[HIGH COURT OF AUSTRALIA.]

HEALEY . . . . . APPELLANT;

AND

HEALEY AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1912.

MELBOURNE, *June* 13, 14, 17.

Griffith C.J., Barton and Isaacs JJ.

*Will—Execution—Signature of testator—Forgery—Evidence.*

Where the alleged signature of a testator to an alleged will was challenged as being a forgery, and the Supreme Court had found that the signature was that of the testator,

*Held*, on the evidence, *Griffith* C.J., *dubitante*, that that finding should not be disturbed.

Decision of the Supreme Court of Tasmania affirmed.

APPEAL from the Supreme Court of Tasmania.

Proceedings were instituted in the Supreme Court of Tasmania in its ecclesiastical jurisdiction by Jane Healey citing the five infant children of herself and her husband Daniel Healey, deceased, to show cause why probate of an alleged will of Daniel Healey of which probate had been granted to her as executrix according to the tenor on 2nd March 1903 should not be revoked. Thereafter the proceedings became an action by the five infant children as plaintiffs against Jane Healey as defendant, the plaintiffs alleging that the alleged will was the last will and testament of Daniel Healey, and the defendant alleging that the signature of Daniel Healey to such alleged will was a forgery. The action was heard before the Full Court which found that the will of which probate had been granted on 2nd March 1903 to Jane Healey was the last will and testament of Daniel Healey.

H. C. OF A. 1912.

HEALEY v. HEALEY.

From this decision the defendant now by special leave appealed to the High Court.

The facts sufficiently appear in the judgments hereunder.

*Magennis*, for the appellant.

*Stops*, for the respondents.

[Counsel referred to *Gair* v. *Bowers* (1); *Woodward* v. *Goulstone* (2); *Atkinson* v. *Morris* (3); *Dearman* v. *Dearman* (4).]

*Cur. adv. vult.*

June 17.

GRIFFITH C.J. The question for determination in this case is entirely a question of fact depending upon the credibility of witnesses and not upon a conflict of evidence. The sole question is whether the testimony of witnesses which was accepted by the Supreme Court should be accepted. In form the proceedings were a trial before the Full Court on oral evidence of a claim for revocation of probate of a will. The witnesses called in support of the will were the attesting witnesses, and the Supreme Court, having heard them, accepted their testimony. This Court is, however, not bound by their finding, as was said by Lord *Halsbury* L.C. in *Riekmann* v. *Thierry* (5), quoted by my brother *Isaacs* in *Dearman* v. *Dearman* (6):—"Upon appeal from a Judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the Court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the Judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision. The judgment to be pronounced by the Court of Appeal is the judgment that ought to have been pronounced by the Judge of first instance." But, where the Court of first instance has had the opportunity of seeing and hearing the wit-

(1) 9 C.L.R., 510.
(2) 11 App. Cas., 469.
(3) (1897) P., 40, at p. 48.
(4) 7 C.L.R., 549.
(5) 14 R.P.C., 105, at p. 116.
(6) 7 C.L.R., 549, at p. 560.

nesses, and has come to the conclusion that they are telling the truth, the Court of Appeal has great hesitation in differing from their conclusion. Nevertheless it is the duty of this Court to investigate the matter for itself, bearing that difficulty in mind.

The testator, Daniel Healey, was a farmer living near Launceston. He died in November 1902, leaving the appellant, his widow, and six infant children. At the time of his death the appellant was away from home in a hospital. He was suddenly taken ill, and is said to have executed a will, which after his death is said to have been given or sent to one Michael Curtain, who had married the appellant's aunt. When the appellant, who was appointed executrix, asked Curtain for the will, he at first refused to give it up, but subsequently he gave up to her the document which was admitted to probate. Substantially its contents were as follow:—"I hereby give and bequeath to my wife and children all my estate and effects both real and personal." He appointed his widow as executrix and if she should die without a will he appointed Curtain and another executors.

The will was proved by the appellant in common form as executrix according to the tenor in May 1903. She then thought the signature was that of her husband. The will is in the handwriting of a Mrs. O'Toole, one of the attesting witnesses, the other being a Mrs. Corkery. The appellant says that about the end of 1903 Mrs. O'Toole told her that the document was not the genuine will, showed her what she alleged to be a true copy of the real will, by which all the testator's property was left to the appellant, and told her that in the document which was admitted to probate the signature of the testator was written by a young girl, a grand-daughter of Curtain, and that this was done because the parties who concocted the document thought that the appellant being a young woman would soon be married again, and that the power the testator had given her by the will should be taken away from her. In the following year the appellant, under a power contained in the Tasmanian law, had Curtain examined before the Chief Justice. We have not had the whole of his deposition before us, but one or two extracts from it were read in cross-examination of a witness. It does not appear that

H. C. OF A. 1912.

HEALEY v. HEALEY.

