[HIGH COURT OF AUSTRALIA.]

WILLIAM HENRY BAILEY AND OTHERS . APPELLANTS;

AND

CHARLES LINDSAY BAILEY AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 9, 12, 13; *June* 10.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Will—Execution—Testamentary capacity—Onus of proof—Prima facie case—Evidence.

A testator, who was eighty-eight years of age and suffering from pneumonia, gave instructions to a solicitor to prepare a will for him. A will was prepared, and three days after the instructions were given he signed it with a mark, being then unable, through weakness, to write his name. Three days later he died. By the will the testator gave all his property to his children equally. The will being attacked on the ground of want of testamentary capacity,

Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Knox* C.J. and *Starke* J. dissenting), that, on the evidence, the propounders of the will had established a prima facie case of testamentary capacity which had not been displaced, and therefore that the will was valid.

Principles applicable to determining the question of testamentary capacity stated.

Decision of the Supreme Court of Victoria (*Weigall* A.J.) reversed.

APPEAL from the Supreme Court of Victoria.

James Bailey, who died on 17th May 1923, had made wills in the years 1898, 1899, 1902, 1906 and 1909. On 13th November 1914 he made another will, by which he appointed his sons Charles Lindsay Bailey, James Robert Bailey and Samuel Edward Bailey to be his executors and trustees, gave certain chattels and an annuity to his

wife (who died in 1919), gave a legacy of £200 to his fourth son, William Henry Bailey, and a legacy of £100 to each of his six daughters, and subject thereto gave all his property in equal shares to the three sons whom he had appointed his executors and trustees. On 8th May 1920 the testator executed a codicil to the last-mentioned will, giving a certain piece of land, a legacy of £100 and certain chattels to his daughter Mrs Bacon. On 14th May 1923 the testator executed a will by which, after revoking all former wills, he gave all his property upon trust for division equally between all his children, and appointed his sons Charles Lindsay Bailey and James Robert Bailey his executors and trustees.

The three executors appointed by the will of 13th November 1914 obtained an order nisi calling upon William Henry Bailey and two of the testator's daughters, Mrs Johansen and Mrs. Hobbs, to show cause why probate of the will of 13th November 1914 and the codicil thereto of 8th May 1920 should not be granted to such executors. The order nisi was heard by *Weigall* A.J., who made it absolute.

From that decision William Henry Bailey, Mrs. Johansen and Mrs. Hobbs now appealed to the High Court.

Other material facts and the nature of the arguments appear in the judgments hereunder.

Latham K.C. and *Sproule*, for the appellants.

Magennis (with him *Menzies*), for the respondents.

Cur. adv. vult.

June 10.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. The only question in this case is whether James Bailey, when he made his will dated 14th May 1923, was of sound mind, memory and understanding. *Weigall* A.J., of the Supreme Court of Victoria, who tried the case, held that he was not. The burden of proof is upon those who assert that the testator was of sound and disposing mind (*Boughton* v. *Knight* (1)), and an

(1) (1873) L.R. 3 P. & D. 64. at p. 76.

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independent review of the evidence, without the advantage of the atmosphere of the trial and of seeing or hearing the witnesses, has not satisfied us that the learned Judge was wrong in his conclusion.

The testator was an old and infirm man between eighty-eight and eighty-nine years of age at the time of making the will. Now, great age, while it necessarily excites the vigilance of the Court, does not in itself establish want of capacity (*Kinleside* v. *Harrison* (1)). We must therefore review to some extent the life history of the testator. He had been a farmer who for many years had lived on his farm, known as " Greenhill," near Kyneton. His property consisted substantially of this farm, valued for probate purposes in 1923 at about £7,000, and some neighbouring land known as the " Bush Paddock," similarly valued at about £260. His wife died in 1919, but ten children—four sons and six daughters—survived him. He had been assisted in working his farm by his sons, but apparently, about the year 1909, he gave up active participation in farm work, and let the farm to one or more of his sons. He continued, however, to live on the farm with his wife, a daughter (now Mrs. Bacon) and such of the sons as worked there. The daughter, Mrs. Bacon, after she had married left the farm, but returned, a widow, in the same year (1913). All the other daughters had married, but none lived near the testator. The testator had made no less than six testamentary dispositions before the will of May 1923, extending from March 1898 to May 1920. All were prepared by and executed in the presence of his solicitor Mr. Hurry, except that of May 1920, which was prepared by and executed in the presence of his old friend and spiritual adviser, the Rev. A. H. Constable. All made dispositions in favour of his wife or his family. These wills call for no further comment than that they made, in the main, pecuniary provisions for his wife and daughters and one of his sons, and gave the residue, ultimately, to his other three sons. They were not inofficious, they did not disregard natural affection or the claims of testator's family.

The only other acts of the testator which throw any light upon the case prior to April 1923, when he became seriously ill, are the letting of his farm to one or more of his sons, the demand of his son

(1) (1818) 2 Phillim. 449 at p. 462.

