Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Donnelly and others v. *Broughton, from the Court of Appeal of New Zealand (District of Wellington); delivered 4th July* 1891.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.
MR. SHAND (LORD SHAND).

[*Delivered by Lord Watson.*]

This is a competition for the right of succession to the estates, real and personal, of Renata Kawepo, a Maori Chief, who resided at Omahu, in the district of Hawkes Bay and Colony of New Zealand, and died there childless, at an advanced age, on the 14th April 1888. His principal wife predeceased him; but he was survived by two spouses of inferior rank, whose precise legal status has not been explained.

The Appellants, Defendants in the original suit, are Mrs. Airini Donnelly, who is of pure Maori blood, her infant daughter Maud Donnelly, her two Maori brothers and their infant children, and her two sisters. Mrs. Donnelly is the grandniece of the deceased, by descent from his sister-uterine; and, according to native custom, is the legal successor to his property and tribal position. She was brought up by him in a manner

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befitting her rank, and had the management of his household until the year 1878, when she was married to her present husband, George Prior Donnelly. Her intermarriage with a foreigner gave great offence to the old Chief, and led to an estrangement, which was aggravated by Mrs. Donnelly appearing in the Land Court as a rival claimant of unsettled territory which Renata was desirous of having adjudged to himself. In the beginning of the year 1888 Mrs. Donnelly consented to withdraw her opposition to her grand-uncle's claim; and, in consequence of that concession, a reconciliation took place, about a month before his death.

The Respondent, William Muhunga Broughton, Plaintiff in the Court below, is a distant relation of the deceased, being the half-caste son of Te Oiroa, the great granddaughter of the sister of Renata's maternal great-grandfather. After the marriage of Mrs. Donnelly he lived with the Chief until his decease, and took an active part in the management of his property and affairs.

The Respondent, on the 24th April 1888, filed a summons in the Supreme Court of New Zealand, in order to obtain probate of a will executed by Renata on the 12th January 1887. By the terms of that instrument the deceased appointed the Respondent to be his sole executor, and declared that all his property, real and personal, should absolutely belong to the Respondent, subject always to the trusts and directions therein expressed. One of these is a direction to realize and invest a sum of money sufficient to yield a clear annual income of 450*l.* sterling, to be held by the Respondent in trust, as regarded three ninth parts, for payment of annuities of 100*l.* and 50*l.* respectively to the testator's two wives; and as regarded the remaining six ninth parts, for behoof of three of the testator's relatives in liferent, and their

lawful issue in fee. Another direction is that the executor shall "well, carefully, and faithfully "see to the welfare and well-being of my Hapus "and people, and reserve such of my lands for "their use and occupation, and make such "provision therefor as to him shall seem fit." The instrument was prepared by a solicitor, with the assistance of Counsel, and was signed and duly executed by the deceased, who thereafter formally acknowledged it to be his last will before a Justice of the Peace.

The application for probate was resisted by the Appellants, who, by their counter-claim, propounded, as the last will and testament of the deceased, a writing bearing date the 12th April 1888, in these terms:—"The persons "for my will are Airini and her younger "brothers and sisters and their children." At the foot of the document is the signature "Renata × Kawepo," with a cross or mark between the two words; and there are also the signatures of two persons as attesting witnesses, one of them being Te Teira, an uncle of Mrs. Donnelly, and the other Te Roera, who is related to Te Teira, but in what degree does not appear. It is not matter of dispute that the body of the document and also the words of the signature "Renata Kawepo" are in the handwriting of Mrs. Donnelly. The Appellants allege, but the Respondent does not admit, that the interjected cross or mark was made by the deceased.

The Appellants do not dispute the genuineness of the will propounded by the Respondent, their case being that it has been revoked by the later will in their favour.

Both Courts below were of opinion that the terms of the second will, if it was duly executed by the deceased, are sufficient to carry to Mrs. Donnelly and the other persons therein

named the whole estate of the deceased, whether real or personal, which was bequeathed to the Respondent by the will of 1887. But the main question submitted for decision was,—whether the writing of the 12th April 1888 was duly executed by the late Renata Kawepo as his last will and settlement?

The cause was tried before Sir James Prendergast, C. J., without a jury, when a great mass of testimony was adduced on both sides. The bulk of it has little or no bearing upon the real issue; but, in so far as it is relevant, the evidence led by the parties is on all material points in direct conflict.

The learned Chief Justice pronounced in favour of the second will, and in delivering judgment observed that, had it not been for the testimony of one witness for the Appellants, he would "have found much difficulty in arriving "at a conclusion that Renata had executed the "will propounded by Mrs. Donnelly." In coming to the conclusion at which he did arrive, the learned Judge relied upon the evidence given by the witness, Archdeacon Williams, as to expressions used by the deceased in the course of Friday, the 13th April, the day before his death, indicating an understanding and belief on his part that he had already made a last will in favour of Mrs. Donnelly.

