IN THE HIGH COURT OF AUSTRALIA

BOREHAM

V.

PRINCE HENRY'S HOSPITAL & OTHERS

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Melbourne

on Thursday, 2nd June 1955.

J. J Gourley, Govt. Print., Melb.

C.7 163/51

BOREHAM

V.

PRINCE HENRY'S HOSPITAL AND ORS.

O R D E R

Appeal dismissed with costs.

BOREHAM

V.

PRINCE HENRY'S HOSPITAL AND ORS.

JUDGMENT

WILLIAMS J.
FULLAGAR J.
TAYLOR J.

BOREHAM

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PRINCE HENRY'S HOSPITAL AND ORS.

JUDGMENT

WILLIAMS J.
FULLAGAR J.
TAYLOR J.

This is an appeal from an order of the Chief Justice of the Supreme Court of Victoria discharging an order nisi granted on the application of Ronald James Boreham the executor named in a will purported to have been made on 28th August 1950 by Samuel Smith who died on 18th August 1953 calling upon nine caveators consisting of seven public hospitals, the Royal Victorian Institute for the Blind and the Australian Red Cross Society to show cause why probate of this will should not be granted to the applicant.

The making absolute of the order nisi was opposed by the caveators on the following grounds: "1. That the will was not executed by the Testator. 2. That the will was not executed in conformity with Wills Act. 3. That there was want of testamentary capacity on the part of the testator existing before the time of execution of the said Will and due to insanity or imbecility the symptoms of which first manifested themselves in or about the month of December 1949. 4. That undue influence was exercised upon the testator by CHRISTINA MAUD BOREHAM. 5. That the testator did not know or approve the contents of the Will." Of these grounds his Honour decided the first, second and fourth in favour of the appellant and found it unnecessary to give a decision on the fifth. But on the third ground he decided that the appellant had not discharged the onus of proof that the testator had testamentary capacity on 21st August 1950, the date that

instructions for the will in suit were given to a solicitor, Mr. L. F. Russell. He added that the evidence warranted an affirmative finding that the testator did not have testamentary capacity on this date. The executor is the appellant in this Court and the caveators are the respondents. At the date of the purported will Samuel Smith, whom we shall hereafter call the testator, was 84 years of age. A great deal of evidence was given on the hearing which his Honour has reviewed at length and we shall not attempt more than an outline of its more relevant portions. Suffice it to say that the testator was, in his early years, an orchardist but that he had retired from this occupation some time prior to 1937 and in that year was living with his wife in a house which he owned at 792 Station Street, Box Hill. They had no children. In 1937 they agreed upon a testamentary plan ultimately to leave their joint property to charity. Pursuant thereto they each made a will on 19th October 1937. By her will Mrs. Smith left the whole of her property to the testator if he survived her and, if he pre-deceased her, to certain charities. By his will the testator devised the house at Box Hill and bequeathed a legacy of £300 to his wife and gave her a life estate in the residue of his property with remainder to these charities. He explained to Mr. J. H. Fulton, a solicitor practising at Box Hill, who prepared these wills, that as they had no children and his relatives were amply provided for they had decided to dispose of their property in this way. The testator's wife died on 29th July 1939. He made a further will on 17th August 1939, also prepared by Fulton, whereby he gave his whole estate to the charities mentioned in his previous will with the addition of two more hospitals. By a codicil dated 10th January 1940 he bequeathed a legacy of £600 to his niece Edith Styles who was then keeping house for him. She kept house for him from a month after his wife died until January 1942, a period of 2 years and 4 months. The testator made a further

