnesses, Mr. Doerr, a King's Counsel, who had known Hinkson for many years, described his relations with Harmes as being " quite friendly and chummy," and recalled how two or three years before he had seen Harmes making himself "quite at home at the Hinkson cottage."

The learned Judge attached great importance to this domestic intimacy. Much evidence had been given in an attempt to show that there was no very close friendship between Harmes and Hinkson. With only two possible and, as the Judge thought, unimportant exceptions, there was not (he said) " a particle of evidence to indicate " that Harmes had been entertained in any other home in the city of Regina as he had been in that of the Hinksons. "I would say," he added, "with regard to those two exceptions ... that I would not rate them as comparable in social prestige with the entertainment at the Hinkson home."

[5] Early in 1941 Harmes was in bad health. He was sometimes obstinate, and it was difficult to persuade him to see a doctor. When he was at last induced to take medical advice, it was found necessary to take him to the hospital, which he entered on 1st March, little more than a month before his death. He was then gravely ill. An obstruction of the bladder, too long neglected, had caused injury to the kidneys, which resulted in uraemic poisoning. On 15th March Dr. Kraminsky, who was attending him, called in Dr. Good, a specialist, and on 1st April the doctors performed a minor operation on their patient. The obstruction was successfully removed, but incurable damage was already done and the operation could not save him. By 3rd April the doctors knew that he could not be expected to live long. Before the events of that crucial day are narrated, it is desirable to mention one incident to which the appellants attached significance. On a day early in March Mrs. Hinkson accompanied her husband on a visit to the hospital. On that occasion, as Mr. and Mrs. Hinkson both admitted, Harmes had been asked to lend Mrs. Hinkson $2500. It was suggested that this was a callous attempt to get money from a sick man, that the couple had displayed such an eager acquisitiveness that they had arrived with a cheque which only needed the deceased's signature to complete it, and that Harmes had not only refused the

request but shown annoyance and resentment at it. Mr. and Mrs. Hinkson both gave evidence about this incident and the Judge believed them. There is no doubt that his belief was fully warranted, since Mrs. Hinkson, who was called to rebut the suggestions of the present appellants, was not cross-examined. Her evidence was that in March neither she nor her husband knew or suspected the gravity of Harmes's illness, that she needed a balance of $2500 in order to buy a house, that her children

persuaded her to ask George Harmes to lend her the money, and that, although her husband was very much opposed to her doing so, he decided to accompany her. The story that a cheque had been prepared was, she said, absolutely false. Harmes had promised to think the matter over, and had said that if he made the loan he would charge no interest. There was some evidence that Harmes had expressed himself strongly to others about this request for a loan, and the learned Judge thought it "possible" that he might have done bo, but "questionable" whether he had. On this, as on other points, the Judge was unfavourably impressed by the evidence of those who belittled the friendship which existed between Hinkson and Harmes. In the light of the Judge's findings on this matter, which they see no reason to question, their Lordships are not prepared to regard the incident of the suggested loan as of any importance. Mr. Hinkson'a evidence as to the critical day was long and detailed. Their Lordships cannot do better than repeat the careful statement of it which is contained in the dissenting judgment of Martin, C. J. S., in the Court of Appeal. The learned Chief Justice said:

[6] "During a period of about a month while the deceased was confined in the hospital, Hinkson visited him frequently, and about noon on 3rd April 1941, he called to see him and found that the deceased did not appear to be improving as fast as was expected after a recent operation. According to Hinkson's testimony, after leaving the hospital on this occasion, he called to see the physician, Dr. Kraminsky, who was attending the deceased, to inquire from the physician as to what was wrong with the deceased. The physician informed him that Harmes was suffering from uraemia poisoning, that he should have had medical attention years ago, that the poison had spread throughout his system, and that he might live for weeks or months or only for days. During the course of the conversation the

