Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Aitken and another v. *McMeckan, from the Supreme Court of Victoria; delivered 6th March* 1895.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Morris.*]

Captain James McMeckan died on the 23rd of May 1890, and on the 12th of June of the same year probate was granted of his will which bears date the 1st of June 1888. On the 2nd of March 1891 the Plaintiff John Jackson Addison McMeckan, the nephew of the deceased testator and the Respondent in this Appeal, filed a Statement of Claim wherein he alleged that prior to and at the time of executing the said will the said James McMeckan was not of testamentary capacity, and was of unsound mind, and incapable of executing any testamentary document, and he further alleged that the execution of the will was procured by the undue influence of Grace Mackie, the niece of the said James McMeckan, and he consequently sought for a declaration to that effect and claimed a revocation of the probate of the will. The Defendants James Aitken and George Martin, who are the executors of the will, and the Appellants in this Appeal, traversed these

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allegations in the Statement of Claim, and the Plaintiff joined issue on the traverses. The action was tried before the Chief Justice and a special jury at Melbourne. At the trial the learned Chief Justice handed to the jury two written questions:—1st, "Was the execution "of the will, dated June 1st 1888, pro- "cured by the undue influence of Miss "Grace Mackie?" Upon that question he held that there was no evidence to sustain the Plaintiff's allegation and directed a verdict for the Defendants, to which direction no exception has been or is taken. The 2nd question was as follows:—"Was Captain James McMeckan, "prior to and at the time of executing the "will dated June 1st 1888 of unsound mind "and incapable of executing any testamentary "document?" The jury by a three-fourth's majority found in the affirmative to this question, and on the 19th August 1891 judgment was given for the Plaintiff, ordering that the probate of the will should be revoked. The Defendants moved the Full Court for a new trial, on the ground that the finding of the jury was against the weight of evidence, but the Full Court by an Order of the 8th March 1892 dismissed the motion. The case now comes on appeal from that Order to Her Majesty in Council.

The testator Captain James McMeckan lived at Hawthorn, near Melbourne, and had been for many years a partner in a firm of shipowners there. He was unmarried and had living at the time of his death three sets of nephews and nieces, viz.:—1st group—Grace, Helen, William, and Anthony Mackie, the surviving children of his deceased sister Grace Mackie; 2nd group—five surviving children of his deceased sister Nancy Kerr; and 3rd group—James McMeckan and John McMeckan (the Plaintiff), the surviving sons of his late brother Anthony McMeckan.

His brothers and sisters all pre-deceased him. The Mackie family had resided with the testator for many years. Grace Mackie had done so permanently from the year 1868, and she managed his household. The Plaintiff had been always on friendly terms with his uncle the testator and often visited him. The Kerrs resided altogether in Scotland.

The testator was clearly proved to have been before and up to the 9th of March 1888 a shrewd man of business, self-reliant, and decided in character, and was described as a hard-headed Scotchman. That he was a successful man is proved by the fact that he died possessed of property valued at over 120,000*l*. In January 1870 he gave instructions for his will to a solicitor, Mr. Klingender. At that period his property amounted in value to about 20,000*l*. By this will he left to his brother John McMeckan, 800*l*., to his sister Nancy Kerr 1,000*l*., to each of her six children 800*l*., to his sister-in-law Kate McMeckan, widow of his brother Anthony, 800*l*., to each of their three children 1,000*l*., to William Mackie 800*l*., to Hugh Mackie 800*l*., to Grace Mackie 1,000*l*., to Anthony Mackie 800*l*., to Grace and Agnes Hamilton, daughters of his sister Margaret Hamilton, 800*l*. each, to his nephew George McMeckan 800*l*., and to each of his two executors 300*l*., these legacies amounting in the whole to about 17,000*l*. Mr. Klingender called his attention to the fact that he had given no instructions as to the disposal of the residue of his property, after the payment of the legacies. He said there would be no residue, but that if there was anything it was to be divided equally among the relatives named in the will. The will was drawn by Mr. Klingender in accordance with these instructions, and was executed by the testator on the 24th of February 1870. He executed a codicil on the 25th of October 1875,

merely altering his executors in consequence of the death of one of them. He executed a further codicil on the 19th of February 1877, whereby he revoked the bequest to his sister-in-law, Kate McMeckan, she having re-married out of the family; and he also revoked the bequest of 1,000*l*. to his nephew James McMeckan, who had incurred his displeasure.

