IN THE MATTER OF THE ESTATE OF JAMES OUDERKIRK, DECEASED

1936

* March 16.
* March 31.

ELLEN JANE OUDERKIRK AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

BERNICE GRANT OUDERKIRK AND WATSON OUDERKIRK (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Will—Testamentary capacity—Insane delusions.*

In deciding whether or not a testator at the time of making his will was influenced by insane delusions to which it is shown he had been subject, all the circumstances of the case must be considered. In the present case it was *held* (reversing the judgment of the Court of Appeal for Ontario and restoring the judgment of the Surrogate Court Judge at trial), on the evidence, that, at the time of the making of the will, the delusions, which were as to the character and conduct of the testator's wife, were present and affected the testator's mind so that he could not rationally take into consideration the interest of his wife; and therefore he lacked the capacity to make a will and the will should not be admitted to probate.

The law on the subject discussed; *Banks* v. *Goodfellow,* L.R. 5 Q.B. 549, *Boughton* v. *Knight,* 3 P. & D. 64, and other cases, referred to.

APPEAL from the judgment of the Court of Appeal for Ontario which reversed the judgment of His Honour F. T. Costello, Esquire, Judge of the Surrogate Court of the United Counties of Dundas, Stormont and Glengarry, who found that at the time of the execution of the will in question the testator was labouring under delusions as to the character and conduct of his wife; that such delusions were fantastic and preposterous and would affect the making of the will; that therefore the testator was not of sound and disposing mind at the time the will was made; and ordered that the will be not admitted to probate. On appeal the Court of Appeal (without written reasons) allowed the appeal and directed that probate be granted.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed and the judgment of the Surrogate Court Judge restored.

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.

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*R. Danis K.C.* for the appellants.

*R. P. Milligan* for the respondent Bernice Grant Ouderkirk.

*J. M. Baird K.C.* for the Official Guardian (representing infant defendants).

The judgment of the court was delivered by

KERWIN J.—The learned Surrogate Court judge directed that the will in question be not admitted to probate for the following reasons:—

> I find that before, at the time, and after the execution of the will, the deceased was labouring under delusions. These delusions were to the effect that his wife was an immoral character, and that she was entertaining men for immoral purposes. His wife, Ellen Jane Ouderkirk, was at the time about seventy years of age. She had borne him eleven children, the youngest of whom was over twenty-one, and the evidence was that she had lived a moral and respectable life.
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> His ideas produced such delusions as were fantastic and preposterous. These delusions would affect the making of the will, and although some provision was made for his wife's maintenance, I consider that the provisions of the will show that he was influenced by such insane delusions.
>
> I find, therefore, that the deceased was not of sound and disposing mind at the time the will was made, and I therefore order that the will be not admitted to probate.

The one plaintiff executor who was actively concerned in propounding the will, appealed to the Court of Appeal for Ontario, and we were informed that that Court at the conclusion of the argument allowed the appeal, but we have not the benefit of the reasons for that judgment. We, therefore, found it necessary to examine the evidence at the trial critically.

The will in question was executed October 18th, 1932. The evidence is overwhelming that the testator did have delusions as to his wife from some time in the year 1928. Dr. Gormley, the family physician, states definitely that he observed them on April 28th of that year, and the evidence indicates that it was because some members of the family noticed these manifestations somewhat earlier, that the doctor was consulted. At that time he was prepared to certify that the man should be sent to an asylum but that was not done as the family decided not to remove him from his home.

The more difficult question that arises is whether these delusions "*were of such a character that they could not reasonably be supposed to affect the disposition of his*

*property."* The leading case on the subject is *Banks* v. *Goodfellow* (1). There are two subsequent cases which are of interest as they contain the relevant parts of charges to juries by the President of the Probate Division, Sir James Hannen, who had been a member of the very strong Court that heard the appeal in the Queen's Bench in *Banks* v. *Goodfellow* (1). The words italicized are taken from his charge to the jury in *Smee* v. *Smee* (2), and the other case to which I have referred is *Boughton* v. *Knight* (3). On page 74 of this latter report, the President quotes and applies the following passage in the judgment of Lord Chief Justice Cockburn in *Banks* v. *Goodfellow* (1):

> It is essential to the exercise of such a power (of making a will) that a testator shall understand the nature of the act, and its effects; 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, and with a view to the latter object that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease, if insane suspicion or aversion take the place of natural affection, if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence, in such a case it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand.

At page 75, after dealing with the evidence in the case before him he charges the jury:—

> It is for you to say whether the accumulation of this evidence (for the defendants) has not this effect on your minds that it leads you to the conclusion that, whatever fluctuation there may have been in the condition of Mr. Knight's mind, for some years before he made this will he had been subject to delusions, especially in reference to the character, the intention, and the motives of his son's acts; and if you so find, then I must impress upon you that it becomes the duty of the plaintiffs to satisfy you that at the time the testator made the will he was free from those delusions, or free from their influence.