On appeal, the decision of the Chief Justice was unanimously reversed by a Court consisting of four Puisne Judges, whose opinion was delivered by Mr. Justice Richmond. They agreed with the Chief Justice in thinking that, if the evidence of Archdeacon Williams were not taken into account, it would be impossible to hold that the Appellants had proved the will. But they differed from his conclusion because, in the first place, they adopted a stricter view of the burden of proof incumbent upon parties who seek to set

up an informal will, signed by mark instead of the usual subscription in full of the testator, obtained from him by one of their own number having a substantial interest in its provisions, and witnessed by two of her relatives; and, in the second place, they held that the evidence of the one witness upon whom he relied was not conclusive, or at all events was insufficient *per se* to satisfy the onus attaching to the Appellants.

Their Lordships do not think it would serve any useful purpose to examine the evidence in detail. It is, however, necessary to refer to the surrounding circumstances, and to the relations in which the parties stood to each other and to the deceased, at the time when the will is said to have been executed by him. As to these facts, there is really no material variance in the accounts given by the witnesses on either side.

During the week commencing on the 8th April 1888 there was a large congress of Maori Chiefs held at Omahu. Mrs. Donnelly, whose residence, Crissoge, is a mile and a half distant from Omahu, was requested by Renata to direct, or to aid in directing, his preparations for their hospitable reception; and, for ten days before Renata's death, the lady seems to have spent a considerable part of each day at Omahu. On Friday, the 6th April, Mrs. Donnelly became seriously alarmed about the state of Renata's health, and sent for Dr. Spencer, who came the following day, and (with the exception of the Sunday) continued to see his patient daily until Friday, the 13th. On the Monday Dr. Spencer communicated to Mrs. Donnelly his apprehension that Renata would not recover, and recommended that, if he had any business affairs to settle, he should be advised to do so at once. On the Wednesday another medical man, Dr. Faulknor, was called in by the Respondent, and the result of a consultation

was that the doctors differed, Dr. Faulknor taking a favourable view of the patient's symptoms, which ultimately proved to be over sanguine. After Dr. Faulknor left, Dr. Spencer had a conversation with Mrs. Donnelly and the Respondent, when he repeated his opinion that, if Renata had any business affairs to settle, he ought to be informed that there was no time to lose. The Respondent, on that occasion, made no objection to Renata's being told what Dr. Spencer advised. On the same day Dr. Spencer, who knew nothing about Renata's having previously executed a settlement, and who in the course of his professional avocations appears, naturally enough, to have been occasionally required to prepare a patient's will, had "offered Mrs. Donnelly to make the will if wanted."

The infirmity of Renata, and the propriety of his making a testamentary settlement of his affairs, became, after the opinion of Dr. Spencer was expressed to Mrs. Donnelly on Monday, the 9th April, a common theme of conversation and discussion, not only in the household of the deceased, but among the Maori Chiefs then assembled at Omahu. Mrs. Donnelly had evidently a conviction that Renata, if advised that his time for the final disposition of his affairs was short, would at all events make a substantial provision in her favour, a conviction probably induced by the fact of their recent reconciliation, and also by her having heard Renata express sentiments hostile to two of the beneficiaries who, with their children, took a share of the fund to be invested under the will of 1887. Accordingly, from the Monday until the night of Wednesday, Mrs. Donnelly was constant in her endeavours to persuade one or other of the Chiefs in congress assembled to approach Renata, to inform him of his hopeless

condition, and to advise him of the necessity of making any change in his settlements which he might contemplate, without delay. Whether from feelings of delicacy, or other motives, none of the Chiefs thus solicited appears to have been willing to undertake the ungracious task of assuring the sick man of the near approach of his dissolution. It is only natural to suppose that the Respondent was not specially desirous that Renata should be stirred up to alter or modify the will already made in his favour; but beyond the suggestion that Dr. Faulknor was right, and that Renata's illness was not so deadly as Dr. Spencer supposed, he did nothing to dissuade or prevent any one who chose from acting on the advice given by Dr. Spencer.

Thus far the facts of the case are substantiated by the evidence given on both sides. It now becomes necessary to refer to the circumstances attendant upon the actual execution of the alleged new will, which, so far as direct evidence is concerned, rests upon the testimony of Mrs. Donnelly, and of Te Teira and Te Roera, the subscribing witnesses.