Charles Lindsay Bailey about 9th April 1923 for £81 for tobacco and whisky supplied to his father for a period of five years, the payment of that account, and some rambling conversations between the testator and some of his family and between the testator and various residents of the district where he lived. The farm was let for some time before the testator's death to his son Charles Lindsay Bailey at £236 per annum, and the rent seems to have been paid annually. This transaction does not suggest any want of capacity on the part of the testator. The claim for £81 was, we think, somewhat grasping, but the son swears that his father thoroughly understood it and made the payment pursuant to an earlier agreement. It may be so. Apparently a year's rent was due, and the son admitted this on the father inquiring whether any rent was owing, and then made a cross-claim for tobacco, &c. Both items were settled in the most formal manner, and the transaction indicates no want of capacity. But we suspect that the son would have had more difficulty in obtaining payment of his account in earlier years. The conversations we have referred to are, however, most important: while they do not, in our opinion, prove any mental derangement in the old man or any disease of the mind, they indicate a decay of the mental faculties due to advancing years. A list of the incidents evidencing this decay may be found in the transcript, and we do no more than refer to them as the foundation of the conclusion; they include forgetfulness of the death of members of the testator's family and of old friends and of the proper seasons for farming operations. We place no reliance on the opinion of Dr. Sewell, because we think it was based, through no fault of his, upon insufficient data. Nor do we wish to suggest that this decay of the faculties of the old man necessarily establishes want of capacity on his part to make the will of May 1923. But it is an important fact to be weighed in connection with the critical events of April and May 1923, to which we now proceed.

Dr. Loughran was the medical attendant of the family at "Greenhill" farm for some five years before the testator's death; and according to him the old man suffered from chronic rheumatism but was otherwise in good health and, up to his last illness, apparently a person of normal intelligence. On 22nd April he was summoned

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to see the testator, whom he found to be suffering from pneumonia, and, as his condition did not improve, he took him, on the 26th, to a private hospital in Kyneton. At this time the testator's condition was serious, there was some delirium, and he was "a little bit muddled." He improved up to 9th or 10th May, when the doctor noted "crepitation left base," which meant that the left lung had become affected, as well as the right. And from that date the testator became weaker until the 15th, when he took a distinct turn for the worse, and died on 17th May. Dr. Loughran stated that he had little conversation with the testator whilst he was in hospital, and that he refrained, indeed, from talking to him, because conversation on the testator's part induced coughing, and weakened him. But, he said, the testator always knew what he (the doctor) meant, and did what was suggested to him. Further, the doctor observed that there was no sign of any mental weakness apart from that associated with the extreme physical weakness. He hazarded an opinion or guess, however, that the testator would probably not have thought of making a will if left entirely to his own initiative. The matron of the hospital, Edith Southern, deposed that the testator was physically very weak, and, substantially, that, while he exhibited no disease of the mind, his mental condition also was very weak and his mind incapable of effort. Sister Hanley and Nurse Wishart, two attendants at the hospital, did not observe any lack of understanding on the part of the testator, except for a short period when he first entered the hospital; and they say he answered their simple questions intelligently, and spoke of the weather and his family. We must now turn to the making of the will in dispute in this case.

The evidence of two of the testator's daughters, Mrs. Hobbs and Mrs. Johansen, suggests that the testator himself initiated the will; but the learned trial Judge did not accept their evidence, and we feel clear that the will was brought about by some action on their part. We do not say that this action amounted to undue or improper influence, because the learned Judge has not so found; but that the daughters in some way represented their claims and made some suggestions for a will we do not doubt. Mrs. Johansen invited the Rev. A. H. Constable to see her father in the hospital, and when he

came, suggested that her father had not settled his affairs, and that that was the reason he was desirous of seeing him. The reverend gentleman saw the testator, and believed that he understood and appreciated what was said. But the testator showed no desire to discuss his temporal affairs. Indeed, he required to be pointedly asked whether he wished to settle his affairs, and he then said "Yes." To the suggestion that he should see a solicitor, the testator again said "Yes." This was communicated by Mr. Constable to Mrs. Johansen, with the suggestion that Mr. Hurry should be consulted, but she was not favourable to this suggestion, and named Messrs. Stevens and Rennick. Mr. Hurry, of course, was the testator's solicitor, who had acted for him in the preparation of all his former testamentary dispositions but one. Mr. Constable said he would see Mr. Stevens and ask him to come to the hospital to deal with the business. He set out to do so; but, on thinking the matter over, he was not satisfied, and therefore retraced his steps and told Mrs. Johansen he would rather not go to Mr. Stevens, and would leave the matter in her hands. Mrs. Johansen persisted in her preference, however, and on 11th May 1923 a telephone message to Mr. Stevens summoned him to the hospital. He went there about 11 o'clock in the morning, and was met by Mrs. Johansen, who said her father had not settled his affairs and "wants to see *you* about doing it." As a matter of fact, the testator was practically a stranger to Mr. Stevens. He was taken into the testator's room, and there saw Mrs. Hobbs also. One of the ladies said "Father, here is Mr. Stevens come to see you about your affairs." And then they both retired. A most critical conversation then took place, according to Mr. Stevens; and this we must set out in detail:—"I said 'Mr. Bailey, you want to see me about settling your affairs, I understand,' and he said 'Yes.' I said 'Do you mean that you want to make a will?' He said 'Yes, that is so.' I said 'Have you considered how you want to leave your property, what you want to do with it after you are gone?' He said 'Yes.' I said 'How?' He said 'Well, I want it all to go to the family, one lot not to get more than another.' I said 'Do you mean by that that you want all your children to share equally in your estate?' and he said 'Yes.' I said 'Are all your children alive?' He said 'No; one of the daughters is dead.' I said