will on the 14th February 1942, also prepared by Fulton, whereby he omitted the legacy bequeathed to Edith Styles, but bequeathed a legacy of £500 to his sister Mrs. Petty and gave the residue of his estate to charities omitting, however, the two hospitals added by the will of 1939 and substituting the Australian Red Cross Society. In all these wills the Equity Trustees Executors and Agency Company Limited was appointed executor. On 23rd September 1949 he made a further will prepared by Fulton appointing F. D. Nicholas, the Manager of the local branch of the E. S. & A. Bank where he had a current account, his executor in lieu of this company, otherwise his property was still left to the same charities, but he added the Box Hill and District Hospital which had come into existence since his last will. Three days later he made a further will, the beneficiaries remaining the same, the only change being to add Fulton as a co-executor with Nicholas. In each of these wills he bequeathed a legacy of £500 to Mrs. Petty. After Edith Styles ceased to keep house for him, the testator lived alone until June 1950 with the exception of three weeks of the early spring in 1949 when another niece Rebecca Ann Styles kept house for him. He had a brother Alfred Smith and two married sisters Mrs. Petty and Mrs. Styles. The Pettys and the Styles, and particularly Gordon Petty son of Mr. and Mrs. Petty, used to visit him at his home. He also had an old friend T. H. Olden who lived next door. One can gather from their evidence and from Mr. Nicholas the sort of life the testator lived in those years. When he ceased to be an orchardist he became an investor and invested in shares in public companies with considerable success. At his death his estate was worth over £25,000 and consisted of his house valued at £1,750, substantial credits in the branch of the E. S. & A. Bank and the State Savings Bank at Box Hill totalling £1,453, a fixed deposit of £1,000 with the E. S. & A. Bank, and shares in twenty-one companies valued at £20,674.

Until about 1948 he seems to have lived the sort of life one would expect a man of his class, who had retired, to live. He worked in his garden, played draughts with his relatives and Olden and, in particular, took a keen interest in the ups and downs of the shares in which he had invested. But advancing age was taking toll of his physical and mental capacities. By the end of 1948 he was suffering from chronic carditis and atheroma, that is enlargment of his arteries, the effect of which, amongst other things, was to affect the supply of blood to the cells of his brain and this was likely to lead to a deterioration of his mental capacities. This decline showed itself in the first instance in curious hallucinations about communists. Apparently the lights of approaching cars penetrated into the bedroom in which he slept and this caused him to believe that he was being persecuted by the communists who were "focussing" their lights upon him and burning him and that they were stealing his food and clothing. He barricaded the windows of his bedroom against this menace and made frequent complaints to the police. He went to see a local medical practitioner, Dr. Phillip Lewis, on 22nd October 1948 and 2nd January 1949, and complained to him about the communists. Dr. Lewis formed the opinion that it was a case of senile dementia. The testator began to lose interest in his games of draughts and in the movement of his shares on the stock exchange and it is plain that his memory and business understanding were declining. His Honour summarised the evidence of Gordon Petty, whom he accepted as a witness of truth, about this period as follows:

> "About the middle of 1948 Gordon Petty said he noticed a change in the testator. He became more troubled by his delusions with regard to 'focussing' and the like, and Gordon Petty thereafter visited him regularly each week, and so was in a position to notice any change in testator's mental state. And he described how gradually during the next two years he ceased to know what was going on on the stock exchange and become no more than passingly interested in what Gordon Petty had to tell him on the subject. For years they played draughts together, the testator being a keen player and able to

> defeat Gordon Petty very easily, but gradually his ability at draughts deteriorated till finally he lost interest in them too. And so during the last few months before Mrs. Boreham came, Gordon Petty's evenings with the testator came to be spent in a run in the car up Croydon way with an ice cream at Mitcham."

On 8th June 1950 the testator was discovered by his relatives in his home in bed in a debilitated and filthy condition. He was unable to recognise them or Dr. Lewis and his physical and mental condition was serious. His Honour found, and we completely agree with this finding, that on this date the testator did not have testamentary capacity. He was taken to the home of the Pettys where he remained for about three weeks and there, with care and proper food and attention, his physical condition rapidly improved. Shortly before he was taken ill negotiations had commenced for a Mrs. Boreham, whose husband had died in May 1950 and who desired to live at Box Hill but could not find a home, to keep house for the testator. Both she and the testator were members of the Church of Christ and they were brought together by the local Minister. These negotiations continued while the testator was convalescing with the Pettys and resulted in an arrangement being made on his behalf by them and his brother, Alfred Smith, whereby Mrs. Boreham and her two younger sons were to live in the testator's house and provide board for him and she was to be paid £2.10.0 a week for her services. Mrs. Boreham's father wanted her to have some security of tenure and a fictitious arrangement was negotiated between him on her behalf and the testator's family on his behalf and embodied in writing on the 19th June 1950, the purport of which was to make her a tenant of portion of the house in consideration of one shilling a week and the testator's board as rental "and excess in gas and electric over ordinary charges". The "lease" was to be terminated by three months' notice on either side. Mrs. Boreham moved into the testator's house on 26th June 1950 and the testator returned on that day or very shortly afterwards. On 6th July 1950 he signed an