Griffith C.J.

he said anything upon which an application to revoke the probate could be founded.

It appears that in January and February 1904, in July and August 1904, in February 1905, and from March 1905 to June 1906 Mrs. O'Toole was detained as an insane patient in the Launceston Hospital, and that during the whole of those periods she persistently said that she was to be imprisoned or punished for something she had done in drawing up a will in connection with which there was to be a lawsuit, and that she had forged a will. When she came out of the hospital a Mr. Piper, a justice of the peace, had an interview with her on the subject, and she told him in answer to questions that she wrote Healey's will at his request, that it was signed in the presence of Mrs. O'Toole's husband and another man who on the day following took Healey to the hospital. That other man was Corkery. The attesting witnesses of the real will, according to Mrs. O'Toole's statement at that time, were O'Toole and Corkery, not Mrs. O'Toole and Mrs. Corkery whose names appear on the document admitted to probate. Mrs. O'Toole, when asked by Mr. Piper what was in the will, said that Healey wanted to leave all he had to his wife. She also said that she gave the will to Corkery and had never seen it since, and did not know whether it was altered. Of course, if that is true, the document admitted to probate is not the testator's will.

Subsequently proceedings were taken against Curtain and Mrs. O'Toole for some criminal offence in connection with the will, I presume for conspiracy. Those proceedings failed. Then Curtain brought an action against the appellant for malicious prosecution, in which the appellant obtained a verdict. Curtain died in October 1909, and at the end of the following month the appellant brought the probate into Court and filed an affidavit to lead a citation to bring in the will and call upon the infant children to propound it for probate in solemn form.

The case, in accordance with the Tasmanian law, came on for trial before the Full Court. The burden of proving that the signature to the document which had been admitted to probate was not that of the alleged testator, was, rightly or wrongly, cast upon the appellant. The document was produced before the

Supreme Court and before us. It is written on two pieces of paper, evidently leaves taken from a child's exercise book and pasted together. One leaf contained the substantive part of the will, and the other leaf pasted below it, the attesting clause and the signatures. Expert witnesses were called who said that the signature appearing on the document as that of the testator was not and could not be his signature. We have had an opportunity of comparing the signature said to be that of the testator with a signature admittedly his, and it is impossible to differ from the expert witnesses in so far as they say that the signatures are entirely unlike one another. The signature which is admitted to be that of the testator is written in what the Chief Justice of the Supreme Court called a free, flowing hand. It is evidently the writing of a man accustomed to sign his name. The signature of the alleged will, on the other hand, struck me when I first saw it as like that of a child—a boy or girl who had only lately begun to write.

Evidence for the respondents was then given. Mrs. O'Toole detailed the circumstances under which she said the document was signed. She said that the testator had been suddenly taken ill with what turned out to be appendicitis, that he was lying on a sofa in the kitchen in great pain—she described it as " mortal agony " (he died about 36 hours afterwards), that she asked him whether he would like to make a will, that she read to him out of a book in the house a form of will which, after some discussion, he said would do with slight alteration, that she then wrote out the will, and that she held it against the wall of the kitchen near his right elbow for him to sign it. She also said that there were a number of other books in the house.

On cross-examination she said, amongst other things, that Curtain, the man to whom the will was sent, had asked her to tamper with it but that she refused to do so. The other attesting witness, Mrs. Corkery, also described the circumstances, substantially agreeing with Mrs. O'Toole. She said, however, that there were no books in the house, and that when it came to the signing of the will there was no book upon which to rest the paper, and that the paper had to be placed against the wall of the kitchen without anything between the paper and and the wall. She

H. C. OF A. 1912.

HEALEY v. HEALEY.

Griffith C.J.

added that the testator said that he preferred to sign the will against the wall. In cross-examination she said that when called as a witness on the prosecution of Curtain and Mrs. O'Toole, she was unable to identify the document as the will, and that afterwards, apparently, in the action for malicious prosecution, she refused to swear to her own signature on the document.