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'Did she leave any children?' and he said 'No; she was not married when she died.' I said that in case there had to be any provision made for grandchildren instead of for a deceased child. I said 'You will have to appoint some persons to act as executors in order to wind your estate up after you are gone; whom do you wish to appoint?' He paused a moment and he said 'I will have my sons Charles Lindsay and James Robert.' I said 'Are you working or are you occupying your farm yourself now?' He said 'No, my son Lindsay occupies it, all the stocks are his.' I forget exactly what my words were, but I said 'I suppose he leases it then?' He said 'No, he just goes on from year to year'; and he added of his own volition, without me asking him, 'he pays me £60,' and I think, from memory, he added the words 'a year.' I said to him 'Well, I will have to go round to the office to prepare the will. I did not fetch the necessary paper to do it with, and I will be back again shortly and see you and you can sign it.'" Mr. Stevens then returned to his office and prepared a will. He went back to the hospital, with his partner, Mr. Rennick, and took with him the will which he had prepared. Mrs. Johansen and Mrs. Hobbs were present in the testator's room, but retired when Mr. Stevens said that he had brought the will for signature. The will—which gave all the testator's property equally between his children, and considerably improved the position of the daughters and one of the sons, in respect of their shares in the testator's estate, as compared with the provisions made for them under the earlier testamentary dispositions—was then read over, and, according to the two solicitors, the testator said "Yes, that is right." But the old man, though a pen was given to him, did not execute the will. He said, according to the evidence, "I do not think I will sign it now." Mr. Stevens asked "What is the matter—is it wrong—is it incorrect—is there anything wrong with it?" And the old man replied "No, I will do it when I get up." The daughters, Mrs. Johansen and Mrs. Hobbs, promptly returned to the testator's side, and one of them said to her father "Do you want Mr. Constable to be here when you sign it?" and the old man nodded his head; but he had never suggested this wish to the solicitors. Mrs. Hobbs lost no time. She wrote to the Rev. A. H. Constable on the same day as follows:—

"The lawyer came this morning and had a talk to papa, who gave him to understand what he required, he returned to his office and drew up the will, and came again to papa and, bringing Mr. Rennick with him, read the will to dad, which he considered was quite correct, just as he wanted it, but he would not put his signature to it, saying that 'there was time enough,' and continually asking 'Couldn't Mr. Constable attend to it,' kept saying 'No, perhaps Mr. Constable would be in.' The lawyer asked would you come in. Papa seems lower to day, his voice is very broken." But Mr. Constable did "not wish to go," and "refrained from going for some days." There came an urgent message, however, from one of the daughters for him to go to Kyneton at once, and he went on 14th May to the hospital. He saw at once that the old man was dying, and "so far gone physically that he did not care very much what happened." The daughters, so soon as they were informed by the nursing sister that the reverend gentleman had arrived, hurried to the hospital with the solicitor, Mr. Stevens. The will was again read over, and the testator was asked whether it expressed his views, he said "Yes," and it was executed in due form of law. But the old man was very shaky indeed, and, when he made an attempt to sign his name on a piece of spare paper, he failed utterly to accomplish his object, and executed the will by means of a mark. The daughters Mrs. Johansen and Mrs. Hobbs apparently made no mention of the fact of the execution of the will to the other members of their family, until after the death of their father; and when they gave evidence of the facts surrounding its procuration, preparation and execution, the learned trial Judge was unable to accept their testimony.

One other transaction at the hospital, relied upon as a strong indication of capacity, must be mentioned. On Sunday 13th May Mrs. Bacon, with Mrs. Johansen, obtained their father's signature to a cheque for £35—for necessary household expenses, as we gather. But Mrs. Bacon explains that her father was in a very low condition, and that when he was repeatedly told "This is Annie, dad," he did not appear to know her; though he was at last sufficiently aroused to say that the cheque was a large order, and to make upon it a signature which no banker would have recognized. Mrs. Johansen, however, attested the signature, and the cheque was paid. We

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are not surprised that the learned trial Judge did not refer to the incident: it is valueless. Mrs. Bacon kept house for her father and elder brother, and household and personal expenses had to be met. The other daughters knew that she kept house, and also that the amount mentioned was necessary for these expenses and that their father had been accustomed to provide such moneys. They did not bother about his capacity, and, as a test of memory and understanding, the incident is, in the circumstances, infinitesimal, and tells as much in the one direction as in the other.