The account given by Mrs. Donnelly is, that on the Thursday morning, some time between 10 a.m. and 12 noon, she went into Renata's apartment, when she found him in bed attended by his two wives, of whom one in a little while went to sleep, and the other shortly after followed her example. So early as the Tuesday morning Mrs. Donnelly, in the expectation of Renata being informed of his condition and thereupon resolving to make a new will, provided herself with paper, pen, and ink, which she carried in her pocket in readiness for the emergency. When both his wives had fallen asleep, Renata asked her, "Have you made my will?" To which she answered, "No." He said, "Why not?" She said, "Because I was waiting for you to tell me to do it." He said,

"Well, do it now." She then said, "What am I to say?" He said, "My will to you and your "teina (*i.e.*, younger brothers and sisters) and "your children." She then wrote the body of the will, to Renata's dictation, upon one of the sheets of paper which she had in her pocket; and, having done so, proposed to wake up one of his wives to fan him, whilst she went out in search of her uncle Te Teira. Renata said, "Never "mind," so she went out and found Te Teira at the gate, and having told him to bring Te Roera with him returned to Renata's apartment. Te Teira and Te Roera soon arrived, whereupon Renata asked if they had been told why they were sent for, and received an answer in the affirmative. The will was read aloud by Mrs. Donnelly, and Renata asked for a pen, but found that he was unable to sign his name, owing to physical weakness, and an injury to his right hand, which it is proved *aliunde* that he had actually suffered. He then, at her suggestion, made the mark with his own hand, and she afterwards wrote his name on either side of the mark, Renata, addressing Te Teira and Te Roera, said, "Friends, will you come and "write your names to my will?" and they accordingly did so, and took their departure.

The attesting witnesses give substantially the same account with Mrs. Donnelly of their being called in, and of the reading and signing of the will in their presence. Their story is so far supported by the evidence of John Sturm, who says that on the Thursday forenoon he saw Te Teira standing in the vicinity of Renata's house, and by that of Mrs. Harper, an English nurse employed by Mrs. Donnelly, who states that, on the same forenoon, she carried a cup of beef tea into Renata's room, where she found Mrs. Donnelly attending to his wants, whilst both his wives were fast asleep. On the other hand, the account given by Mrs. Donnelly and these witnesses

is absolutely inconsistent with the evidence of the two wives of Renata, as well as that of the Respondent and others, who say that they were in the house, and had opportunity of seeing what was done there, at the time when the will is alleged to have been made.

To return to the history of the document in dispute. Mrs. Donnelly took and retained possession of it, and its existence did not become known to the Respondent until after the death of Renata upon the Saturday. On the Thursday night and Friday morning Mrs. Donnelly communicated the fact that Renata had made a will in her favour, which was then in her keeping, to her husband and one or two persons, including Archdeacon Williams, whom she considered her friends. She herself says that, on the Thursday evening, she was informed by the witness Frederick Luckie that he had made arrangements with the Respondent and James Carroll, who had acted as agent for Renata in the Land Court, to talk that night "about Renata's will," and that she thereupon "kept telling Luckie "never to mind about it." On the Friday morning she told Mr. MacLean, her solicitor, and one of her witnesses, that she had not mentioned the will on the previous night, because, "if Luckie "knew, he might think it his duty to tell Carroll "and Broughton."

The principles applied by the Probate Court in England to a will obtained in circumstances similar to those which occur in the present case were explained by Sir John Nicholl in Paske *v.* Ollat (2 Phill., 323). After stating that, when the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person, the learned Judge goes on to say,—"The presumption and *onus* "*probandi* are against the instrument; but as

" the law does not render such an act invalid,
" the Court has only to require strict proof, and
" the onus of proof may be increased by circum-
" stances, such as unbounded confidence in the
" drawer of the will, extreme debility in the
" testator, clandestinity, and other circumstances
" which may increase the presumption even so
" much as to be conclusive against the in-
" strument."

Having regard to the painful conflict of the evidence adduced by the parties in regard to matters about which there could be no difference between witnesses who were disposed to tell the truth, and to the observations upon native testimony given after a lapse of time, which were made in almost the same terms by the Chief Justice and by the Appeal Court, their Lordships entirely concur in the opinion expressed by Mr. Justice Richmond, to the effect that " the rules which govern Courts of Probate
" should by no means be relaxed in the case of
" alleged testamentary papers executed by
" Maoris on their deathbeds."

Omitting for the present any reference to the testimony of Archdeacon Williams, which, owing to the importance attached to it by the Judge of first instance, must be separately noticed, their Lordships are of opinion, not only that the case put forward by the Appellants is within the rule as stated by Sir John Nicholl, but that there are circumstances which make the presumption conclusive against the validity of the instrument which they propound.