authority for his brother, Alfred, to operate on his account at the E. S. & A. Bank so that the weekly payments of £2.10.0 could be regularly made to Mrs. Boreham. Three weeks later these payments were increased to £4. 0. 0 per week, this arrangement also being made on behalf of the testator by his family. The evidence as a whole indicates that the illness which the testator suffered at the beginning of June caused a further definite decline in his ability to manage his affairs, a decline of such a nature that all these arrangements for his future personal welfare had to be made and carried out by his family on his behalf. He still, no doubt, knew in a vague and indefinite way that he owned shares in companies, but it is obvious that the details had largely escaped him. He was just groping at his affairs and, without the help of his family in domestic matters and that of Nicholas and the new Bank Manager with respect to his shares, chaos would have quickly ensued. His bodily needs were well cared for by Mrs. Boreham. With company in the house and with a change of bedroom, he had lost his fear of communists and there is no doubt that he benefited greatly from the manner in which Mrs. Boreham ministered to his physical needs.

The local Minister of the Church of Christ in July and August 1950 was the Reverend Fitzgerald. He believed that his parishioners should provide for the church when making their testamentary dispositions. He was always ready to make a will for any of them for this purpose, and to produce the necessary form. About the middle of August 1950 he trained his testamentary guns on the testator. After a preliminary talk, he made more specific suggestions on 19th or 20th August 1950. The testator told him that he had left his property to the Hospital Board, meaning the local Box Hill Hospital. Fitzgerald suggested that he should consider his church and that a proper will for a testator to make would be to provide for his wife and children, then for his church and

anyone else in need as well as the Box Hill Hospital. The testator suggested that he should provide for Mrs. Boreham who would be in need of a home. Fitzgerald agreed with this and it was arranged that he should return in the afternoon of 21st August with a will form and make a will for the testator on these lines. The testator told him that he did not wish to go to Fulton, because Fulton was the Secretary of the Box Hill Hospital, and he and Nicholas had persuaded him to leave his property to that institution and would seek to prevent him altering his intentions. This conversation is cogent evidence of a serious lapse of memory on the part of the testator for the Box Hill Hospital was only one of ten institutions to which he had left his property by his previous will, and it was quite irrational on his part to believe that Fulton and Nicholas had persuaded him to leave his property to charity or that Fulton would not have taken his instructions to leave his property as he wished if he was satisfied that he had the capacity to make a will and had changed his testamentary intentions. As his Honour said, the testator made no mention to Fitzgerald of the arrangement he had made with his wife to leave his property to charity. He had apparently forgotten about this and that a number of charities were to share in his estate. Fitzgerald returned on the afternoon of 21st August to make the will and was told by the testator that he had been to another solicitor that morning, not Fulton, and had already made a will, leaving Fitzgerald with the belief that the new will followed the lines they had discussed.

The testator had not in fact made any will that morning. He had been to another solicitor, Mr. L. F. Russell, and had given instructions for a new will. Russell told him to return in a week's time when the will would be ready for execution. Unfortunately Russell died before the case came on for hearing and his evidence was not available. There is only the evidence of Mrs. Boreham as to what happened

