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*Feb. 7, 8, 9.
*April 25.

IN THE MATTER OF THE ESTATE OF ALBINA POIRIER, DECEASED.

YVETTE LEGER AND JOSEPH ADRIEN MICHAUD ..... } APPELLANTS;

AND

HECTOR POIRIER ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Will—Validity—Testamentary capacity—Onus of proof.

Held, that a document propounded for probate as a deceased's last will should be declared not to be her last will, because it did not satisfactorily appear that it was executed by a competent textatrix. (Judgment of the Supreme Court of New Brunswick, Appeal Division, 17 M.P.R. 147, which, by a majority, had affirmed judgment in the Probate Court admitting the document to probate, reversed.)

Per the Chief Justice and Kerwin, Taschereau and Rand JJ.: Facts in evidence cast on the whole case such a doubt of the competency of the testatrix as required the Court to say that the onus of showing the document to be the will of a "free and capable" person had not been met.

There may be testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory"

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like. Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this was not present here.

Per Hudson J.: Once testamentary capacity is called in question, the onus lies on those propounding a will to affirm positively the testamentary capacity (*Robins* v. *National Trust Co.*, [1927] A.C. 515, at 519). The trial Judge's decision was on the assumption that the onus was on those attacking the will, and in this (on the issue of testamentary capacity) he was mistaken. In view of that mistake and of the doubts he expressed in reaching his conclusion, the rule, suggested from decisions in this Court, against disturbing concurrent findings of fact in the courts below did not apply, and it was the duty of this Court to review the evidence and come to its own conclusion, subject, of course, to the normal weight to be given to the trial Judge's findings and to the opinions of the Judges in appeal. On the evidence, the deceased's mental capacity at relevant times was open to some doubt, and the rule is that wherever a will is prepared and executed under circumstances which raise the suspicion of the court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the court that the testator knew and approved the contents of the instrument. (Hudson J. expressed "some hesitation" in his conclusion against validity of the will. Also, dealing with the issue of undue influence, he pointed out that the onus was on those asserting undue influence, and held that the findings below that undue influence had not been proved should not be disturbed.)

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), dismissing (Fairweather J. dissenting) the present appellants' appeal from the judgment of the Honourable Edward G. Byrne, Judge of Probate for the County of Gloucester, admitting to probate the document propounded as the last will and testament of Albina Poirier, late of Bathurst, New Brunswick, deceased, in proceedings taken (in view of caveat filed on behalf of the present appellants) by the present respondent, the executor appointed by the said document, to have the same proved in solemn form. The main grounds alleged against validity of the document as a will were testamentary incapacity and undue influence.

J. F. H. Teed K.C. for the appellants.

C. T. Richard for the respondent.

(1) 17 M.P.R. 147.

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The judgment of the Chief Justice and Kerwin, Taschereau and Rand JJ. was delivered by

RAND J.—This is an appeal from a judgment of the Supreme Court of New Brunswick, Fairweather J. dissenting, affirming the finding of the Probate Court of Gloucester County that the document propounded for probate by the respondent was the last will of Albina Poirier. The probate was opposed by two grandchildren, the appellants, children of a deceased daughter, and the grounds were undue influence on the part of a son, the respondent, and incompetency.

The testatrix at the time of executing the document, November 21st, 1941, was about seventy-nine years of age. Her husband had been a merchant in Bathurst and from the time of his death in 1918 she continued the business until 1935 or 1936 when it was transferred to the son. She had been a vigorous and capable woman but in the fall of 1941 her health began to fail rapidly, ending in her death on March 2nd, 1942. The instrument was prepared by a solicitor, Mr. Robichaud, and he states that at the time she was in a very feeble condition.

From the spring of 1939 until her death, her home was occupied by her son with his wife and family. The number of the children is not given but the family is described as large. In August, 1941, it was thought necessary to have someone in attendance to help the deceased look after herself and get about the house, and a young grandniece, Rose Gosselin, was engaged who remained until some time in January, 1942. She was a bright girl of over seventeen years who, through close association, probably had a better opportunity than any other person to observe the actual state and progress of the mother.

