**Supreme Court of Canada**
**Magdall v. The King, [1921] 62 S.C.R. 88**
**Date: 1914-02-23**

John Magdall Appellant;

and

His Majesty The King Respondent.

1920, June 21.

Present: Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

*Criminal law—Seduction under promise of marriage—Previous illicit connection—Previous chastity of complainant—Findings of the jury—Arts. 210, 212, 1002, 1140 Cr. C.*

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta[1], dismissing, on equal division of the court, the appeal by the appellant from the refusal of Simmons J., at the trial with a jury, to reserve a case for the opinion of the Appellate Division.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

*W. F. O'Connor K.C.* for the appellant. *W. L. Scott* for the respondent.

THE CHIEF JUSTICE.—This was an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta which, on an equal division of opinion, refused to quash a conviction against the appellant prisoner under section 212 of the Criminal Code for having, under promise of marriage, seduced and had illicit connection on or about the 27th day of March, 1919, with one Mary Kovack, an unmarried female under the age of 21 years.

Two questions only were raised and argued at bar : one, whether the evidence of Mary Kovack, the female in question, was corroborated or not; and the other, whether she was at the time of the alleged offence of previously chaste character.

After hearing Mr. O'Connor, counsel for the appellant, on the question of corroboration, we were unanimously of the opinion that there was sufficient evidence of corroboration, and Mr. Scott was not called on to reply on that point.

The second question raised a much more delicate and difficult point: Was the jury justified in not finding the complainant Mary Kovack, at the time of the illicit connection of the 27th March between her and the prisoner, a girl of previously unchaste character?

The material facts necessary to reach a conclusion on that point are fully set in the learned judge's reasons given in the Appellate Division (1). The

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[1] 15 Alta. L.R. 313; [1920] 2 W.W.R. 251.

As to the signature of the witnesses at the request of the testator, undoubtedly this is a requirement of article 851 C.C., although it is not mentioned in the English Wills Act, 1 Vict., ch. 26, from which article 851 C.C. is derived. But it is to be remarked that when the will is signed or marked by another person than the testator, article 851 requires the *"express* direction" of the testator, while with regard to the signature of the witnesses at the request of the testator, nothing is said as to the form of this request. In my opinion, inasmuch as the legislature, in speaking of the direction or request of the testator, requires it to be expressed in one case and not in the other, it follows that this request can, in the latter case, be implied by reason of the circumstances surrounding the execution of the will. Here Mellor testified that Mrs. Wynne, when the witnesses and she had walked right up to the bed, asked them if they would be witnesses and put their signatures on the will, and that she said this aloud to both of them. The request she thus made to James and Mellor must have been heard by Wynne, who then signed the will and saw or could see the witnesses sign it in his presence. In my opinion, but I say this with every deference for the majority of the learned judges of the Court of King's Bench who thought otherwise, it would be pushing formalism too far to reject this will for the lack of an expressed request of the testator to the witnesses, and the more so as this is an essentially simple and popular form of will, which undoubtedly the legislature desired to render as easy as possible to the least educated of the population.

If it be contended that Mrs. Wynne who went for the witnesses and asked them to attest the will, had no mandate from Wynne to do so, I would answer

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that evidently no express mandate was required. And the question really is whether Wynne intended to make a will and dispose in favour Of his wife, and unless Mrs. Wynne's testimony be discredited, I must find that he did. The obtaining of witnesses, although essential, was not, under the circumstances disclosed by the evidence, a matter requiring any kind of mandate from the testator, for if we must take it as established that he wished to make a will, getting the witnesses necessary for the validity of the will was merely carrying out his desire.

It may be that this will is quite near to the danger point, but after full consideration I find myself unable to set it aside and nullify the very natural and reasonable disposition which Wynne made of his property, for he and his wife had been long married and had no children. Of course, Tuck's affidavit in support of the probate was untrue, as he did not see

Wynne sign the will, although he probably could identify his signature. But nothing would now be gained by annulling the probate, for the testimony of James and Mellor shews that Wynne really signed the will. And, in my opinion, the attack on the will itself fails.

I would therefore allow the appeal with costs here and in the Court of King's Bench and restore the judgment of the learned trial judge.

*Appeal allowed with costs.*

*Solicitor for the appellant: W. F. Ritchie.*

*Solicitors for the respondent: Elliott & David.*