The extraordinary difference between the genuine signature of the testator and that on the alleged will is sought to be accounted for by the circumstances under which the latter was written. It is said that he was in great pain—"mortal agony"—and that the signature was written against the wall of the kitchen. Evidence was given that the wall consisted of rough split palings, and an officer of police, who by consent of the parties was asked to report on the nature of the walls, reported that the inner walls of the kitchen were of very rough palings. On examining the signature to the document the pen appears to have run perfectly smoothly with no break in the formation of the letters either in the down-strokes or the up-strokes, such as one would expect in the case of a signature written on a corrugated surface like that of a very rough paling. We thought that more light might be thrown on the matter by a photographic enlargement, and we had one made. The photograph, however, indicates no break either in the down-strokes or the up-strokes. Each letter appears to have been begun separately and formed laboriously without any break, just like a schoolboy's or schoolgirl's writing. There is one other circumstance to which I should refer, that the writer, whoever he or she was, having come to the end of the letter "l" in the name "Daniel," suddenly drew the pen back to dot the "i" without lifting the pen from the paper. That is not like what one would expect from a child, and it might have been done by a person in pain, who was to a certain extent unable to control his hand.

Another singular feature of the case is that there is no apparent motive for the forgery—if there be one—unless indeed it was a pious fraud. It may be that Mrs. O'Toole, having been asked to make a will for the testator, leaving his property to his wife and children, found that she had made a will leaving it to the wife absolutely, and felt called upon to redress the wrong she had

done, and that a will was accordingly drawn up and produced which really expressed the wishes of the testator. I do not regard that as an improbable suggestion. Ideas of right and wrong vary greatly, and I can quite understand a person thinking that he was not doing wrong in redressing such an inadvertent mistake by preparing a fictitious document which would give effect to the testator's real intentions. There was also some evidence of a conversation between Curtain and Mrs. O'Toole as to whether it was not too late to alter the will.

The learned Judges of the Supreme Court accepted the story of Mrs. O'Toole and Mrs. Corkery, notwithstanding these strange discrepancies, the inconsistencies between what they said at the trial and what they had said before, the strange difference between the signature of the testator's name to the will and his genuine signature, and the absence of what might have been expected some sign of a break in the strokes, if the document was really signed against the wall. It appears clearly from the enlarged, photograph that the will was not signed while the paper was pressed against a hard smooth surface, for the photograph at the back of the paper shows the letters in the words Daniel Healey standing out almost in *basso relievo* on the paper. There is one other singular circumstance, namely, that Curtain insisted when examined before the Chief Justice that the will was written on one sheet of paper, and not on two sheets, and that the paper had never been divided. The document, as I have said, is on two pieces of paper pasted together.

Under those circumstances I have had very great hesitation in deciding what to do. The improbabilities in the story told by the two attesting witnesses are very great. Moreover, there is some reason to doubt whether the testator knew and approved of the contents of the will in the form in which it now stands. That I infer from Mrs. O'Toole's evidence as to the instructions which he gave. But the only plea put in by the appellant was that the will was a forgery, and no amendment was asked for. In fact, the whole case appears to have been conducted very economically, and, I am afraid, somewhat perfunctorily. Some people might think that the greatest economy was in the truth.

Under ordinary circumstances I should be disposed to think

H. C. OF A. 1912.

HEALEY v. HEALEY.

Griffith C.J.

a new trial should be ordered. But the grant of a new trial is discretionary, and to grant one in this case would be to destroy the estate. Under all the circumstances, and with much hesitation, I do not see my way to say that the judgment of the Supreme Court was demonstrably wrong. If the story told by the attesting witnesses was shown by physical evidence to be absolutely impossible, I should not hesitate to come to the conclusion that the alleged will is not the will of the testator. But I cannot say that the alleged facts are physically impossible. I therefore feel unable to dissent from the conclusion to which, I understand, my learned brothers have come.