This girl tells us that, from September until she left, in spite of the mother's protests, the front door of the home was kept locked and the key retained by the son or his wife. Persons calling to see the mother were admitted only after they had passed the scrutiny of the one or the other. Both the wife of the appellant grandson and a Mrs. Lasnier, who had been brought up in the family, were told by the mother to enter the house by the back door and to go upstairs to her room without regard to the family below. On at least two occasions the son showed such anger and hostility to their visiting as to order them

out of the house. In the spring of 1939 he had done that to Mrs. Lasnier at the time of a short visit but, on the mother's plea, she had remained. These two young women were both thoughtful and considerate of the older woman who had for them a cordial regard; but to the son, particularly in the later stages, obsessed with a determination to control his mother's property, they appeared as if bent on frustrating him. So far as the evidence goes, such a notion was utterly groundless. All of this conduct, of course, was with reference to a home, not of his own, but of his mother's. That she desired to live alone is beyond doubt. She had spoken to a Father McKenna about it. She disliked the son's wife. In August, 1941, she had consulted Robichaud as to means by which the family could be forced out. Later, she protested to the son that he must go away, that the children bothered her and she wanted to be alone; but to no purpose.

On the morning of November 21st, 1941, the son arranged with Robichaud to come to the home and prepare a will, but it does not appear who raised the matter in the first instance. In the afternoon, before Robichaud arrived, he had a conversation with his mother. The Gosselin girl was present part of the time and what was said is of much importance. She recounts the colloquy in which the mother's words were drawn out by the questions of the son:

He came and talked to her before Mr. Robichaud came how she was going to fix her affairs. . . . He asked her how much money she wanted to give.

* * *

Q. What were the first words he told her that you do remember?
A. "How do you want to fix that?"
Q. What did Mrs. Poirier say?
A. She didn't talk.
Q. Did Mrs. Poirier repeat anything that Hector had said to her?
A. Yes. When he asked her "How do you want to fix that?", she repeated that.
Q. The exact words?
A. Yes.
Q. Did she do that often, repeat the exact words?
A. She nearly always repeated.

* * *

Q. What did she say?
A. She repeated what he said, "What do you want to do? You want to give $2,000 to Adrien, $2,000 to Yvette?"

* * *

Q. After she repeated these words to Hector, what did Hector say?
A. Hector spoke next. Hector said "You want to give $2,000 to Adrien, $2,000 to Yvette." Mrs. Poirier would repeat behind what he said.

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COURT: Just what words did she say?

A. She repeated the same thing, "$2,000 to Adrien, $2,000 to Yvette." That's what Mrs. Poirier said. "You want to give $2,000 to Adrien." She repeated the same thing for Yvette. "2,000 for Adrien, $2,000 for Yvette."

* * *

Q. Now what conversation was said after that?

A. About the house. Hector said, "The house, to whom do you want to give it?" She said, "The house, I want to give it to Yvette."

Q. Next?

A. He said, "You don't want to give it to Marcelle?"

Q. Who is Marcelle?

A. The oldest girl at Hector Poirier's.

Q. What did she say to that?

A. She said "Give the house to Marcelle? No."

Q. What was said next?

A. Hector said "Give it to me."

Q. What did she say?

A. She said "No."

Q. Then what?

A. Then I went away.

Q. How did Hector address her, calmly?

A. Yes.

Q. Did that change?

A. Yes, when she wouldn't give him the house.

Q. Did Hector get angry?

A. He was not in good humour.

Shortly after three o'clock Robichaud was shown upstairs by the son who remained in his mother's presence at least until the gifts of $2,000 were mentioned. He told the granddaughter, Mrs. Yvette Leger, when the will was produced by him to be read, that he did not know its contents: but a letter to Mrs. Lasnier of December 1st in evidence, the fact that the document had been handed to him by Robichaud following its execution, and his complete assumption of authority over his mother's affairs thereafter, refute that statement.