physician informed Hinkson that one Hendricks, the manager of the Bank of Montreal, had telephoned him on that day inquiring as to the condition of the deceased and as to whether or not he was in a condition to have his will made. Dr. Kraminsky advised Hinkson that he had told Hendricks that the deceased was in condition to have his will made and that be should have it attended to at once. Hinkson then remarked to Dr. Kraminsky that he was a personal friend of the deceased and asked the physician what he would think of his (Hinkson's) going there. To this the physician replied that it would be ' all right ' if be (Hinkson) desired to see that a will was made, and he advised Hinkson to have it attended to immediately. Hinkson thereupon proceeded to the Willson Stationery Company where he purchased a will form and went to the Grey Nuns' Hospital. He arrived at the hospital at 5.20 p. m., went immediately to the room of the deceased and asked him if Hendicks had been to see him and the deceased replied that he had. Hinkson then asked the deceased if Hendricks had said anything to him about making a will and the deceased replied that he had not. Hinkson then stated that this seemed strange as he had been informed by Dr. Kraminsky that Hendricks was to visit the hospital to see the patient about his will. Hinkson then informed the deceased that he had brought a will form with him 'if you would like to do anything about it,' that the doctor had told him that he was a sick man, and that it might be well for him to make a will. The deceased at first demurred but finally instructed Hinkson to prepare the will; according to Hinkson the deceased was quite normal mentally at the time; discussion then took place as to the appointment of an executor; Hinkson suggested that Hendricks be made executor but the deceased was not impressed; he then suggested a trust company and deceased said, 'I think that would be better,' and asked Hinkson to suggest a trust company; Hinkson suggested the Canada Permanent Trust Company, and the deceased agreed. Hinkson then asked the deceased what bequests he desired to make and the deceased named the Greek Relief Fund. On being told that there might be more than one Greek Relief Fund the deceased said that the last contribution he made was through the Royal Bank of Canada, and he then suggested a legacy of $1000 to the Greek Relief Fund payable through the Royal Bank of Canada. The deceased then began to enumerate other bequests and Hinkson took a receipt form from his pocket so as to be able to take a memorandum on it of them. This

form is produced in evidence and contains a written memorandum of all the bequests contained in the will except the one to Mrs. Kolueri, the niece in Greece, which was the last bequest agreed upon and which is noted on the memorandum by the word 'Kolueri' only. The next bequest named by the deceased was $1000 to the Old Folks' Home at Wolseley, Then followed a bequest of $5,000 to his sister Helen Sernou of Kolena in Greece and the deceased, at Hinkson's request, spelled for him the words 'Sernou' and 'Kolena.' At this point the deceased asked for the total of these bequests and referred to the amount of money he had in the bank and to the amount necessary to pay succession duty on his estate. He stated that he had in the bank from $20,000 to $25,000 and expressed the opinion that the succession duty would be $10,000. Hinkson testified that as they continued he totalled the bequests from time to time so as to keep within the limit of the money in the bank as the deceased wanted to make bequests not exceeding $13,000 or $14,000. Hinkson asked the deceased about other relatives and referred to his nephew Paul Harmes now of Toronto but formerly of Regina; at first the deceased would not agree to leave anything to the nephew but finally on Hinkson's advice instructed him to include a legacy of $2000 for Paul Harmes. The next bequest named by the deceased was to an orphanage in the city of Medicine Hat and, after some discussion in which Hinkson suggested that it might be better to give something to an orphanage in the province of Saskatchewan, the deceased instructed a legacy of $1000 to the Orange Orphanage at Indian Head and also a legacy of $1000 to the Children's Orphanage in the city of Medicine Hat. The deceased then mentioned $2000 to the best student in Greek at the University and after discussion he decided that the amount should be left to the University of Saskatchewan as a scholarship fund, the interest to be payable to the best student in Greek, and the scholarship to be known as 'The George Harmes Scholarship in Greek.' The deceased then stated that he wanted to leave $1,000 to Mrs. Kolueri, the niece residing in the village of Kolena, Greece, and Hinkson took a note of this legacy on the memorandum as before referred to. Hinkson then asked the deceased about other relatives, but he said 'No,' and referred to a sister in Greece but stated, 'She is married and has got a husband looking after her,' and 'I am not going to leave her anything or any of the rest of them,' He then asked, 'How much does that total up to?' and on being told said, 'That's enough.' Hinkson then said,

