1961
*Nov. 3

EUGENIE GUERIN AND OTHERS (*Defendants*) ..... APPELLANTS;

AND

1962
Apr. 24

MAURICE GUERIN AND OTHERS (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Wills—English form—Testamentary incapacity—Undue influence—Medical evidence—Surrounding circumstances—Prima facie presumption of incapacity—Whether onus of capacity discharged.

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

The deceased, a bachelor of 87 years of age, after living in furnished lodgings for many years, went to reside with his sister, one of the defendants. He was suffering from diabetes, was hard of hearing and almost blind. Some two months later he was admitted to hospital for an operation. Before the operation, he expressed to his nephew, the other defendant, a sudden desire to make a new will. The nephew consulted a notary by telephone; the latter refused to attend but advised the nephew as to how a will in the English form should be drafted. No attempt was made to get in touch with the deceased's own notary. A document was written out from a draft prepared by the nephew. It was read out to the deceased, signed by him and witnessed by two witnesses. In this will the deceased left everything to his sister and named his nephew as sole executor. The will was attacked on grounds of testamentary incapacity and undue influence. The trial judge found in favour of the will but his judgment was reversed by the Court of Queen's Bench. The sister and the nephew appealed to this Court.

Held: The appeal should be dismissed.

The Court of Queen's Bench found that the medical evidence as to the physical and mental condition of the deceased at the time the will was executed coupled with the circumstances surrounding the preparation and execution of the will, were sufficient to raise a *prima facie* presumption of incapacity; that the burden of establishing capacity to have made the will was therefore shifted to the defendants; and that the latter had failed to discharge that burden. These findings should not be disturbed.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Prévost J. Appeal dismissed.

M. Marquis, for the defendants, appellants.

E. Poissant, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—In their action, respondents, who are a brother and certain nephews and nieces of the testator, Joseph Samuel Guérin, contest the validity of a will made on October 2, 1954, which left everything to the appellant Eugénie Guérin Foisy, a sister of the testator, and which named her son the appellant Edouard Foisy as sole executor. The will is attacked upon grounds of testamentary incapacity and undue influence.

The learned trial judge found in favour of the will but his finding was unanimously reversed on appeal[1].

[1] [1961] Que. Q.B. 84.

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The impugned will, in the form derived from the laws of England, was made some four days prior to the testator's death in hospital following an operation, and is a short one. It reads as follows:

> Je lègue tous mes biens, meubles et immeubles, sans exception ni réserve, à ma sœur Eugénie Guérin, veuve non remariée de Adélard Foisy.
>
> Je révoque tous autres testaments que j'ai pu faire avant ce jour.
>
> Je nomme mon neveu, Edouard Foisy, comme mon seul exécuteur testamentaire.

If valid, the will revoked another will made by the deceased in authentic form on January 26, 1954, before I. R. Lavoie and colleague, notaries. Under the terms of this notarial will the testator after providing for certain particular legacies to the respondent Maurice Guérin and the respondents Paul Béchard and Marguerite Béchard, children of a deceased sister, named as his residuary legatees the appellant Madame Foisy and the children of two other sisters who had predeceased the testator.

The facts are fully set forth in the judgments of the learned trial judge and in the Court below. For the purpose of this appeal they can be shortly stated.

In 1954 the deceased Joseph Samuel Guérin was 87 years of age. He was a bachelor and for many years prior to August 1954 had been living in furnished lodgings. Early in August 1954, following a visit with relatives near Mont Laurier, he went to reside in the home of his sister, one of the appellants.

He had suffered for some time from diabetes, for which he was treated with insulin, was hard of hearing, and almost blind. Near the end of September 1954 he developed a serious infection in the form of an abscess on one of his buttocks.

His physician Dr. Louis Lamarche was called in to see him on September 27, 1954, and thereafter saw him every day until his death, with the exception of Sunday, October 3. Dr. Lamarche called in consultation a surgeon, Dr. Wilfrid Perrault, who visited the deceased for the first time on the afternoon of October 2, 1954. He recommended that an operation be carried out in hospital as soon as possible. The deceased was admitted to the Maisonneuve Hospital that same evening. Dr. Perrault visited his patient in hospital

the next day Sunday, October 3, operated on him the following day Monday October 4, and thereafter saw him each day until his death early in the morning of October 6.