Now, the mother had made a will in 1939 in which the son was bequeathed $2,000, the grandson $5,000, and the residue, less a small bequest for masses, left to the granddaughter. The executors were the last named and a Father Robichaud. This distribution was repeated in another drawn in 1940 in which a Father Poirier was named executor, the circumstances of the execution of which, however, on the objection of the respondent, were not allowed to be proven. Father McKenna, who drew both wills, says, apropos of having a lawyer, that she seemed "to have some kind of fear of lawyers and implicit faith in the clergy".

The first of these instruments was executed in the home of the grandson. The will of 1941, of an estate of approximately $24,000, gave to each of the grandchildren $2,000 and, with a provision of $300 for masses, the residue to the son. This gives the latter about $17,500 more than he would receive under the prior instruments.

Apparently the will of 1940 was kept in a locked satchel, the key of which was carried by the mother in a small bag. Some time in October the Gosselin girl got it for the mother who kept it for a week or so and then had it locked up again. About the 14th of November, a date remembered by the girl in relation to wages due on the 13th which the mother, for the first time, forgot to pay, the small bag, in which money also was kept, disappeared. On the next day, when the loss was noticed, the mother, as she then so often did, began to cry. The girl went to Hector about it. He told her the bag had been dropped into the toilet from which he had recovered it and that he had put it in the safe in the store where it would remain. Whether the explanation given was true or not there is no way of deciding. This incident is clearly recalled by the girl as happening after the mother's mind and memory had become seriously weakened, from the effect of which her habits and controls, even as to natural functions, had become disorganized: and as the date is not disputed, it becomes a most material circumstance in her story. The satchel remained in the house and beyond doubt came into the possession of the son, but we know nothing more of its contents. This concurrence of circumstances, in which the son comes into the control of the satchel containing the will and a new document appears within a week, while the mother is in or approaching a critical stage of illness, is too striking to be quite disregarded.

The mother had visited Yvette in Ottawa in 1940 and had written the granddaughter if she might spend the winter of 1941-42 with her, but later on decided she was not well enough to travel so far and would have to put the visit off. There is no doubt of the affectionate regard in which she held the granddaughter: and on several occasions, when alone with the Gosselin girl, she had remarked that her "property" was "for Yvette".

The grandson had enlisted in 1940 and left Halifax for overseas on July 21st, 1941. About a week before this

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departure, his grandmother had visited him at Sussex, New Brunswick, in camp there and what passed between them can best be given in his words:

> Yes, when my grandmother was down to see me in Sussex, we were left alone about an hour and my wife and my mother-in-law were away. My grandmother mentioned at the time that even if I were going overseas, that she was looking after my family in spite of the fact that I mightn't return from overseas. She told me that she was leaving me $5,000. The way the conversation led to that was that she asked me if there was anything she could do for me and I mentioned the fact that I would be very glad if she would keep an eye on my family. It was a young family and anything she could do to help them out would be very much appreciated by myself. That led to her statement, saying she was leaving me $5,000 in her will.

In 1935 or 1936 the mother had conveyed to the son the land adjoining her home on which the store building stood, with, so far as the evidence goes, the business carried on in it. There is nothing in the case to indicate what the value of this property was.

The deceased had been attended by Dr. Coffyn and during either November or the early part of December suffered a nervous disturbance which brought about a severe mental confusion. There are documents in evidence which purport to record visits on November 25th and December 3rd and he fixes the latter as the date of the minor stroke; but admittedly this was only his recollection of the occurrence in May, 1942. Admittedly, too, none of the documents brought forward by him were originals; they were said to be copies made in May, 1942, or later after the controversy had arisen; and the trial judge was quite justified in declining to place any reliance in them whatever. His comment, too, that "this witness displayed, in my opinion, some of those attributes of advocacy which, however unconscious, are not wholly devoid of partiality", was quite warranted. On the 15th of December, Mrs. Michaud, wife of the grandson, after having had almost to force her way into the house, found the mother dishevelled, "terribly failed", helpless in mind and body. Around Christmas Mrs. Leger paid a hurried visit to Bathurst but the son had given orders before she arrived that she was not to be left alone at any time with her grandmother and she was not. Mrs. Poirier was at the height of her confusion at this time and it is doubtful if she recognized the granddaughter. Later on, in January, when it is claimed she was somewhat improved, the son paid the

Gosselin girl off before the month was up, ostensibly on the ground that his mother was then able to look after herself. Toward the end of February a more severe paralysis set in, from the effects of which she died in a few days.