'What about the balance of the estate ?' and enumerated the Arlington Hotel, the Diana Cafe and a property on 5th Avenue, and said, 'What about them?' To this question the deceased replied, 'I am going to leave them in tact.' Hinkson suggested to the deceased that he leave the residue to the Dominion Government to help along the war effort; he also asked him about his nephew Paul Harmes, stating: There is the Arlington Hotel down there.....he used to operate the hotel for you.....he is in that line of business. Why not leave him the hotel then ?' To this the deceased replied, 'I have left him all I am going to leave him.....I wouldn't have left him that much if it had not been for you.....He doesn't know anything about the value of money or property.' Hinkson then suggested 'Pete' (Peter) Borgares who had visited the deceased at the hospital frequently but the deceased stated, 'I won't leave anything to Pete.' Hinkson then said, 'I have made these suggestions and it you don't want to act on them, have you made up your mind as to what you want to do with the balance of the estate'? The deceased appeared to consider the matter for a short time and then said, 'Well, you have been the best friend that I have got, you can have it.' To this Hinkson replied, 'It would not be right for me to accept it.' He also suggested to the deceased, 'You could still double or treble these bequests - you could give a big share of it to the Dominion Government-some more to charities, and if you wanted to leave me a little bit of it that would be in order, but to leave me the whole thing it would not be proper, it wouldn't be right.' Hinkson also suggested to him at this time that rather than complete the will that night they leave it till the following day but deceased said, 'No, we will tonight.'' According to Hinkson this conversation occurred about 6-30 o'clock in the evening, and he then completed writing the legacies, of which he had a record on the receipt form, into the will and when all was complete except the residuary quest he said to the deceased, 'George, have you made up your mind about the balance?' and deceased replied 'Yes, I have made up my mind.' hereupon Hinkson stated, 'If you feel that way out it I will put my name in here on the will form and if you want to change your mind about it overnight I will come back with another will form tomorrow,' and again, 'We will make out an entirely new will if you change your mind overnight.'. Hinkson then filled in his own name in the residuary clause and at this point, about seven o'clock, two nurses, Miss Sizer and Miss Montgomery, arrived to witness the will.

[7] It appears that about 5.30 in the evening when deceased had signified his desire to make a will, a nurse entered the room-or some one at least whom Hinkson took to be a nurse-and Hinkson said to her, 'Would you mind getting another nurse and be somewhere handy where I can call you? Mr. Harmes here is making a will and we will need a couple of witnesses.' At 6.30 p. m. two nurses enterted the room and asked if the will was ready; on being informed in the negative one of them instructed Hinkson to pull the light cord when he required them and then left the room returning about 7 o'clock when they again asked Hinkson if he was ready. Hinkson replied that he was 'just about ready.' At that time the will had been completed except the attestation clause which Hinkson then completed and then said to the deceased in the presence of the nurses, 'George, you had better wait till tomorrow before you sign this will,' but the deceased said, 'No, give me the will now, I will sign it now.' The will was then signed by the deceased in the presence of the two nurses who signed the same as witnesses in the presence of the testator and in the presence of each other. It was not read over to the deceased in the presence of the nurses but Hinkson testified that as he wrote each legacy into the will form the memorandum he had kept he read it over to the deceased and received his approval. After the will was signed and after the nurses left the room Hinkson gave the will to the deceased who placed it under his head but on Hiukson's suggestion it was placed under the pillow. Hinkson testified, that throughout the whole time which the provisions of the will were under discussion and at the time it was executed the deceased was mentally alert."