BARTON J. The decision of this appeal depends entirely on a question of fact. The document put forward purports to be the will of Daniel Healey. It bears date the 29th November 1902. Healey died on the 1st December. The widow, now the appellant, was named as executrix, and two other persons, Denis O'Keefe and Michael Curtain, were named as executors to act "in the event of her death without will." Early in 1903 the appellant applied for probate in common form, and it was granted to her as executrix according to the tenor of the document, which was annexed to the usual executor's oath which she made in support of her application, and in which she swore that she believed it to be the true last will and testament of her deceased husband. That was on the 8th April 1903, and in her evidence at the trial she said she looked at the signature before applying for probate, and believed it to be that of Healey. After probate she managed the farm, dealt with the stock, and, as she testifies, acted in every way as Daniel Healey's executrix. She says that suspicions of the genuiness of the document as a will were aroused in her mind by something which she heard, about Christmas 1903, from a Mrs. O'Toole, one of the two persons who signed the paper as attesting witnesses. Six years and a half after probate she cited the infant children of the testator, who are his only next of kin, and Denis O'Keefe, to show cause why probate should not be revoked, on the ground that the document of which it had been granted was a forgery. I may say here that, after this long interval, the institution of proceedings followed the death of

Michael Curtain at an interval of five weeks. In her affidavit to lead the citation, sworn on 26th November 1909, she swore: "I claim to be interested under a will of the said Daniel Healey deceased dated on or about the 29th day of November 1902 (which I verily believe has since the death of the said Daniel Healey been fraudulently concealed or destroyed) by which will the said Daniel Healey left all his property to me absolutely and appointed me sole executrix thereof." Still, she waited for six years after the alleged statement of Mrs. O'Toole, on which this allegation was founded, and to which further reference will be made presently. The document attacked purports to give the whole of Healey's property to the appellant "for her and her children's benefit absolutely and for ever." Her position may be summarized thus: Under the document impeached, if genuine, she would take one-seventh of the whole. Under an intestacy, one-third. Under the document alleged in her affidavit, if shown to be Healey's last will, the whole, to the exclusion of her children. That position she apparently aimed at establishing when she cited the respondents. A guardian to the infants having been appointed *ad litem*, the appellant's motion to revoke probate resolved itself into an application for proof in solemn form of the document now before us, and the infants by their guardian propounded it as the last will of Daniel Healey. The appellant pleaded that it was not executed according to the provisions of the *Wills Act*, and that the signature purporting to be that of Daniel Healey was a forgery. The sole question was and is whether the name appearing at the foot of the will is the signature of Daniel Healey. At the hearing O'Keefe submitted to the judgment of the Court. The issue was tried by the three learned Justices of the Supreme Court of Tasmania, sitting without a jury. They found that the onus thrown upon those who supported the will had been fully discharged, and the will had been proved in solemn form. They decreed the document to be the true last will and testament of Daniel Healey, and granted probate accordingly.

Their Honours came to their conclusion after close investigation. The whole of the circumstances of the alleged execution were recounted in detail. Persons of experience in handwriting

H. C. OF A. 1912.

HEALEY v. HEALEY.

Barton J.

compared the name at the foot of the propounded document with an admitted signature of Healey, and other admitted signatures of his appeared to have been submitted to their Honours by consent after judgment had been reserved. The undeniable fact that the alleged signature differed very greatly from the admitted signature was clearly pointed out, and on the other hand there was the evidence of the attesting witnesses that it was written by Healey, who was then very ill, "with great groaning," "in dreadful pain," "in great agony," at his farm at Prosser's Forest; that Mrs. O'Toole, after reading a form of will out of a book and then discussing with Healey his intended dispositions, sat at a table and there copied the form of will, making the necessary alterations; that the two pieces of paper which together contained the whole writing (we all thought they looked like two pages from a child's exercise book) were pasted together; that the document was then read over twice to Healey, who said it was correct; that he preferred to sign the paper against the wall near which he lay on a sofa; that for this purpose John Corkery, the husband of one of the witnesses, had to raise him on the sofa, supporting his back; that he signed it while so supported, Mrs. O'Toole holding it against the wall for him to sign; that he wrote his name with great difficulty owing to his illness and pain, and the fact that the wall was made of rough split palings. All this testimony was given in full detail. After fully considering the matter the Court came to the conclusion that the attesting witnesses must be believed. The appellant and Mrs. O'Toole were in direct conflict as to certain information which the former alleged that the latter had given her, which if believed amounted to a confession on the part of Mrs. O'Toole that she and Michael Curtain had conspired, without any probable motive that we heard suggested, to forge the propounded document, in substitution for the true will leaving the appellant sole devisee and legatee and executrix. This was the alleged information of Christmas-time 1903, on which Mrs. Healey had based the passage I have quoted from her affidavit to lead the citation. It seems to me unlikely that if Mrs. O'Toole had lent her active aid to so nefarious a plot by actually writing out the words for a forged signature to be appended to them, she would put her head into the lion's mouth by telling the defrauded