So far as the principles of law governing this case are concerned, they are well settled, and may be found in the cases of *Banks* v. *Goodfellow* (1) and *Boughton* v. *Knight* (2). A testator is "left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make" (3), but "it is essential to the exercise of such a power that a testator . . . shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect" (4). "Mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains" (5). The testator's "memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by

(1) (1870) L.R. 5 Q.B. 549.
(2) (1873) L.R. 3 P. & D. 64.
(3) (1873) L.R. 3 P. & D., at p. 66.
(4) (1870) L.R. 5 Q.B., at p. 565.
(5) (1870) L.R. 5 Q.B., at p. 566.

the testator ? as this : Had he a disposing memory ? was he capable of recollecting the property he was about to bequeath ; the manner of distributing it ; and the objects of his bounty ? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will ? " (1). It is " a practical question, one in which the good sense of men of the world is called into action, and . . . it does not depend solely on scientific or legal definition " (2).

We were exhorted to bear in mind, also, in this case, the law laid down by Sir *James Hannen* in *Parker* v. *Felgate* (3), approved by the Judicial Committee in *Perera* v. *Perera* (4) :—" If," said Sir *James Hannen*, " a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, ' I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.' "

Now, the evidence satisfies us that *Weigall* A.J. was quite accurate in his finding that the testator was, throughout the closing years of his life, generally regarded by his family and by his friends as a very old man whose mental and physical powers were failing, and who should be treated with kind indulgence—in fact, as a child rather than as a man competent to manage himself or his affairs. He suffered, as the learned Judge says, from strange losses of memory, from repeated forgetfulness and from inability to retain in his mind for more than a very short time, information or correction which, when supplied, he had apparently understood. The evidence also satisfies us that the will prepared by Mr. Stevens was not initiated by the testator, but by his daughters Mrs. Johansen and Mrs. Hobbs. He was very weak physically at the time, and, though not devoid of reason, he was substantially incapable of sustained mental effort ; he was quite unconscious, we are satisfied, of his earlier testamentary

(1) (1870) L.R. 5 Q.B., at p. 568.
(2) (1873) L.R. 3 P. & D., at p. 67.
(3) (1883) 8 P.D. 171, at p. 173.
(4) (1901) A.C. 354, at p. 361.

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dispositions prepared by his former solicitor, Mr. Hurry, and by his old friend, the Rev. A. H. Constable. He was quite unable, we feel satisfied, "to discern and discreetly to judge" of the claims of his various children upon his regard and bounty. The testator was not, at this period, we think, without understanding: he could comprehend simple questions, and at times recognize his family and friends. But he was incapable, we are certain, of any concentration of mind or of understanding the nature of his act in making the will of May 1923 and its effects.

The propounders of the will of May 1923 naturally place great reliance upon the evidence of Mr. Stevens, confirmed to some extent by his partner Mr. Rennick. They point out, and truly, that the learned trial Judge did not express an unfavourable opinion of this evidence or state that he did not accept it. And we give weight to this contention. But it is somewhat difficult, without having seen the deponents or heard their evidence, to appreciate the real strength of the testimony. Dr. Loughran says that he refrained from talking to the testator because of his great weakness and the increased coughing induced by the effort of conversation. Yet, on 11th May, when both lungs of the testator were affected and he was distinctly worse than at the period of which the doctor speaks, we hear nothing from Mr. Stevens of his weakness or of the effect of a rather long conversation upon him. And when Mr. Stevens returned to the testator with the will he had prepared, it is a strange and disconcerting fact that the testator would not sign it. This refusal on his part shows, to our minds, how variable and uncertain were his moods and mental efforts. And it shows, we think, distrust of those surrounding him and doubt as to what was happening. The suggestion that he required the Rev. Mr. Constable to be present when he signed the will came from the daughters promoting the will, and not from the testator; he is said to have merely nodded assent. Again, the facts that the daughters persisted in calling in Mr. Stevens to prepare the will instead of Mr. Hurry, despite the expressed dissatisfaction of Mr. Constable; that Mr. Constable was induced, against his wishes, to attend at the execution of the will by the misleading if not untrue statements of Mrs. Hobbs that her father would not put his signature to the will, saying "There was time

enough," that he was "continually asking 'Couldn't Mr. Constable attend to it,' kept saying 'No, perhaps Mr. Constable would be in'"; that the daughters never informed any other members of the family that they were promoting the will, and kept secret the fact that the will had been made until after his death—all oppress us with doubt and leave our minds uncertain of the verity of the case made by the propounders of the will.

One thing of which we feel convinced is that the will never recurred to the testator's mind from 11th May, when Mr. Stevens first presented it for execution, until the 14th, when he again presented it in the presence of Mr. Constable. On this latter date, we think, as Mr. Constable said, the testator was so far gone physically that he did not care very much what happened. The presence of his spiritual adviser, perhaps, allayed his distrust of those surrounding him which he had previously exhibited. But we are utterly unable to believe that the mind of the testator was able to appreciate the will read over to him or remember that he had previously given instructions for a will, or that he treated the document presented to him as giving effect to those instructions and accepted it as carrying them out.

On the whole, therefore, we are not convinced that *Weigall* A.J. was in error in concluding that the testator was not of sound mind, memory, and understanding, when he made the will of May 1923. On the contrary, we agree with his conclusion, and think it well warranted by the evidence. Consequently, the appeal ought in our opinion to be dismissed.