[8] One addition may usefully be made to this narrative. Mr. Hinkson had never acted professionally for his friend, George Harmes, but he said that in the course of conversation he had learned from him that there were "certain bequests" which it was his intention to make. He thus explained his anxiety to learn from the doctor whether Harmes could make a will, and to persuade him to make one. Mr. Hinkson visited the hospital again during the afternoon of the following day, the 4th April. He had meanwhile spoken on the telephone to an official of the Succession Duty Department and ascertained that the amount of succession duty under the will as drawn would be $ 28,611.00. According to his own evidence, which on this point was not challenged, he took a new will form with him to the hospital. He saw Harmes and found him less happy about his own condition. Hinkson told him the

result of his inquiry about succession duty, and he said, "Well, that is all right. We won't do anything about it now." Hinkson offered to send for "a preacher or a priest", but the offer was refused. After a few minutes, seeing that Harmes was "getting dozy" and did not want to talk, he said, "God bless you, good-bye" and so left him. Later in the evening he returned, but though he went into the sick room, he had no conversation with the testator. He obtained possession of the will, which had been placed in a drawer. He learned later that his friend was dead: in fact he died between 11 p.m. and midnight.

[9] It is now necessary to refer to the evidence relating to the mental condition of the testator on 3rd April. It is convenient to deal first with that of Mr. Hendricks, who, after his conversation with Dr. Kraminsky, had visited the sick man shortly after 2 p.m. He had spoken to him about making a will, and tried to get his signature to a power of attorney, but had given up the attempt. Dr. Kraminsky's advice had been, to use Mr. Hendrick's own words, "that I might find him so that I could discuss things with him temporarily and I might not-the thing to do was to go and see." At an early stage in his evidence Mr. Hendricks said that he tried to arouse Mr. Harmes, and added, "I think I succeeded in arousing him so that he knew who I was, although I am not even certain of that." Harmes "tried to discuss his affairs" with him, but " could not sustain the effort." "I thought," said Mr. Hendricks, "I was working a hardship upon Mr. Harmes and I let the matter drop and went home." He had put a power of attorney before the sick man and " that part of the business went just so far as for him to try to sign it, but he couldn't." Later, under cross-examination, the witness said that he believed that at that moment Harmes understood the contents of the document. One question and answer on which the respondent's counsel much relied, may be quoted :-

Q. Then at two o'clock of that day he had sufficient mental power and alertness to understand the nature of a power of attorney?

A. He did, I guess; I thought he did ... or I wouldn't have asked him to sign it.

[10 and 11] Dr. Kraminsky and the consultant, Dr. Good, both gave evidence. The former was in substantial agreement with Mr. Hinkson as to the conversation which he had had with him. He had said, when asked if Harmes could make a will:

" If you don't do it today you never will be able to do it probably." Dr. Kraminsky's evidence seems to their Lordships to have been given with great fairness. He was wise enough not to be too dogmatic, and completely candid about his recollection. He described the usual symptoms of sufferers from uraemia, how they will appear to be bright, then get drowsy and fall asleep in the middle of an answer. But he did not profess to remember whether Harmes was "brighter or less bright than the ordinary patient." He thought he was "just the average case." He did remember that on the morning of 3rd April he had his eyes closed practically all the time. He thought that, he might have been able to make a will, but it would have been necessary for him to be present in order to give a decided opinion. When he was asked whether the suggestion that he should make a will, and the fact that "some new thing was confronting him" would stimulate his mind, he gave the frank reply that medical science could not answer that question. Uraemic poisoning affected the activity of the brain, but no medical man could say how far the degree of that activity depended on the poison in the patient's blood, and how far on "the way he feels."

[12] Dr. Good took a rather more unfavourable view of the testator's condition. He had visited him regularly and "doubted his ability to concentrate satisfactorily for more than a very brief period." He agreed, in answer to the Judge, that he had not "challenged him to a sustained attention." He "did not believe that he had the mental capacity to realise the entire significance of his actions." His visits, however, had lasted no more than five minutes, and he could not recall any occasion on which Harmes had failed to answer satisfactorily any question that he put to him. On the 3rd April he had seen him once only, at eight in the evening. The evidence of the nurses who attested the will was that on the 3rd April he was intelligent and rational. One of them, Miss Sizer, said that he "was in rather a weak condition but he seemed all right. He knew everything, what he was doing and everything." The other, Miss Montgomery, said that he was "wide awake." A "Nurses' Record," which was put in at the trial and bears Miss Sizer's signature, has the words "Listless, does not respond readily and irritable" in reference to the afternoon of the 3rd April but it may be said that, generally speaking, the evidence of these two witnesses strengthened the case for the will. It is necessary to refer to only one other witness, Miss Evans, who was engaged as a "special nurse" for Mr.