widow all about it. On the other hand she went into hospital as a lunatic a month after the alleged conversation. She raved there, and she may have raved a month before she went there. The appellant says that Mrs. O'Toole showed her a copy of the "original will." Of course, if that is true, there can be no question of raving. But Mrs. O'Toole not only denies this conversation and its incidents, but denies that there was any foul play in Curtain's drawing room or anywhere. She says there were some nine people in the drawing room after the funeral, that she did not see the will there, nor was it spoken of, and that the girl Gertrude Curtain, who was alleged to have actually forged Healey's name in that room, never entered it. Mrs. Corkery's testimony as to the alleged forging was to the like effect. She says that there were ten people in all in Curtain's sitting room after the funeral, that none of them went with her into any other room (which would have been necessary unless the forgery were to be committed in the presence of the whole gathering), that no papers of any kind were produced by any one in the room, nor was there any talk about a will; and that she was there all the time. As the appellant did not proceed until some weeks after Curtain's death, his testimony was lost.

Upon this matter their Honors believed Mrs. O'Toole and Mrs. Corkery, and I think they were probably right.

Here then are all the parties asserting that Healey made a will, and that he made only one genuine will. If the story of the forgery is not definite enough to be accepted, can this document be rejected on the question of handwriting?

Now the learned Judges who tried the case had a great advantage over us. They saw and heard and scrutinized the witnesses. They were assisted by lengthy and rigorous cross-examinations. As was said by my learned Brother *Isaacs* in *Dearman* v. *Dearman* (1) "the mere words used by the witnesses when they appear in cold type may have a very different meaning and effect from that which they have in the witness-box." Lord *Blackburn* said in *Smith* v. *Chadwick* (2), "The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the Judge who tried the cause, and saw the witnesses

(1) 7 C.L.R., 549, at p. 561.

(2) 9 A.C., 187, at p. 194.

H. C. OF A. 1912.

HEALEY v. HEALEY.

Barton J.

and their demeanour." This is a Court of review. We heard the testimony read, albeit we never saw or heard those who testified; and we are bound to come to our own conclusion. As the same great Judge points out, "the Court of Appeal, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find a verdict the other way." My position is that I for one am far from being convinced that the inference in favour of the respondents, who were the plaintiffs below, should not have been drawn from the evidence. It was unsatisfactory in some respects. On the other hand, the evidence of experts in handwriting is necessarily of a fallacious tendency. I admit that I cannot pronounce for the one side or the other without entertaining doubt. Apart from the careful judgment of the Supreme Court and the conflict I have mentioned, this Court has but little line to guide it as to the credibility of the witnesses; but I should entertain the greater doubt if I pronounced against the judgment appealed from. After carefully considering the signatures, admitted and disputed, I cannot say that upon the differences between them, the one made under normal conditions, and the other explained, if the explanation be accepted, by the very abnormality of the conditions, I feel justified under all the circumstances in rejecting the testimony of the attesting witnesses, accepted as true by a tribunal which saw and heard them. It is impossible not to feel that one's decision must rest on one of two bases. Either one must accept the version of the attesting witnesses, which as it stands on paper is not I think an improbable one as a whole, or he must reject it as perjured upon a comparison of two signatures, deciding that the inference against the will, based on that alone, outweighs the testimony which but for the comparison he would have no reason to disbelieve. I say, based on that alone, because where we find a conflict of oral evidence the story told against the attesting witnesses is not a probable one, and Mrs. O'Toole and Mrs. Corkery do not appear to have been shaken in their denials.

I do not think myself justified in adopting the conclusion based on the difference in signature.

On the whole therefore I am of opinion that the judgment of the Supreme Court should be affirmed.