ISAACS J. Three questions remained after argument before the learned primary Judge, *Weigall* A.J., for his determination, namely, (1) whether the testator knew and approved of the contents of the will of 14th May 1923, (2) whether he had testamentary capacity and (3) whether undue influence was exercised by Mrs. Johansen and Mrs. Hobbs. Having found against testamentary capacity, his Honor said it was unnecessary to determine the other two questions. As to the first he said nothing further; but in view of the argument before him on the third, he rightly decided it. He found against undue influence. On this appeal nothing was said

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about the first point, it being obviously, in the circumstances, concluded by the decision upon either of the other two points. Both those points were vigorously contested.

It is all-important to understand the proper method of approaching this question. Cases of the highest authority have shown the way. It will perhaps be of more general use if I collect in the form of working propositions the effect of those authorities so far as they affect cases like the present:—

(1) The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged the Court is bound to pronounce against the instrument (*Baker* v. *Batt* (1); *Bremer* v. *Freeman* (2); *Durnell* v. *Corfield* (3)).

(2) This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence (*Symes* v. *Green* (4); *Baker* v. *Batt* (5)).

(3) The proponent's duty is, in the first place, discharged by establishing a prima facie case (*Bremer* v. *Freeman* (2)).

(4) A prima facie case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the Court judicially that the will propounded is the last will of a free and capable testator (*Durnell* v. *Corfield* (6); *Baker* v. *Batt* (7); *Barry* v. *Butlin* (8); *Fulton* v. *Andrew* (9), and cases there cited).

(5) A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments (*Swinburne on Wills*, Part II., sec 5, quoted with approval by *Kent* C. in *Van Alst* v. *Hunter* (10)).

(6) The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the Court varies with the circumstances (*Barry* v. *Butlin* (11); *Jones* v. *Godrich* (12); *Wrench* v. *Murray* (13)).

(1) (1838) 2 Moo. P.C.C. 317, at pp. 319-320.
(2) (1857) 10 Moo. P.C.C. 306, at p. 357.
(3) (1844) 1 Rob. E. 51.
(4) (1859) 1 Sw. & Tr. 401, at p. 402.
(5) (1838) 2 Moo. P.C.C., at p. 319.
(6) (1844) 1 Rob. E., at p. 67.
(7) (1838) 2 Moo. P.C.C., at p. 330.
(8) (1838) 2 Moo. P.C.C. 480, at p. 482.
(9) (1875) L.R. 7 H.L. 448, at p. 461.
(10) (1821) 5 Johns. Ch. (N.Y.) 148, at p. 158.
(11) (1838) 2 Moo. P.C.C., at p. 484.
(12) (1844) 5 Moo. P.C.C. 16, at pp. 19-20.
(13) (1843) 3 Curt. 623, 635.

(7) As instances of such material circumstances may be mentioned : (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries (*Wrench* v. *Murray* (1) ; *Brogden* v. *Brown* (2) ; *Durnell* v. *Corfield* (3) ; *Symes* v. *Green* (4) ; *Bama Soondari Debi* v. *Tara Soondari Debi* (5) ; *Sajid Ali* v. *Idab Ali* (6) ; *Jagrani Kunwar* v. *Durga Prasad* (7) ; *Banks* v. *Goodfellow* (8) ; *Harwood* v. *Baker* (9) ; *Van Alst* v. *Hunter* (10)) ; (b) the exclusion of persons naturally having a claim upon the testator (*Wrench* v. *Murray* ; *Brogden* v. *Brown* ; *Harwood* v. *Baker* (11) ; *Banks* v. *Goodfellow*) ; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit (*Wheeler* v. *Alderson* (12) ; *Baker* v. *Batt* (13) ; *Barry* v. *Butlin* (14) ; *Bur Singh* v. *Uttam Singh* (15)).

(8) Once the proponent establishes a prima facie case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof (*Bremer* v. *Freeman* (16) ; *Waring* v. *Waring* (17) ; *Sutton* v. *Sadler* (18) ; *Bama Soondari Debi* v. *Tara Soondari Debi* (19) ; *Bates* v. *Graves* (20) ; *Bur Singh* v. *Uttam Singh* (21)).

(9) To displace a prima facie case of capacity and due execution mere proof of serious illness is not sufficient : there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them