Harmes, and first took up her duties between 8-30 and 9 p.m. on the 3rd April. She then saw him for the first time and said that he then "appeared to be in full possession of his faculties." On her arrival he had raised the question of payment of her fees. He found out from her what her charges were, and asked how she would like to be paid, by the day or by the week. He said that he did not want to be bothered, that his bill at the hospital was being paid for two weeks, that he was "a well-off man" and that she need not worry about being paid. He was "wide awake," she said, and "quite alert,"

[13] It was Miss Evans who received Mr. Hinkson when he came to the hospital in the afternoon, and again in the evening, of 4th April. In the afternoon, he asked her about her patient's condition, and she "gave him the doctor's opinion, that he might live for a week or so, or he might die immediately." Hinkson, she said, told her "not to allow any visitors in, as they would most likely just be people who weren't his friends." On his later visit he asked for the will, "saying that it would save him the trouble of coming down if Mr. Harmes should die during the night." She found it and gave it to him. Afterwards, thinking that she might have done wrong, she asked Harmes if he knew the gentleman who had just left the room. He replied that it was Mr. Hinkson, a lawyer. He then, to quote the witness, "said either 'he was' or 'he is drawing up my will, but he doesn't know half my affairs." She did not tell him that she had given the will to Hinkson, because "he was very drowsy that day, didn't want to be bothered with anything." But even on 4th April, when she learned during the earlier visit that Hinkson wished to speak to him about his will, she thought "that he should have his will attended to without delay."

[14] The evidence of the most important witnesses has now been set out in sufficient detail to show the nature and substance of the case which the learned Judge of the Surrogate Court was called upon to determine. He found that the testamentary capacity of the deceased, the due execution of the will, and the knowledge, and volition of the testator as to its contents, had all been established. He held that there was no evidence to support the allegation of undue influence. The Supreme Court having restored and affirmed the learned Judge's decision, the immediate question for their Lordships' consideration has been whether the appellants had succeeded in showing the judgment of the Supreme Court to be

erroneous. In the opinion of the majority of the Supreme Court, the learned Judge had made no error in law, and had come to a decision on the facts, in face of contradictory evidence which there was no sufficient reason to disturb. In a short judgment in which Kerwin and Taschereau JJ., concurred, Rinfret J., expressed his complete agreement with the judgment of the Chief Justice of Saskatchewan, and Gillanders J., gave judgment to the like effect.

[15] Counsel for the appellants sought to show that, at least in respect of those issues in which the burden of proof lay on those propounding the will (all the issues, that is to say, except that raised by the allegation of undue influence), the judgment of the Surrogate Court was vitiated by an error in law. This contention had the strong support of the three Judges who, in the Courts of Canada, were for pronouncing against the validity of the will. The argument was that the learned Judge had failed to give effect to two rules of law which, had he observed them, must have led him to a contrary conclusion. These rules were said by Parke, B., not to admit of any dispute when he reaffirmed them in (1838) 2 Moo. PC 480 (1)They were then formulated as follows :

[16] "The first that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

[17] The second of these rules was, as Parke, B., remarked "laid down by Sir John Nicholl, in substance, in (1815) 2 Phill. 323, (2)and is stated by that very learned and experienced Judge to have been handed down to him by his predecessors." Sir John Nicholl's statement of the rule differs only in expression from that of Parke, B. He spoke of "the presumption" as well as the onus probandi being against the instrument, and, in a passage much relied on by the appellants'

counsel, said :-

[18] "The onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the instrument."