The circumstances surrounding the preparation and execution of the impugned will must be ascertained largely from the evidence given by the appellant Edouard Foisy. According to Foisy, the deceased suddenly, between 5 and 6 p.m. on Saturday, October 2, expressed to him the desire to make a new will. Foisy then consulted by telephone a friend or acquaintance of his, one Etienne Duval, a notary, but the latter apparently refused to come to the Foisy home, pleading other engagements. Foisy testified however that Duval offered to advise him and did advise him over the telephone as to how a will in the English form should be drafted. No attempt was made to get in touch with the testator's own notary, and no reason was given for the failure to do so.

Foisy also telephoned to a friend, one Jean Loranger, who came to the Foisy house accompanied by another friend, one Jean-Paul Paquette, and these two acted as witnesses to the impugned document. This document was written out by Loranger in Foisy's room from a draft prepared by the latter, and after this had been done the three then entered the deceased's room. Apparently the appellant Madame Foisy and one of her daughters were also present at this time. After the document had been read to the deceased by Foisy, he signed it in the presence of the witnesses Loranger and Paquette. All this appears to have taken place between six and eight o'clock on the evening of October 2nd.

Evidence as to the physical condition and mental attitude of the deceased was given by Dr. Lamarche and Dr. Perrault. It is clear from their testimony that the deceased was a very sick man, suffering from chronic diabetes and uremia, complicated by a severe diabetic abscess. As to his mental attitude, Dr. Lamarche testified that when he saw him on the morning of October 2 he found him "un peu hébété". Dr. Perrault when he saw the deceased that afternoon stated that he was "plus ou moins conscient".

The records of the Maisonneuve Hospital of the admission and treatment of the deceased were received in evidence as an exhibit at the trial by consent of both parties. Dr.

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Gervais, the interne who examined the patient on admission had recorded—"Le patient est sourd et répond très mal aux questions".

Dr. Julien Pesant, a specialist in diabetes—who had not seen the patient—was examined as an expert, and gave as his opinion based upon the medical record of the deceased, that by reason of his age and physical condition "il pouvait être certainement un petit peu omnibulé . . . . un peu dans les nuages".

Testamentary capacity was considered by this Court in *Léger v. Poirier*[1]. In the judgment of the majority delivered by Rand J., the leading cases were examined and that learned judge said at p. 161:

> 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: . . . .
>
> Merely to be able to make rational response 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.

That statement has been approved subsequently by this Court in *Mathieu et al. v. St. Michel*[2]; *McEwen v. Jenkins*[3]; and *Hayward v. Thompson*[4].

The medical evidence in the case at bar, taken by itself was not perhaps sufficient to establish a *prima facie* case of testamentary incapacity. That evidence, however, must be considered in conjunction with the surrounding circumstances. These included such matters as (1) the unseemly haste in the preparation and execution of the will; (2) the fact that no attempt was made to obtain independent advice from the deceased's own notary, who had acted for him for many years, and before whom he had recently executed a will in authentic form; and (3) the absence of any satisfactory explanation as to why the deceased should suddenly have decided to bequeath all his property to one sister—

[1] [1944] S.C.R. 152, 3 D.L.R. 1.
[2] [1956] S.C.R. 477, 3 D.L.R. (2d) 428.
[3] [1958] S.C.R. 719 at 725.
[4] (1960), 25 D.L.R. (2d) 545.

with whom he had recently come to reside—and to disinherit his brother and the other immediate relatives benefited under the notarial will.

The Court below found that the medical evidence as to the physical and mental condition of the deceased at the time the will was executed and the circumstances surrounding its preparation and execution, were sufficient to raise a *prima facie* presumption of incapacity, that the burden of establishing capacity to have made the will was therefore shifted to appellants, *Russell v. Lefrançois*[1], and that they had failed to discharge that burden. In my opinion those findings should not be disturbed.

It should be added, perhaps, that the judgment of the learned trial judge did not depend upon any finding as to credibility. Even accepting that the deceased knew and approved of the contents of the will as it was put to him immediately before execution, as my brother Judson has pointed out in *Hayward v. Thompson, supra,* at p. 557, this still leaves untouched the quality of the judgment that he was able to bring to bear on the making of a will.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the defendants, appellants: Nadeau, Villeneuve & Pigeon, Montreal.

Attorney for the plaintiffs, respondents: Emile Poissant, Montreal.