First of all, it is a singular thing that Renata, who, even in the opinion of Mrs. Donnelly, was not likely to make a new will unless he was prompted to it, should on the Thursday morning have conceived the idea that he had already instructed Mrs. Donnelly to prepare a will for him, and had told her the terms in which it was to be

made. It is not less singular, if he had resolved to make a new testamentary disposition of his affairs, that he should have entrusted the duty of preparing a proper document for that purpose to Mrs. Donnelly, instead of one or other of the agents whom he was in the habit of employing for business purposes, of whom there was no scarcity in Omahu at that time. If the will-making scene really began with the question, "Have you made my will?" that would suggest some doubts as to the mental condition of Renata, induced by physical weakness. He certainly was not in a good state for executing a settlement without the deliberate aid of some unprejudiced person. Dr. Spencer, who saw him just after the hour fixed by Mrs. Donnelly for the execution of the document, says that he was then weak and "sinking," and that on the Friday, the day to which the evidence of Archdeacon Williams applies, he was drowsy and "sinking fast."

Then the circumstance that Mrs. Donnelly was carrying about with her materials for writing out a will on the shortest notice is not calculated to beget any inference in favour of the Appellants' case. Not less unfavourable to such an inference are the facts, that she undertook the task of writing the will herself, when Dr. Spencer (who had offered to do so) and so many others were at hand, who could have performed it without the imputation of interest, and that she called in her uncle and another relative, when it would have been so easy to obtain the attestation of witnesses above all suspicion.

Last of all, the transaction, according to Mrs. Donnelly's own narrative of it, was characterized by what Sir John Nicholl terms "clandestinity." Assuming the will to have been made as Mrs. Donnelly alleges, the fact that no outsider was present at its execution did not afford a legi-

timate reason for keeping its existence secret. If the witnesses on both sides are to be believed, Renata was not a man to be driven from his settled purpose; and if the fact that he had made a new will had been divulged, it is more than probable that there would have been no room now for any question either as to his having executed a will or as to his understanding of its terms.

Their Lordships now proceed to consider the evidence of Archdeacon Williams, which the learned Chief Justice accepted as sufficient to rebut all legal presumptions against the validity of the document of the 12th April 1887.

The reverend gentleman saw Renata three times on Friday, the 13th, in the morning, in the course of the day, and again at night. Before the first of these interviews took place he had been informed by Mrs. Donnelly, and had obviously a firm belief, that Renata had executed a will in her favour upon the day preceding. On the first occasion he put the question to Renata, "I suppose you have made your will to your satisfaction?" and Renata replied, "Yes, it is done," an answer which might refer with as much propriety to the will of 1887 as to the writing upon which the Appellants rely. Upon the second, and the important occasion, Renata woke out of a sleep, and addressing the Archdeacon said, "You were asking me about my will." Renata, who spoke in the Maori language, then, pointing to Mrs. Donnelly, went on to say either "*It is in her favour*," or "*She has it.*" The witness is uncertain which of these expressions was used by the deceased. According to the evidence of the Archdeacon, Renata next referred to the withdrawal of Mrs. Donnelly's claims in the Land Court, which "was exceedingly gratifying "to him, and '*that now under existing circum-*" '*stances I leave everything to her.*'" Shortly

afterwards the deceased, closing his fist, said, "Yes, the question is in my hands—here it "is," and then, opening his hand towards Mrs. Donnelly, said, "to that woman."

Their Lordships do not doubt that the strongest presumptions against the validity of a will, arising from the position of the parties by whom, and the circumstances in which, it was prepared and executed, may be overcome by clear testimony showing that the testator subsequently acknowledged that it was executed by him, and also that it gave effect to his intentions with regard to the final disposal of his property. The statements of Archdeacon Williams were accepted by the Chief Justice as clear and indubitable evidence to both these effects; they were discarded by the Court of Appeal, who were of opinion that, notwithstanding the confidence expressed by the witness in the accuracy of his own observation, he might have mistaken the import of what the dying Chief said.

Although the honesty of the witness may be beyond question, it does appear to their Lordships that the testimony of one person, however honest, which depends to a large extent not only upon the accuracy of his hearing, but upon his previous belief as influencing the construction he was likely to put upon the language which he heard, is a somewhat narrow ground for setting aside the pregnant presumptions arising in this case from facts either admitted or proved beyond doubt. But they do not find it necessary to dispose of the evidence of Archdeacon Williams upon that consideration. The statements by Renata to which he speaks do not square with the terms of the instrument which is propounded and impeached in this suit. They mean that Renata had made a will leaving the whole of his property to the Appellant Mrs. Donnelly, and can mean nothing else. But

the writing of the 12th April gives Mrs. Donnelly only one fifth of his succession, and gives the remaining four fifths to persons for whom he had never expressed any predilection, and to whom he never referred as the objects of his bounty. The natural inferences suggested by these facts are either that Renata, if he did execute a document purporting to be a will on the 12th April, did not understand its contents, or that the will in question is of domestic manufacture for the purpose of defeating the Respondent's rights under the undoubted will of January 1887.

In these circumstances their Lordships have had no hesitation in coming to the conclusion that the decision of the Court of Appeal is in accordance with law; and they will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The Appellants must pay the costs of this appeal.