[19] The course taken by the argument makes it desirable that their Lordships should make some comments upon these well-established rules. With regard to the first, it is always well to remember, when the familiar metaphor of "the burden of proof" is employed, precisely what it means. "The strict meaning of the term onus probandi," said Parke, B., in the case already cited, "is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him." A valuable supplement to this observation is to be found in the words used by Lord Dunedin when he delivered the judgment of their Lordships' Board in (1927) AC 515 (3)at p. 520:-

[20] "Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."

[21] The concluding words of the rule as it was stated by Parke, B., emphasize the necessity of the complete removal of doubt from the judicial mind. "The conscience of the Court" must be satisfied. Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact.

[22] The second rule has commended itself to many generations of Judges and has thus rightly acquired the status of a rule of law, but it is no more than an application to particular circumstances of a principle which may be supposed to guide all persons of prudence and good sense in their ordinary affairs. The principle is that when the only man who can prove a face has a strong motive for asserting it, his evidence must be received with greater caution than that of a

disinterested witness, and that every circumstance of legitimate suspicion which is found to exist must make any reasonable man less ready to accept his uncorroborated testimony. The rule applies this general principle to the particular case of a will. It warns the judge that, in circumstances such as exist in the present case, the evidence of the witness who drew the will must be received with caution, but this does not mean that it mast be rejected altogether. The burden of proof may be discharged. The adverse presumption may be rebutted. Sir John Nicholl's words are not to be understood as meaning that at some point, which the law can define, the judge will be in a position to say that the presumption has become conclusive against the will, so that, if he were trying the case with a jury, it would be right to direct them that they must pronounce against it. If this were the meaning of the rule, it would involve the untenable proposition that it is a question of law whether or not a presumption of fact has been rebutted. That question must always be one of fact, and the true meaning of Sir John Nicholl's words is that unless the tribunal is finally satisfied that its initial suspicions were unfounded the burden of proof remains undischarged and the presumption must prevail.

[23] It was said, however, that the learned judge had erred in law because he had not given enough weight to the various circumstances of suspicion which admittedly were present. It had to be conceded that from the outset he had professed to regard the will as "a document charged with suspicion", but, in effect, it was contended that if he had really been suspicious, he had not been suspicious enough. Complaint was made that he too readily believed Mr. Hinkson, found excuses for his conduct and sometimes benevolently intervened during his cross-examination. Their Lordships have given full consideration to these criticisms but, with all respect to those learned judges who have expressed them, they are satisfied that there is no sufficient ground for them, and no ground at all for saying that the learned Judge either overlooked or disregarded the relevant rules of law. Those rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth. Their Lordships agree with the majority of the Supreme Court that no error in law has been established.

[24] The question remains whether the learned judge's decision on the facts was erroneous, and so manifestly erroneous that an appellate Court ought to set it aside, Their Lordships will not repeat what has been said in so many authoritative decisions notably in 1935 AC 243,(4) as to the respect which an appellate Court ought to pay to the opinion which a Judge, who has watched and listened to the witnesses, has formed as to their credibility. There are, no doubt cases in which a Judge can be shown to have misapprehended part of the evidence, or to have drawn inferences from the facts found which cannot reasonably be justified, or in some other way to have left his decision fairly open to attack. In the present case the learned Judge took a most favourable view of Mr. Hinkson's evidence, and believed it, and their Lordships are of opinion that the Court of Appeal had no sufficient reason for disagreeing with him. The appellants' strongest argument was founded on the medical evidence which, considered by itself, would certainly make it at least doubtful whether the deceased had testamentary capacity and a disposing mind. But it was for the Judge to consider the evidence as a whole. All the witnesses whom their Lordships have mentioned (with the exception of Miss Evans, who was examined on commission), gave evidence before him, and the judgment makes it plain that he gave full consideration to the evidence of the doctors. The Judge thought that they were speaking, to some extent, from their general knowledge of the disease rather than from a clear recollection of the condition of one of many patients, and he preferred to rely on the evidence of the nurses. This is a matter on which the Judge who has tried the case is best qualified to express an opinion. Their Lordships would add that the doctors' evidence, if the fullest possible weight be given to it, though it casts doubt upon the evidence of Hinkson, cannot be said to render it incredible, and, further, that the evidence of Miss Evans shows that the mind of the deceased was sufficiently alert for the discussion of a matter of business.