(1) (1843) 3 Curt. 623.
(2) (1825) 2 Add. 441-449.
(3) (1844) 1 Rob. E. 51.
(4) (1859) 1 Sw. & Tr., at p. 402.
(5) (1891) L.R. 18 Ind. App. 132, at p. 139, per Lord *Shand*.
(6) (1896) 23 Calc. (P.C.), at p. 10, per Lord *Watson*.
(7) (1913) 36 All. 93, at p. 98, per Lord *Shaw*.
(8) (1870) L.R. 5 Q.B. 549.
(9) (1840) 3 Moo. P.C.C. 282, at p. 285.
(10) (1821) 5 Johns. Ch. (N.Y.), at p. 159, per *Kent* C.
(11) (1840) 3 Moo. P.C.C., at p. 290.
(12) (1831) 3 Hag. Ecc. 574, at p. 587.
(13) (1838) 2 Moo. P.C.C., at p. 321.
(14) (1838) 2 Moo. P.C.C., at pp. 483-484.
(15) (1910) 38 Calc., at p. 367, per Lord *Robson*.
(16) (1857) 10 Moo. P.C.C., at p. 357.
(17) (1848) 6 Moo. P.C.C. 341, at p. 355.
(18) (1857) 3 C.B.(N.S.) 87, at p. 96.
(19) (1891) L.R. 18 Ind. App., at pp. 139-140, per Lord *Shand*.
(20) (1793) 2 Ves. Jun. 287, at p. 288.
(21) (1910) 38 Calc., at pp. 366-367, per Lord *Robson*.

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unequal to the task of disposing of his property (*Bur Singh* v. *Uttam Singh* (1); *Wingrove* v. *Wingrove* (2)).

(10) The opinion of witnesses as to the testamentary capacity of the alleged testator is usually for various reasons of little weight on the direct issue (*Kinleside* v. *Harrison* (3)).

(11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions (*Durnell* v. *Corfield* (4)).

(12) Where instructions for a will are given on a day antecedent to its execution, the former is by long established law the crucial date (*Perera* v. *Perera* (5), following *Parker* v. *Felgate* (6); see also *Griffin* v. *Palmer* (7) and *Barry* v. *Butlin* (8)).

Approaching the present case in the way indicated, we have first to see whether on the testimony for the appellants, who in truth are the proponents of the contested will, a sufficient prima facie case was presented. I feel no doubt there was. The testator, it is true, was eighty-eight years old and was ill with pneumonia. He was in a private hospital. To the extent that the testator's condition calls for more than ordinary vigilance, I bestow that upon the evidence. On 11th May 1923 Mr. Stevens, a solicitor, against whom no impropriety or untruthfulness is suggested either by the learned primary Judge or any one else, saw the testator in the hospital. The testator was in bed reclining against a pillow. One of the appellants said :—" Father, here is Mr. Stevens come to see you about your affairs." Mr. Stevens in his evidence said :—" I shook hands with the testator, and he shook hands with me. One of the ladies said ' Well, shall we go out ? ' and I said ' Yes, please.' They went out and the door was shut. I took a chair and sat down beside the bed, and I said ' Mr. Bailey, you want to see me about settling your affairs, I understand,' and he said ' Yes.' I said ' Do you mean that you want to make a will ? ' He said ' Yes, that

(1) (1910) 38 Calc., at p. 367, per Lord *Robson*.
(2) (1885) 11 P.D. 81, at p. 83.
(3) (1818) 2 Phillim., at pp. 457-459.
(4) (1844) 1 Rob. E., at p. 55.
(5) (1901) A.C., at p. 361.
(6) (1883) 8 P.D. 171.
(7) (1617) Brownl. & Gold., Part I., 43, at p. 44.
(8) (1838) 2 Moo. P.C.C., at p. 485.

is so.' I said 'Have you considered how you want to leave your property, what you want to do with it after you are gone ?' He said 'Yes.' I said 'How ?' He said 'Well, I want it all to go to the family, one lot not to get more than another.' I said 'Do you mean by that that you want all your children to share equally in your estate ?' and he said 'Yes.' I said 'Are all your children alive ?' He said 'No ; one of the daughters is dead.' I said 'Did she leave any children ?' and he said 'No ; she was not married when she died.' I said that in case there had to be any provision made for grandchildren instead of for a deceased child. I said 'You will have to appoint some persons to act as executors in order to wind your estate up after you are gone ; whom do you wish to appoint ?' He paused a moment and he said 'I will have my sons Charles Lindsay and James Robert.' I said 'Are you working or are you occupying your farm yourself now ?' He said 'No, my son Lindsay occupies it, all the stocks are his.' I forget exactly what my words were, but I said 'I suppose he leases it then ?' He said 'No, he just goes on from year to year' ; and he added of his own volition, without me asking him, 'he pays me £60,' and I think, from memory, he added the words 'a year.' I said to him 'Well, I will have to go round to the office to prepare the will. I did not fetch the necessary paper to do it with, and I will be back again shortly and see you and you can sign it.'" Referring to this first interview the learned primary Judge says : "In giving these few instructions and in his answers to Mr. Stevens' questions the testator seems to have spoken sensibly and, except in an erroneous statement as to the rental paid by Lindsay, to have shown an intelligent appreciation of certain facts, and no manifestation of incapacity." This, unquestionably the most important incident in the case, is therefore regarded by the learned Judge, and I agree with him, as in itself prima facie sufficient to establish capacity, though, of course, capable of being outweighed by sufficient evidence to the contrary. As to the £60, it may be noted that it was possibly a slight error of mental computation. Mr. Stevens does not definitely say the testator added the words "a year," and it appears from the inventory of assets that rent at £236 a year had been paid up to 1st March 1923, which left nearly two and a half months rent owing. That would be approximately