Isaacs J. The net value of the property after deducting costs prior to this appeal is about £430. If the will stands, the mother (appellant) and her six children are entitled to about £60 each; but the costs of this appeal have still to be provided for. If the appellant succeeds, she gets one-third of the property, and the children two-thirds. However, the appellant made up her mind, as she stated in her evidence, to "fight to a finish." That is pretty nearly realised. The whole question is one of fact, namely, whether or not the words "Daniel Healey" purporting to be the testator's signature were in truth written by him. Of course, no amount of sworn testimony can establish a natural impossibility. *Sir William Scott* once observed, *The Odin* (1), that:—"It is a wild conceit that any Court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment." And the learned Judge added:—"If the papers" (for which I will substitute "witnesses") "say one thing and the facts of the case another, the Court would exercise a sober judgment, and determine according to the common rules of evidence to which the preponderance is due." And so if in this case there were some clearly proved fact, which entirely convinced the conscience of the Court that, despite the affirmations of the witnesses, the signature deposed to could not be that of the testator, then that conviction must, regardless of consequences, be given effect to. Or, if there were some indisputably established fact, which left the matter necessarily doubtful so that the Court could not come to any definite conclusion in favour of the will, the proponent would fail. One rule is stated by *Parke* B. in *Barry* v. *Butlin* (2) 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 propounded is the last will of a free and capable testator." But there is no fact having the effect stated. The strongest circumstance against the genuineness of the signature is that the wall against which Healey wrote was constructed of palings. But they had been up for eleven or twelve years, had sustained probably a good deal of friction by daily contact, and it is by no means an impossibility, or even an improbability that, just alongside the bed, the surface had become sufficiently level

(1) 1 C. Rob., at p. 252. (2) 2 Moore P.C., 480.

H. C. OF A. 1912.

HEALEY v. HEALEY.

Isaacs J.

to permit of a signature being written without bearing marks of corrugations. Australian hardwood does assume a smooth and often a slippery surface after continued use. The report of the superintendent of police states the lining of the kitchen walls consisted of very rough palings, but that is a general statement, and no special reference is made to the spot where for so many years constant attrition must have taken place. In those circumstances I am not able to conclude that the wall at that spot was such as to necessarily preclude a signature such as we see on the paper propounded. There are degrees of roughness, and it does not at all follow as an inevitable result that the signature would if written as described present an appearance different from that on the instrument propounded. We might conjecture it would, or even in the absence of trustworthy witnesses doubt the genuineness of the signature. And the Court then must in accordance with the second rule in *Barry* v. *Butlin* (1) "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." I cannot set up any conjecture I might form as sufficient to cancel all the oral testimony if the witnesses are to be considered trustworthy. It then becomes a mere question of credibility of the attesting witnesses. And without at all abdicating the duty of an appellate Court to arrive at its own conclusions we must bear in mind that in a case like the present there is what I have called in *Dearman* v. *Dearman* (2), and for lack of any better expression again term "unrecorded material," which was available to the primary tribunal but which is not available to us. I mean the demeanour and behaviour of the witnesses in Court. Lord *Halsbury* alludes to this in *Riekmann* v. *Thierry* (3) as a circumstance of great weight. Now here there are facts deposed to by the witnesses which if believed completely establish the authenticity of the document. It is common ground that some will was executed. No other is forthcoming. Mrs. Healey swears Mrs. O'Toole showed her what purported to be a copy of another.

(1) 2 Moo. P.C., 480.
(2) 7 C.L.R., at p. 561.
(3) 14 R.P.C., at p. 116.

This is wholly inconsistent with Mrs. O'Toole's evidence, and if Mrs. O'Toole is interested from one point of view, so is the appellant from another. The appellant in an affidavit of September 23 1904, swore that Mrs. O'Toole wrote out a copy from memory showing the property was left to her alone, and that this copy was written in the presence of Mr. Hopkirk, solicitor. Mr. Hopkirk was called but said nothing about this, and the alleged copy was not produced. The evidence of Mrs. O'Toole is that the testator referred to his helpless family, that she read the will over to him twice carefully, that he signed it, and that the document produced is the same.

Mrs. Corkery the other attesting witness identifies the document and her signature and deposes that Healey said he wished to leave the property to his wife and children. A curious incident appears in the evidence of Mrs. O'Toole which was relied on for the appellant. In cross-examination the witness testified that Curtain said on the day of the funeral that the words in the will, "without will," would give Mrs. Healey too much power. That was suggested as the reason why a substituted will was prepared. And in one event, that is, if the document propounded were found not to contain the words "without will," the incident would so far tend to strengthen whatever conjecture might otherwise exist that this was not the real will of the deceased. But in the will proved those very words "without will" appear; and so the incident tells just the other way.

It should be added that I consider it an important circumstance that the proceedings were not taken until just after Curtain's death; his evidence would have been most material and by waiting until he died, even if only for 10 months the appellant has shut out a means of information the importance of which cannot be definitely measured.

On the whole I think the appeal should be dismissed.

*Appeal dismissed. Respondents' costs as between solicitor and client to be paid out of the estate.*

Solicitors, for the appellant, *Hollow & Adams*

Solicitors, for the respondents, *Nicholls & Stops.*

B. L.