On the 9th of March 1888 the testator, while lunching at his club in Melbourne, had a seizure. He was conveyed home in a cab by a waiter about four o'clock in the afternoon, went to his bed, and was visited by his ordinary medical attendant, Dr. Flett, about six o'clock.

The making of the will of the 1st of June 1888 was brought about in the following way. Some six weeks or two months after the 9th of March 1888 Mr. James Aitken, the testator's agent and banker and his partner in station business, and one of the executors of the will in dispute, was visiting him, and he introduced the subject of a will by asking the testator whether he had settled his affairs, to which the testator replied that he had a will, and he went out of the room and brought back with him the will of 1870, and handed it to Mr. Aitken to look at. Mr. Aitken said to him that things had changed very much with him since 1870, and that he had better let him send out Mr. Klingender to have the will overhauled. The testator did not on that occasion assent, but he did so on a subsequent visit, and on the 14th of May Mr. Aitken called at Mr. Klingender's office who on the 16th of May visited the testator at his house. Mr. Klingender stated in his evidence that he saw the testator in a room called the library; that he was sitting on a chair with a newspaper before him; that he said he wanted to see him (Mr. Klingender) about his will, that a great number of the people named in the former will had died, and that things had changed very much since the old will was made;

that he (Mr. Klingender) produced the instructions for the will of 1870, which he had preserved and brought with him, and proceeded to read over the names of the persons in the will, saying to the testator:—"You will tell me which of "them are dead." The witness gave in detail the answers of the testator as to each of the names so read out, and then asked the testator:—"What "is your will to be?" to which the testator replied:—"The same as the old one," and that he would leave a legacy of 500*l*. to the "Ladies "Benevolent Society." The witness then asked what was to become of the residue, and the testator said it was to be divided among the Mackie family. Mr. Klingender said that he prepared a draft new will by altering the draft of the will of 1870 in red ink, and brought it on the 26th of May 1888 to the testator to whom he read it; that when he got to the foot of the first page, where the legacy was given to his nephew James McMeckan, the testator said:—"Take him out; he shall never have a farthing "of my money"; that when he read the clause referring to his nephew George McMeckan the testator said:—"Strike that out; he is already "well provided for"; that the testator made an alteration in his nomination of executors, and directed the insertion of a legacy to the "Scots' "Church Children's Aid Society." Mr. Klingender went on to say, that on the 1st of June he attended at the testator's house with the new will engrossed, taking with him his book-keeper who witnessed its formal execution; that it was duly executed; and that at the same time the testator cut or tore off his signatures to the will of 1870 and the two codicils.

On the question whether the testator was prior to and at the time of executing the will of the 1st of June 1888 of unsound mind and incapable of executing any testamentary

document, the Plaintiff relied upon two classes of evidence:—First, evidence that the testator was at the time suffering from brain disease which so affected his mind as to render him incapable of executing any testamentary instrument. Secondly, the evidence of witnesses as to their own observation of the testator and the state of his mind. The Defendants controverted both classes of evidence. They alleged that the disease which the testator suffered from arose from his heart and did not affect his mind, and they produced a number of witnesses who had not only formed an opinion of his business capacity but who had transacted business with him; and they relied especially upon the evidence of Mr. Aitken and of Mr. Klingender as to the making of the will itself.

