4/1927

IND

v

SCOTCH COLLEGE.

JUDGMENT. MR. JUSTICE ISAACS.

Delivered 26 September 1927

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The judgment of Napier J. which is appealed from is in substance a refusal by the learned trial Judge to accept as true the story told viva voce by the appellant and his three principal witnesses respecting the circumstances directly and indirectly connected with the execution of the document propounded as the will of Mrs. Ingerson. To us, as an appellate tribunal unable by seeing or hearing them to judge of the personal characteristics of those witnesses, their story comes not only with its own inherent improbabilities in the light of the surrounding facts, but also with the discredit of rejection. In such a case, where, as shewn by the cases referred in argument, the conscience of the Court must be satisfied, the task of reversing the primary decision is almost hopeless. To these authorities there may be added the case of Weir v Grace (1899 2 S.C. (H.L.) 30), where at p. 30 Lord Chancellor Halsbury said:- "Of course, it is the duty of the person "propounding a will to shew it is the will of the testator or testatrix. "That includes its execution, and the sanity and testamentary capacity "of the person who has executed it. If doubt is left on either of "these propositions, the ordinary consequences of law follows, namely, "that the person whose duty it is to establish the proposition has "failed to establish it, and therefore the judgment should be against "him."

The question to be determined in this appeal is whether the appellant has proved so satisfactorily as to leave no judicial doubt, that Mrs. Ingerson executed the document of November 9 1925 as her last will. In point of form, no doubt, the testimony on behalf of the proponent would be sufficient to establish execution. But how far was the Court bound to accept that evidence as true? Sir William Scott in the Odin (1 Chr. Rob., at p. 252) said:- "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."

Mr. Cleland very justly observed that the Court would not be justified in evolving a suspicion not based on actual circumstances. But that is far from being the case here, whether we regard the matter from the standpoint of Mrs. Ingerson, or that of Mr. Ind and his witnesses. From her standpoint there is the complete transition, without anything like adequate or reasonable cause, from her previous benefactions, going back in some respects twenty years, there is the inconsistency of her alleged conduct with her proved prior manner of conducting her affairs, and there is also the great improbability of her shewing sudden and secret confidence in strangers, as well as highly technical knowledge in framing a will. From the appellant's standpoint, the narrative given by him and his two chief witnesses not only assumes a simplicity of mind and a worldly innocence altogether incompatible with their stations in life and their proved experience, and indeed with the ordinary acquaintance of mankind, with every day affairs, but also includes a series of coincidences little short of wonderful. It is unnecessary to enter into the details of the many

improbabilities to which their story gives rise, it is sufficient to say it is not credible, and this appeal must fail.

The appeal should therefore be dismissed with costs.

Ind v Scotch College

Judgment Higgins J.

The ultimate difficulty in the way of the success of the appeal in this case is that the learned judge of first instance, who saw and heard the witnesses, has not believed the truth of the plaintiff's story. It is, of course, open to us on the appeal to come to a different conclusion of fact, to decide, virtually, that the judge ought to have believed the story on the evidence; but, in my opinion, we, who have not heard the evidence, should not be justified in reaching such a conclusion, on the evidence as it stands before us. Had the judge decided, that, notwithstanding all the suspicious circumstances, notwithstanding the sudden and extraordinary revulsion of feeling on the part of the testatrix which the story involves, he believed the story, the decision would probably have to stand. But he did not so find. True, he did not find that the plaintiff and his witnesses----his commission agent friends---- were guilty of a fraudulent conspiracy. It was sufficient for his purpose to say that he was not satisfied with the truth of their story. "I entertain", says the judgment, "to say the least of it, a very serious doubt whether the events to which they [the plaintiff's friends, Pearson & Blunt] deposed could have happened as I was told they did happen"..... .....The appearance of the document and the circumstances disclosed in evidence have excited in my mind a grave suspicion whether the signature, as it now appears, was really appended for the purpose of authenticating the contents of the instrument, and under ~~the~~ circum-

-cances which would establish it as the last will of a free and competent testatrix". The burden of proving the fundamental fact of the knowledge and intention of the testatrix,of proving that she knew and approved of the contents of the document, lay on the plaintiff;and that burden has not been satisfied(Tyrrell v Painton 1894 Prob 151). The judge at the trial was not under any obligation to accept the evidence of the plaint -iff and the attesting witnesses as being true;and we cannot say that it ought to have been so accepted. No judge is under an obligation to believe a witness even if there is no direct witness to the contrary.

I need not restate the ~~series~~ series of facts which the judgment before us has so well and so fairly summarized. But I should like to call more specific attention to certain facts.(1)Mrs Barton,who lived with the deceased,and whose evidence the learned judge expressly accepts as to the condition of the deceased,says of her "she could neither read nor write after the accident. Her sight was very bad. I never saw her sign her name after the accident. I never saw her try. So far as I know,she never wrote anything after the accident. Prior to that she used to write letters to her friends". This state of her eyes is confirmed by the evidence of Mr Angus,her minister. According to him,the deceased lady said,about the 12th Nov 1935----3 or 4 days after the signing of the alleged will----"There is a letter from Mr Nicholson which I have no t opened. I can't read it and don't understand". Mr Angus then read it to her.(2)On the 12th or 13th Nov 1935,this alleged will having been signed on the 9th,the deceased spoke to Mr Angus in

language which would be un-intelligible unless she believed that her will of the 10th ~~Nov~~ March 1924 was still to operate as her last will. Finding that she had sent £30 to the Rev Mr Nicholson, in Scotland, instead of her annual gift of £4, she said "It is clear evidence I don't know what I am doing. He gets £16 more than usual. My estate will stand it, and you know when my will is proved you know he will get £100 for himself and £100 for the poor". This statement is consistent with the will of 10th ~~Nov~~ March 1924, and wholly inconsistent with the alleged will of 9th Nov 1925.

(3) After the accident in October the plaintiff used to visit the deceased nearly every day, and gave her brandy and egg beaten up. Mrs Grieve, whose evidence the Judge expressly accepts states that she never saw the deceased the worse for liquor except after the accident, when she saw her several times the worse for liquor.

Mr Cleland, in his able argument for the appellant, has relied strongly on certain summaries of the relevant law as to proof of wills expressed by my brother Isaacs in Nock v Austin (25 C.L.R. 519, 528), and in Bailey v Bailey (34 C.L.R. 570-572). But it is a mistake to treat such summaries as if they were an exhaustive code applicable to all wills under all circumstances. My learned brother never meant his summaries to be so treated. As he explains clearly at p. 570 of Bailey v Bailey, they are treated by him as "working propositions" stating the effect of the authorities "so far as they affect cases like the present". It is the duty of the Court to consider directly the questions of capacity, undue influence, intention to execute a document as a will, ~~directly~~, and not to lean merely on expressions, ~~however accurate, as to the view~~ of previous judges in ~~laying down~~ stating the principles on which they act in particular cases. All depends, finally, on the circumstances of each case.

In my opinion, the appeal must be dismissed.