The law on this subject is well understood, but difficulties may arise in applying it, as is indicated by the vigorous dissenting judgment of Mr. Justice Sedgewick in *Skinner* v. *Farquharson* (4). There the majority of the members of the Court, who had heard the re-argument, and who

(1) (1870) L.R. 5 Q.B. 549.
(2) (1879) 5 Pro. D. 84.
(3) (1873) 3 P. & D. 64.
(4) (1902) 32 Can. S.C.R. 58.

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were living at the time judgment was given, reversed the decision of the Supreme Court of Nova Scotia and restored the judgment of the trial judge. The testator in that case had by an earlier will provided for his wife and son. Prior to the execution of the later will which was in question, he, to quote the head-note, "had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house and treated his wife with violence." By the later will he reduced the provision for his wife and it was held, again quoting the head-note, "that the provision made by the will for testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the belief that when it was executed the testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them and the will was therefore valid."

All the circumstances of each case must be considered, and in the present appeal we have come to the conclusion that the delusions were present on October 18th, 1932, the date of the making of the will, and that they did affect the testator's mind so that he could not rationally take into consideration the interest of his wife.

The solicitor who drew the will and who had known the testator for some years testified that he noticed nothing abnormal about the man, but he had never heard of the suggestion in 1928 that the testator be sent to the asylum nor had he heard of the delusions from which the man suffered since that time. It is true that the solicitor's recollection was that the testator mentioned some family trouble but the reference must have been of a fleeting character since it left no impression upon the mind or memory of the solicitor. The reference which, according to the solicitor, the testator made to his wife's age, and "that he wanted to provide a home for her where she would be taken care of in her old days, and he seemed to have it in his own mind that he was making a better provision for her now than he had formerly made for her" does not affect the matter, as that involves a comparison of the testator's mental condition at the time the previous will was executed and at the date of execution of the will in question; and at the trial the question of the probating

of the earlier will in these proceedings was abandoned. The testator was examined by a doctor on October 18th, 1932, but merely for some physical ailment, and while that doctor did not consider that Ouderkirk was incompetent to do business, he did not have present to his mind the question now under investigation. Similarly with Dr. McLeod, who saw Ouderkirk in March and April of 1932. It is true there is evidence called by the propounding executor that several merchants saw him from time to time and considered that he was quite capable of doing business and others called by the executor considered that the man was normal. This negative evidence, however, cannot prevail against the evidence of Dr. Gormley and Eliza McLeod, a daughter of the testator.

Dr. Gormley did not see Ouderkirk the day the will was made and had not seen him possibly for several weeks, but he was quite definite in his opinion as to the permanency of the delusions, and his evidence is not weakened, in our view, by his statement that when Ouderkirk was to undergo an operation the witness suggested that he arrange his affairs; as the doctor admitted, that implied the making of a will, but he stated that he should not have said that to the patient under the circumstances.

Eliza McLeod saw her father at her home in Cornwall on the day in question both before and after the will was executed, and on each occasion her father by his language showed that he was still labouring under the delusions with reference to his wife. It is not remarkable that he did not mention these to the solicitor since he went to the latter's office with notes for a will prepared by another witness. This witness, Hutt, called by the plaintiff, did not notice anything about the testator different from any other time he had seen him, but did consider strange the provision which the testator desired to be inserted in his will as to the burial of his wife, and also the provision of $5 a year for her. According to the evidence of the widow, the testator had a family plot in the cemetery and no one is buried there except himself, but despite this, the will provides for the burial of the body of the wife in a separate burial plot. This manifestation of the man's delusion as to his wife is on a par with what is indicated by the evidence of Eliza McLeod and Roy Casselman to the effect that some

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years before (Casselman fixes it about 1930), Ouderkirk told these two witnesses that after his death his picture in the house was to be taken down so as not to be near the picture of his wife whom he at that time described in terms similar to those used by him on other occasions.

We are clearly of opinion that these delusions did affect the mind of the testator to such an extent, and at the relevant time, that he was unable to make the will, and the appeal will, therefore, be allowed and the judgment of the Surrogate Court judge restored. The respondent Bernice Grant Ouderkirk must pay the costs of the appeal to this Court, but we do not interfere with the disposition made by the Court of Appeal for Ontario of the costs of the appeal to that Court.

*Appeal allowed with costs.*

Solicitors for the appellants: *Danis & Danis.*

Solicitor for the respondents: *J. C. Milligan.*

Solicitor for infant defendants: *McGregor Young (Official Guardian).*