A very considerable portion of the evidence in the case was addressed to the nature of the seizure that the testator had at the club on the 9th of March, whether it was apoplexy arising from affection of the brain, or a fainting fit from affection of the heart. An undue amount of importance was given to this contention, and to the skill, accuracy, and credit of Doctors Jackson and Flett who respectively supported these rival theories. Whether it was cerebral affection or heart affection from which the testator suffered becomes of importance, only to the extent that if it was the former the testator would be more unlikely to be capable of understanding business than if the attack arose from the latter cause; and it is probable that the jury were unduly impressed as to the capacity of the testator on the 1st of June 1888 by the conclusions they formed as to the accuracy and credit of Dr. Jackson or of Dr. Flett. Assuming that the seizure was of the character of cerebral affection, the question still remains, had the attack so affected the testator as to

render him incapable of transacting important business? From the time of the seizure he undoubtedly became an altered man. It caused an entire change in his mode of life. He did not leave his home. He wrote no letters. He made no entries of his expenses as he had previously done. He did not fill up his cheques, though he signed them. He became a shattered man. But to what extent? The evidence for the Plaintiff, apart from the medical evidence, is the evidence of witnesses who speak to the condition of the testator as he appeared to them, and who state that in their opinion he was not fit to transact business, but it is important to notice that none of them appears to have tried him on business subjects; on the other hand several of the witnesses for the Defendants speak not only to their opinions as to his capacity, but also to conversations with him on business subjects and to the actual transaction of business with him. There appears to be no cause for doubting the truth of the evidence of Mr. James Aitken, which most strongly points to the capacity of the testator. Mr. Aitken was the managing director of the firm of Dalgetty & Co. He had known the testator for twenty-five years; "more intimately," he said, "since 1879, "1880." He was his agent and banker. The testator visited him once or twice a week in his office up to the date of the seizure, and after that the witness used to visit the testator at his house, bringing with him the accounts of the expenditure on the stations. He was at the club at lunch on the very day the testator got the seizure, and saw him immediately after it and before he was removed home. He visited him a day or two after it, and continued to do so, bringing business papers with him which the testator went over. But the most important of all the witnesses on this point is Mr. Klingender,

who went to see the testator on the 16th of May. His evidence, which has been referred to by their Lordships, and which is fully set forth in the learned Chief Justice's charge to the jury, is entirely inconsistent with an unsoundness of mind such as would render the testator incapable of making any testamentary disposition.

Their Lordships are not unmindful of the weight due to the verdict of the jury, which should not be set aside merely because the Judge is of opinion that if he were the jury he would have found the other way. Still it is by no means an immaterial circumstance that the learned Chief Justice who tried the case stated that he was not satisfied with the verdict, and that in his opinion it was wrong. Further, their Lordships cannot regard the conflict in this case as one in which evidence on the one side is to be weighed against evidence of the same quality on the other. As the learned Chief Justice pointed out in his charge to the jury (Record, p. 285), and as their Lordships have already observed, the witnesses who spoke to occasions of incapacity were not transacting business with the testator, whereas those who did transact business with him were satisfied of his capacity. The two classes of evidence run on different planes; that of the Defendants applies itself to the crucial period of the making of the will, while that of the Plaintiff is addressed to the testator's conduct and condition at other times. The disproportionate amount of attention given to the medical evidence, which as above observed bears rather on the probable capacity of the testator than on his actual capacity as exhibited in action, was calculated to divert the attention of the jury from the real issue. On these grounds their Lordships hold that the verdict is contrary to the evidence to such an extent as to call for a new trial. It was urged at the bar that even

if the testator were of capacity to make a will he may not have understood the amount of his estate or the effect of the residuary gift. No such question was raised by the pleadings, nor was there any cross-examination of Mr. Klingender or Mr. Aitken in respect to it, nor was any evidence directed to the point, nor was any such question put to the jury. But as there will be a new trial the Plaintiff can present his case in any way that the evidence at his command admits of.

Their Lordships are therefore of opinion that the judgment of the Supreme Court of the 19th August 1891, except in so far as it relates to costs, and the Order of the Full Court of the 8th March 1892, should be set aside, and that a new trial should be granted, and that the costs of both parties in the Full Court should be paid out of the estate of the said James McMeckan in the same manner as is directed by the said judgment of the 19th August 1891, and their Lordships will so humbly advise Her Majesty. The costs of this appeal must be dealt with in the same manner.