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£50. Mr. Stevens then went to his office and wrote the will, which is of the simplest and most natural kind, and in fact so fair and natural as to represent the legislative view of propriety in the absence of a will at all. Mr. Stevens shortly afterwards returned to the hospital with his partner, Mr. Rennick, who is equally free from any circumstance of reproach. They saw the testator. The testator was introduced to Rennick, and after mention of Rennick's father signified his recollection of the latter. The appellants left. Stevens read over the will and said "Now, that gives your property equally between all your children and appoints the two sons Charles Lindsay and James Robert your executors. Is that what you want to be done; is that correct?" He said "*Yes, that is right.*" Then says Mr. Stevens:—"Previous to that I had asked for a book to be put on his knees so that he could sign it on. He was sitting up in bed with his knees doubled a little in front of him. The book was brought in by one of the staff of the hospital. That was when we went in first. After going through the will I put the will down on this book and handed him a pen. He held the pen for a moment or two in his hand, not long, and he said 'I do not think I will sign it now.' I said 'Well, what is the matter—is it wrong—is it incorrect—is there anything wrong with it?' He said 'No, I will do it when I get up.' I said 'Well, you do not want to sign it now?' He said 'No.' I just turned to my partner, Mr. Rennick, and I said 'The old gentleman does not want to sign at present, we will just leave it.' Mr. Rennick went out of the room. Shortly afterwards the two daughters came back in." To his Honor:—"Rennick left me alone with the testator. He went out when I described what had taken place. I was folding up the will, putting it in my pocket, and he went out just immediately ahead of me. Before I had picked up my hat and gone out, the two daughters came in, Mrs. Johansen and Mrs. Hobbs, and one of them said—I cannot say which one of them it was—'Why do you not want to sign it father?' He said 'Oh, there is no hurry now.' I do not know how they knew he had not signed it, I had not told them he would not sign it. I do not know what my partner had said or whether he told them so outside. I cannot say how they knew. They did not know anything about the will at the time. One of them asked 'Why do you not want to sign it, father?'

and he said 'There is no hurry now.'" To Mr. *Sproule*:—"One of them said 'Do you want Mr. Constable to be here when you sign it?' He nodded his head; he did not say 'Yes,' but he made an inclination of his head which indicated to me he meant assent. He definitely bowed his head." To his Honor: "He had not mentioned Mr. Constable's name to me at all." To Mr. *Sproule*:—"Mr. Rennick and I went away, but before going, I am not sure whether it took place in the room or just outside in the hall of the hospital, one of the ladies said 'If Mr. Constable comes to see father it will probably be in the afternoon, and if he were to come to-morrow could you come round?' I said 'No, I could not, I shall be away in the afternoon from 2.30 until at least 4.30'; and Mr. Rennick said he would be away." Mr. Rennick corroborates this as to the interview at which he was present. As to Mr. Constable, Rennick says "there was something said about Mr. Constable, but I am not clear what it was," and he in effect repeated that.

There is confirmatory evidence by the appellants, but as *Weigall* A.J. to a considerable extent, though not entirely, distrusted their testimony. I pass it by, with the observation that it in no way conflicts with the evidence of Stevens and Rennick; or, if it does, the latter is accepted.

Besides the evidence of the testator's then instant condition, there is evidence of a more general nature specially directed to the period of his illness in the hospital. Dr. Loughran, who had already known the testator for five years and had professionally visited his house, treated him in the hospital. Dr. Loughran therefore was in an exceptionally good position to detect any mental incapacity had such been manifested. After a detailed statement, he said: "There was no sign of any mental weakness apart from what would be associated with extreme physical weakness." And again: "*So far as I observed him, there was no sign of any mental weakness.*" One important question and answer should be quoted. His Honor: "Did you observe a state of things such as this? I suppose finally he must have in your opinion changed his power to carry out a business transaction at that time?" Answer: "*It would all depend on the nature of the transaction.*" Dr. Loughran did not think the testator had any particular bad turn on 11th May or before the

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15th. Then he was like a dying man. But up to that the doctor says : " I should say he was just in the same condition as any other very old man who was dying with a lingering illness."

Kathleen Hanley, a certificated nurse and to a considerable extent attending on the testator, and Edith Southern, the matron of the hospital, were also called for the appellants. Apart from some opinions of Miss Southern as to capacity of making a mental effort, which count for very little if anything, the facts and outward manifestations of capacity by the testator indicate no such weakening of mind and memory as displace the expert evidence of Dr. Loughran and the clear prima facie evidence of the solicitors.