on that day and Russell's notes of his instructions for the will. His Honour had the opportunity of observing Mrs. Boreham in the witness box for many hours and formed an unfavourable opinion of her trustworthiness as a witness. He was unable to accept her evidence of the critical events that took place on the morning of 21st August at its face value and said that he was thrown back on Russell's notes for this purpose. Mrs. Boreham said that the testator came into the kitchen in his best suit at eight o'clock in the morning and said he wanted to make a new will and wished to leave immediately to do so. She said he must have his breakfast first and that she would make an appointment. She said that she rang Fulton and made an appointment with him but the testator refused to go to Fulton. He said: "I thought you were going to take me to your solicitor". She said:"Mr. Fulton is your solicitor, is he not?" He said: "Yes, but he's Secretary of the new Hospital Board. He wouldn't let me change my will". She said: "Well, I have made an appointment". He said: Well, I am not going to him. Isn't there anybody else. I want to go to your solicitor." She said she then looked in the telephone book and just by chance found Russell's name and that she rang him up and made an appointment. She sent the testator to keep the appointment but he came back and said that he could not find Russell's office. She then drove the testator there in her car. Fulton said that no such appointment was ever made. Mrs. Boreham said in cross-examination that she had previously spoken to Russell several times on the telephone and it is probable that he got part of the information contained in his notes from her over the telephone. There is, we think, a great deal in the submission made by Mr. Voumard that before the testator arrived at Russell's office at all he had received instructions from her that she was to be the executrix and she was to be left the house.

Mr. Russell's notes read as follows:

"Instructions for Will of Samuel Smith, 792 Station Street Box Hill Retired Orchardist 21/8/50

For next Monday 28/2/50 at 2.30p.m.

Executrix Christina Maude Boreham Widow

House Ppty - 792 - Station St - Box Hill

Executor - Ronald James Boreham
792 Station St. Box Hill
Grocers Assistant

Whole Estate to Mrs. Boreham above
- Reason given - "She does everything for me and
- am very very grateful for her kindness to me -
- and I am very affectionately disposed to her boys
- also.

Leslie F. Russell Solicitor Box Hill - My relatives are comfortably situated - and in fact "got plenty" and - I have helped my nieces in the past with gifts - of money-"

Mrs. Boreham is sacrificing the best years of her wage earning life to my welfare.

House in Station St. - good block with house about £2000 64 x 140

E.S. & A.Bank
State Savings Bank
Mortgages - no Bonds
Shares in Companies through Nicholas
List in E.S. & A. Bank Bank Manager"

Reading these notes it is evident (1) that Russell was not told of the contents of the previous wills of the testator and the arrangement made with his wife to leave his property to charity; (2) that Mrs. Boreham had only been his housekeeper for seven weeks; (3) that Mrs. Boreham had become his housekeeper under an arrangement which she and her father were satisfied was beneficial to her; (4) that the testator had discussed a new will with Fitzgerald a day or two before and had expressed an intention to leave the home to Mrs. Boreham and then to leave the bulk of his property to the Church and to charity; (5) that his share holdings were worth £20,000. Mrs. Boreham herself says Russell was told the testator's property consisted of the home worth about £2,000 and a few shares. If Russell had been told these things, and in particular that the testator was a wealthy man worth

£25,000, and that his house was only a minor part of the estate, it is inconceivable that he would, without the most searching enquiries, have made a will for the testator leaving his whole fortune to a woman whom the testator had known for only seven weeks. Reading the notes one gathers the impression that Russell must have thought that Mrs. Boreham and her boys had lived with the testator for many years, for the notes say that she was sacrificing the best years of her wage earning life to his welfare – a fantastic statement to make with reference to a woman who had only lost her husband the previous May and who had only looked after the testator for seven weeks under an arrangement beneficial to both parties. There are no further notes by Russell of what occurred when the testator attended his office on 28th August and executed the will. But there is the evidence of Mrs. Boreham that she drove him to Russell's office, and that the same ground was covered again before the execution of the will.

In asking us to set aside his Honour's findings Mr. Smithers has indeed undertaken an onerous task. The question whether a testator has testamentary capacity is a question of fact, and on a question of fact a Court of appeal, whilst it is under an obligation to examine the whole of the evidence for itself, is subject to certain well known disadvantages in comparison with the trial judge who has the opportunity of seeing the witnesses and "observes, as we cannot observe, the drift and conduct of the case". The authorities are collected and discussed in Paterson v. Paterson (89 C.L.R. 212 at pp. 218-224). There can be no suggestion on this appeal that his Honour misdirected himself in law and, before a Court of appeal upsets a finding into which the credibility of witnesses enters, it should be convinced that the primary judge is wrong. In the present case we are certainly not convinced that his Honour's findings were wrong.