Now, although the condition of the mother in August and September was fair, there is no doubt of marked deterioration as the fall wore on. The girl stresses the loss of memory, loss of initiative, a disintegration of habits, inability to carry on conversation, childishness, a tendency to repetition of words addressed to her, and apathy; "she would ask us something that had no sense. If we refused her she would cry"; "we would talk to her and she wouldn't answer". The girl tells us also that the failure of memory was commented on by the son's wife in connection with a remark, made by the latter, that the mother had asked the son "to make her will", but whether before or after November 21st is not clear. Neither is it wholly clear whether the marked change in memory, insisted upon by the Gosselin girl as taking place before the making of the will, was a result of the minor nervous seizure, "not exactly a stroke, although her face was twisted and her tongue refused to talk properly", as Dr. Coffyn puts it. Some time in November she presented a "glassy stare" to the wife of the grandson. No doubt to some degree she could be aroused but the picture is clear of a pronounced declension in her physical and mental condition. Although Dr. Coffyn spoke of "visits that I cannot remember the dates" of in November, his records show only one attendance. In any event, he would be concerned chiefly with questions as to which memory would play little, if any, part:

> When I talked to her about her own condition, she was able to answer me perfectly straightforward.

He was asked to comment on the following question and answer in the evidence of Rose Gosselin:

> Q. I am going to read you part of the evidence given by Rose Gosselin. "Can you place the date when you first noticed any material change in her mental condition?" (Page 78). She replies "About the beginning of November, I think." Is that correct?
>
> A. Not as far as my recollection goes.

The veracity of this girl, the chief witness to the essential facts, is conceded; the only challenge is as to the accuracy of her recollection of the precise time when the breakdown in memory took place. But the fact on which she was

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most emphatic was that that collapse preceded the will; she felt the elderly lady was being put to something beyond her condition; "she had no commonsense in November".

Now, we know the intentions of this woman as to the disposition of her property at a time when she was in good health and able to look after her own affairs, and that those intentions, so far as the evidence discloses them, continued up to the day of signing the impeached will. Although the solicitor knew of her relatives, he made no enquiries of any sort regarding them, or her property, or an existing will. His opportunity to judge of her memory was of the most limited kind. According to the second witness, Meahan, throughout the time he was present, during which the will was read aloud and executed, not a word was uttered by Mrs. Poirier and she was unable to sign her name to the document.

These facts cast on the whole case such a doubt of the competency of the testatrix as, in my opinion, requires us to say that the onus of showing the document to be the will of a "free and capable" person has not been met. The direct evidence of Rose Gosselin remains uncontradicted by either of the only persons actually in a position to do it, the son and his wife. Neither took the stand; and the sudden and radical reversal of benefits remains unexplained, save by the state of mind and memory portrayed by the girl.

The findings of the trial judge on the point of capacity are neither clear nor satisfactory. He says:

> The proponents of the Will at the time this case was tried, must have realized that the evidence was confusing and I find it hard to understand why other evidence was not adduced by the proponents, for certainly these people living with the testatrix and who were in association with her on the day that the Will was made should be in a position to state facts concerning the conversation, actions and doings of the testatrix on the day that the Will was made, which would have been of great value.
>
> After considering all of the evidence and having in mind my observations as to the partiality of certain witnesses in the matter, it is very difficult to arrive at a conclusion. I am satisfied, however, that prior to the making of the Will, the testatrix at times did not have her normal mental faculties and further I am satisfied that for some time prior to the making of the Will, her mental faculties were more impaired than would be normal for a woman of her age and I am accepting the testimony of Dr. Baxter and also of Dr. Coffyn that she was suffering from senile dementia. In saying this, however, I am not overlooking the fact that the testatrix could have and may have enjoyed what is known as a lucid interval on the date that the Will was made and further, in spite

of the fact that her normal mental faculties were impaired, I am not prepared to say that the testatrix did not have sufficient mental capacity to make a Will on the 21st November, 1941, for even though her mentality could not be considered normal, she still could have had sufficient powers of mind to make a valid will.