[25] The learned Judge formed the opinion that Mr. Hinkson was " guileless - somewhat' of a simple innocent type of mind." "I don't think he is an astute planner of an outrageous haul or anything of that kind," he said. It was rightly said by counsel for the appellants that the truth might lie between these two extremes, and it was suggested that a fairer view of Hinkson was that he was so intent on the business which he had officiously undertaken, and was of so insensitive a nature,

that he had failed to appreciate the enormity of seeking to extort a testamentary disposition from a weak and only intermittently conscious man, and perhaps had persuaded himself that the deceased full capacity and a disposing mind.

Their Lordships are bound to say, however, that it is impossible for them, judging only from the printed page, to decide between the various opinions of the witness's character which its perusal may leave open for acceptance by different minds. While, therefore, they would not endorse every one of the opinions expressed by the learned Judge, and in particular are disposed to think that he somewhat exaggerated the difficulties of Mr. Hinkson's position, they have come to the conclusion, in agreement with the Supreme Court, that his decision on the facts must stand.

[26] The allegation of undue influence must be separately considered. The burden of proving it is on those who attack the will, either as a whole or in part. As has been said, the learned Judge held that there was no evidence to support the allegation. Their Lordships heard from Mr. Balfour, of counsel for the appellants, an ingenious argument founded on a passage in Sir James Hannen's summing up to the jury in (1886) 55 LJ P 7,5when the learned President said:

[27] "From advanced age or from some other cause a person may be so weakened that, upon a thing being pressed upon him, he becomes so fatigued in brain as to consent to do it, though it is an act with which his brain does not go."

[28] It was submitted that these words might well be applied to the present case, and that the evidence of Mr. Hinkson himself justified the inference that the enfeebled will of the sick man had been overborne by his friend's relentless importunity, until at last, anxious only for peace and quiet, he was coerced into the expression of wishes "with which his brain did not go." Their Lordships need only say, with regard to this contention, that their acceptance of the Judge's findings of fact compels them to reject it. If Mr. Hinkson's evidence was true, he exercised no undue influence. It is legitimate to urge upon a man whose condition is precarious the desirability of making a will. Such pressure as was exercised in respect of particular dispositions fell far short of coercion, and was used, not for the benefit of Mr. Hinkson, but against his own interest and in support of the claims of others.

[29] The learned Judge of the Surrogate Court was satisfied that Mr. Hinkson was not influenced by any dishonourable or improper motive, and, having found on the evidence that he was the testator's best friend, rightly attached great importance to the fact that there was nothing unnatural in the dispositions of the will. Their Lordships, while in no way questioning this conclusion, are far from commending Mr. Hinkson's conduct as an example to be followed. The learned Judge spoke sympathetically of the difficult position in which he was placed, but their Lordships feel that the difficulties were of Mr. Hinkson's own making. Elementary prudence would have suggested that either the sick man should be advised to procure the services of a lawyer, acting professionally, or, at least, that some third person, a medical man if possible, should be present to hear the testator's approval of the contents of the will. The omission to take such reasonable precautions as these might well have resulted in a dispute even if the will had contained no disposition in Mr. Hinkson's favour, and a member of the legal profession might have been expected to foresee this possibility of costly litigation in which part of his friend's estate would inevitably be consumed. In the event, in accordance with the order of the Supreme Court, from which their Lordships in no way dissent, the costs of all parties in the Surrogate Court, in the Court of Appeal and in the Supreme Court are to be paid out of the estate. These costs are, no doubt, considerable, and Mr. Hinkson must by now be persuaded that his conduct, however well intentioned, was ill-advised. Their Lordships will humbly advise His Majesty that the appeal to His Majesty in Council should be dismissed. The appellants must pay the respondent's costs of this appeal.

Appeal dismissed.