We are convinced that they were right. In Bull v. Fulton (66 C.L.R. 295 at p. 338) Williams J. said in a judgment in which Latham C.J. concurred: "Advancing age generally takes toll of some physical or mental attribute, however tough a person's constitution may be, and it has been recognized so often that it affects the faculty of memory that a will made by a person of advanced age is always carefully scrutinized by the court (Kinleside v. Harrison ((1818) 2 Phill. Ecc. 449, at p. 462 (161 E.R. 1196, at p. 1200)).

The proper approach of the Court to the question whether a testator has testamentary capacity is clear. Although proof that the will was properly executed is prima facie evidence of testamentary capacity, where the evidence as a whole is sufficient to throw a doubt upon the testator's competency, the Court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it or, if instructions for the will preceded its execution, when the instructions were given. Memory is the faculty which is peculiarly in question in the present case. The testator had a mind originally sound, but it had become weakened by age and illness without producing actual insanity. The testamentary capacity required by a person in this class is discussed at length in Banks v. Goodfellow (L.R. 5 Q.B. 549 at pp. 566 to 570). After referring to several decisions in the United States of America and to the decision of the Privy Council in Harwood v. Baker (3 Moo. P.C. 282) it was said: "From this language (that is of the Privy Council) it is to be inferred that the standard of capacity in cases of impaired mental power is, to use the words of the judgment, the capacity on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding". The onus lay on the appellant to satisfy his Honour that the testator had this

capacity, but there is nothing in Russell's notes to suggest that at the interview of 21st August the testator was able to remember the true extent of his property, or to recollect the provisions of his previous will or the arrangement that he had made with his wife. On the contrary the true inference would appear to be, not a negative conclusion that these pre-requisites to testamentary capacity were not proved, but a positive finding that all he could remember was that he owned the house and a few shares and that he thought that under his previous will, induced by Nicholas and Fulton, he had left all his property to the Box Hill Hospital. Every time that the memory of the testator can be tested by reliable evidence it is demonstrated that on 21st August 1950 he was unable to comprehend the extent of the property to be disposed of and the nature of the claims of those he was excluding. The only inference to be drawn from Russell's notes is that the testator had forgotten the extent of his property. According to Mrs. Boreham he told Russell that he owned the house and a few shares whereas he was a wealthy man worth £25,000. By altering his previous will and leaving his whole estate to Mrs. Boreham he clearly showed that he was unable to comprehend the claims of those he was excluding. If he had decided to leave none of his property to charity, notwithstanding his promise to his wife, he was then bound to compare the claims of his relatives upon his bounty with those of Mrs. Boreham and we think that he was unable to form a rational judgment on this matter. He had in his previous wills made after her death left legacies of £600 and £500 to members of his family. Mrs. Petty was bequeathed a legacy of £500 by the will of 26th April 1949. His brother and sisters may have had "plenty" but his nieces were not well off. He had not in any real sense helped his nieces in the past with gifts of money. He had made a gift of shares worth £120 to one of

them but he had given nothing to the other. They certainly had not got "plenty". His reference to Mrs. Boreham and her sons show that he had an utterly irrational idea of the extent to which he could possibly have benefited from any kindness Mrs. Boreham had shown him or of the extent of the affection he could possibly have acquired for her two sons in the short time that had elapsed since she had commenced to housekeep for him. It was quite untrue that she did everything for him. Her family were doing quite a lot and so was Nicholas who prepared his income tax returns and the new manager of the bank who helped him with his share problems. He was not merely grateful for her kindness to him, he was "very very grateful". The evidence as a whole, and in particular Russell's notes, paint a picture of an old man in the twilight of his life suffering from senile decay and from a serious impairment of his intellect. The will itself leaving the whole of his property to Mrs. Boreham was, in the circumstances, as irrational as any will could be.

The appeal should be dismissed with costs.