He then proceeds to examine the question whether the proponents of the will had adduced preponderating evidence that there was sufficient testamentary capacity when the instructions were given and he concludes:

> And I come to a very dubious conclusion based not only on the evidence of the witnesses, but also on the examination of the will itself which is in evidence and having in mind that the testatrix has executed what is apparently on its face a normal will, that the weight of evidence is slightly in favour of the proponents. But, as I say, it is dubious. Because of this, I am prepared to admit the will to probate, but it is with doubt that I do so.

Throughout the trial he seemed to labour under the impression either that the prior wills and other evidences of intention were irrelevant or that they could be proved only by means that seemingly were not open to the appellants. He had previously stated that the evidence brought forward by the appellants had "not satisfied the onus placed on them of proving conclusively that the testatrix was unduly influenced".

Now, in the majority judgment below, it is clear that both Baxter C.J. and Grimmer J. were powerfully influenced by the view that a pronouncement against the will necessarily involved a reflection upon the integrity of Robichaud, which was repelled by both his standing as a solicitor and the finding of the trial judge. But there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; this has been recognized in many cases:

Marsh v. *Tyrrell and Harding* (1):

> It is a great but not an uncommon error to suppose that because a person can understand a question put to him, and can give a rational

(1) (1828) 2 Hagg. Ecc. R. 84, at 122.

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answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.

Quoting from the *Marquess of Winchester's Case* (2), Sir John Nicholl adds:

> By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

Murphy v. *Lamphier* (3):

> Again the words of Sir John Nicholl are apposite: "To support a paper thus revoking and altering this will and substituting a disposition quite different from and the very opposite to it, would require the clearest and most indisputable evidence": *Dodge* v. *Meach* (4).

Menzies v. *White* (5).

Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole, and this I am satisfied was not present here.

I would, therefore, allow the appeal and direct that the judgment of the Probate Court be reversed and the document propounded be declared to be not the last will of the deceased. Because of special circumstances surrounding the controversy, however, all costs should be out of the estate.

HUDSON J.—This is a contest as to the validity of the will of Albina Poirier, deceased.

The due execution of the will is now conceded but it is claimed on behalf of the appellants that such execution was secured by undue influence of the respondent and that the testatrix lacked mental capacity at the time the will was executed.

The deceased left an estate of an estimated value of $24,000. By the will each of the appellants was given a legacy of $2,000 and the residue was bequeathed to the respondent with a direction that he should pay $300 to have masses offered for the repose of the testatrix's soul.

(2) 6 Coke's Rep. 23.
(3) (1914) 31 Ont. L.R. 287, at 308.
(4) (1828) 1 Hagg. Ecc. 612, 617.
(5) (1862) 9 Gr. 574.

The respondent was a son and the sole surviving child of the deceased. The appellants were her grandchildren, whose mother was the daughter of the deceased and who had died some years previously. These beneficiaries were the only surviving descendants of the deceased, except a large family of the respondent to whom nothing was bequeathed.

The provisions of the will do not in themselves raise any suspicion, much less a presumption of either undue influence or mental incapacity.

On the issue of undue influence, the learned trial Judge held:

> Although, as I say, I am not quite satisfied that the testatrix was not unduly influenced, I am satisfied that by the evidence adduced the opponents of the will have not satisfied the onus placed on them of proving conclusively that the testatrix was unduly influenced and on this ground the will should be admitted to probate.

This finding was affirmed by a majority of the learned Judges in appeal.