Stopping here for a moment to see how far, in view of the propositions stated, the appellants' case as to capacity was established by the events of 11th May, it appears to me quite fully established. I pass to the incidents of 14th May, when the will was executed. Mr. Constable had previously seen the testator apparently on 10th May, and had, after a conversation with Mrs. Johansen, himself asked the testator if it were true his affairs were not settled. The testator said " Yes." Of course, Mr. Constable knew that as a fact the testator had already made a will and a codicil because he (Constable) had himself three years before drawn and witnessed the codicil, in which the will was mentioned. Both he and the testator apparently understood by " affairs not settled " that they still needed to be settled, in accordance with present wishes. On 10th May Constable advised testator to see a solicitor ; and to this testator assented. That fits in perfectly with the narrated events of the next day, and strengthens the appellants' evidence as to the 11th. On 14th May Mr. Constable visited the hospital and found testator very weak physically, but able to converse upon and apparently understand spiritual matters. Further, though so far as appeared to Mr. Constable the testator would not have been able to discuss the terms of sale of his landed properties and whatever belonged to them, including probably the acreage value, cash deposit, periods of bills, interest, &c., yet he said he appeared to be quite capable of understanding what was said to him on a simple matter. " Otherwise," added Mr. Constable, " I should not have been satisfied as a witness to that will."

As pointed out in proposition 11, the opinion of Mr. Constable, like all other lay opinions, is only of slight and indeterminate weight; it is in this case strengthened by his reluctance to be concerned in any new will of the testator. That reluctance may have been from a desire not to intervene actively, without necessity, in conflicting affairs of parishioners, but at all events his last-mentioned statement entirely negatives any such reason as disbelief in the necessary testamentary capacity of the testator. The actual execution as deposed to by Mr. Stevens was after fully reading and independently explaining the short and simple will. The testator was asked if he understood and approved; he said "Yes." He tried to write his name, and he was physically too weak. He was asked if he would make his mark, and he replied "Yes." He did so.

The prima facie case is complete, and I cannot doubt it is such as judicially to satisfy a Court, even after all the necessary vigilance is exercised to ascertain whether, notwithstanding the age and illness of the testator, he still possessed what Lord *Loughborough* calls "the relative capacity" to make the will propounded. What I have said carries with it the conclusion that the testator fully knew and understood what was done.

Unless, therefore, the respondents can show that beneath all this apparent quality of "mind, memory, and understanding," there was the vitiating circumstance that the testator was merely mechanically speaking and acting in obedience to the coercive will of the appellants—though in their absence,—the will of 14th May 1923 should be given effect to. The learned primary Judge has rejected the plea of undue influence. I agree with him, and in view of proposition 9 hold that to be inevitable on the facts before the Court. The evidence of facts relied upon by the respondents to displace the appellants' testimony consists entirely of weakened memory respecting principally the existence of neighbours who had died. One or two instances of forgetfulness as to neighbouring visits and the extent of ploughed land appear, and little more. This was added to by the expert opinion of Dr. Sewell, who based his views first on some evidence of the nature just indicated. On this he deposed to some generalities—such as mental degeneration proceeding, specially aggravated by pneumonic toxæmia. He did not peruse the

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evidence of Dr. Loughran or that of the nurses, the solicitors and Mr. Constable. He was certainly asked as to items in the evidence of Dr. Loughran, but Dr. Sewell made some very important concessions. For instance, when asked as to whether, in relation to the events of 11th May, he thought the toxic effect of pneumonia was passing off or had passed off, he said : (a) " I would certainly want to know what was the nature of the conversation and the nature of the business that he had transacted " ; and (b) " Provided that in his conversation he initiated and enumerated the members of his family himself and did carry out intelligent conversation, if that is in evidence, I would say Yes, that the toxæmia must have largely cleared off at that stage " ; and (c) " I think Dr. Loughran is the only man who could state whether that " (the crepitation) " was pneumonia or whether they were just the crepitations of a heart failure—the character of the crepitations differ tremendously in the two cases."

As against the mere opinions and suggestions of the respondents that the testator was prior to and after 11th May 1923 quite incapable of understanding business, there are two incontestable proofs to the contrary. One is the rather trying incident of 9th May when Lindsay and Mrs. Bacon took part with the testator in an adjustment of accounts as to whisky and tobacco going back to 8th January 1918. Amounts and dates were stated in writing and payments by cheque made to and acknowledged by the testator. He not only signed his name to the receipt, but he also initialled and dated the duty stamp. The other is the cheque incident of 13th May, when Mrs. Bacon asked him for a cheque for £35. He signed it, saying " That was a large order." Mrs. Bacon states she did not expect to be paid, presumably because of the bad signature. The bank required Mrs. Johansen to attest the signature, which she did, and the cheque was paid and Mrs. Bacon got the benefit of it. Physical inability to write a usual signature is one thing. Mental capacity to understand the transaction is another. Mrs. Bacon might well have doubted the first, but, if honest, could not have doubted the second.

The respondents' evidence is all too weak to displace the appellants' primary case.

In the result, in my opinion the appeal should be allowed and the order nisi discharged.

GAVAN DUFFY J. I have had the advantage of reading the judgment prepared by my brother *Isaacs* in this case, and I agree with him in thinking that the appeal should be allowed.

RICH J. I have had the opportunity of reading the judgment of my brother *Isaacs*, and concur in his reasons and his conclusions.

Appeal allowed. Order appealed from set aside. Order nisi discharged. Costs of both parties in Supreme Court and High Court to be paid out of the estate.

Solicitors for the appellants, *Hedderwick, Fookes & Alston.*

Solicitors for the respondents, *H. Hurry & Son*, Kyneton, by *J. A. Armstrong.*

B. L.