On the issue of mental incapacity, the learned trial Judge found as follows:

> After considering all of the evidence and having in mind my observations as to the partiality of certain witnesses in the matter, it is very difficult to arrive at a conclusion. I am satisfied, however, that prior to the making of the will, the testatrix at times did not have her normal mental faculties and further I am satisfied that for some time prior to the making of the will, her mental faculties were more impaired than would be normal for a woman of her age and I am accepting the testimony of Dr. Baxter and also of Dr. Coffyn that she was suffering from senile dementia. In saying this, however, I am not overlooking the fact that the testatrix could have and may have enjoyed what is known as a lucid interval on the date that the will was made and further, in spite of the fact that her normal mental faculties were impaired, I am not prepared to say that the testatrix did not have sufficient mental capacity to make a will on the 21st November, 1941, for even though her mentality could not be considered normal, she still could have had sufficient powers of mind to make a valid will.

A majority of the Court of Appeal affirmed the decision of the trial Judge. Chief Justice Baxter said:

> I have no hesitation in coming to the conclusion that the testatrix was competent to make her will at the time it was executed.

Mr. Justice Grimmer said:

> There is in my opinion evidence to sustain the judgment which I think should have been rendered without the least hesitation.

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It is suggested on behalf of the respondent that there were concurrent findings of fact and that by a long series of decisions of this Court it is now well settled that such findings should not be disturbed.

In respect of the finding as to undue influence, I would say at once that if that stood alone the Court would, in my opinion, not be justified in disturbing the judgment. The onus on the issue of undue influence is clearly on those who assert it. *Craig* v. *Lamoureux* (1), and in the case of *Robins* v. *National Trust Company* (2), Viscount Dunedin after discussing the onus in the case of a charge of mental incapacity proceeds, at p. 522:

> No question of this sort arises as to the procuring of the will by fraud or undue influence, because it is admitted that in that case the onus is always on the person who attacks the will.

On the second ground, however, that of mental incapacity, the situation is different. The learned trial Judge came to his conclusion because he assumed that the onus was on the appellants. In this I think he was mistaken. The authorities on the point are numerous. In the above-mentioned case of *Robins* v. *National Trust Company* (2), Viscount Dunedin states at page 519:

> Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity.

It was also stated by Viscount Dunedin in the same case at page 518, in regard to the rule of concurrent findings of fact:

> If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all.

In view of the doubts expressed by the trial Judge and his mistake as to the onus, it would seem that the rule of concurrent findings does not apply and that it is the duty of this Court to review the evidence and come to its own conclusion, subject, of course, to the normal weight to be given to the findings of the trial Judge and the opinion of

(1) [1920] A.C. 349. (2) [1927] A.C. 515.

the learned Judges in appeal. In this instance the findings of the trial Judge really conflict with his conclusion. On the other hand, Chief Justice Baxter and Mr. Justice Grimmer on appeal had no hesitation in concluding on the evidence that the testatrix had mental capacity. Mr. Justice Fairweather dissented and came to an opposite conclusion.

I was much impressed by the careful analysis of the evidence by Chief Justice Baxter, but an anxious perusal of the whole evidence has led me to the conclusion that the mental capacity of the deceased at relevant times was open to some doubt and, as said in *Tyrrell* v. *Painton* (1), the true rule is that wherever a will is prepared and executed under circumstances which raise the suspicion of the court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the court that the testator knew and approved the contents of the instrument.

In the present case the respondent, with whom the deceased was then living, was in the house at the time the will was prepared and executed. He was the chief beneficiary under and the proponent of the will in these proceedings but he was not called as a witness and no explanation was offered for his failure to testify. For these reasons and with some hesitation I conclude that the appeal should be allowed.

As both courts below have found in favour of the will and as, in my view, the charge of undue influence against the respondent fails, I think the costs of all parties should be paid out of the estate.

Appeal allowed. All costs to be paid out of the estate.

Solicitors for the appellants: *Friel & Friel.*

Solicitor for the respondent: *C. T. Richard.*

(1) [1894] Probate 151.