Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Joan Olive Dunsmuir v. *James Dunsmuir, and of Edna Wallace Hopper* v. *James Dunsmuir, from the Supreme Court of British Columbia; delivered the 2nd August* 1906.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Lord Macnaghten.*]

The action which gave rise to these Appeals was brought for the purpose of having the probate of the will of one Alexander Dunsmuir recalled, and the will set aside, on the ground of incapacity and undue influence.

The Appellant Edna Wallace Hopper, a step-daughter of the testator, was the Plaintiff. She claimed under and in right of her mother, who died soon after the testator's death. Her position as Plaintiff was made difficult, if not impossible, by the fact that her mother for valuable consideration had renounced all interest in the testator's estate. However, in the course of the trial the testator's mother, the Appellant Joan Olive Dunsmuir, came forward and was allowed to intervene. She made common cause with the Plaintiff, and set up the same case.

The will which is impeached was executed on the 21st of December 1899, the day on which the testator married the Plaintiff's mother, a

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Mrs. Wallace, with whom he had lived for many years. The will gave everything to the testator's only brother, the Respondent James Dunsmuir, with whom he was associated in large undertakings which their father, Robert Dunsmuir, had established in Vancouver. It was a mere copy or repetition of a will executed on the 5th of October 1898. Re-execution was only rendered necessary by the marriage.

The testator had resided for nearly 30 years at San Francisco, managing there the most important branch of the family business, the sale and disposal of the coal raised from the Dunsmuir Collieries. He died at New York on the 30th of January 1900 at the early age of 46.

The trial of the action took place before Drake, J. It lasted 42 days—a preposterous time, as the learned Judge truly observes. The witnesses were no fewer than 80 in number, and a vast quantity of evidence was collected,—some relevant, a great deal irrelevant, but admitted on the plea that it was necessary for a complete survey and just appreciation of so important a case to leave nothing untold.

In an extremely able and concise Judgment the trial Judge expressed a clear opinion that no undue influence had been exercised, and that the testator, though he ruined his health and ultimately killed himself by indulging in bouts of excessive drinking, was at the time when he made his will of sound mind, memory, and understanding.

At the trial there was some suggestion in the evidence that the testator, whose domicile of origin was British Columbia, had in process of time become domiciled in California, and it was said that the will was not duly executed in accordance with the law which prevailed there. The learned Judge refused to allow the point to be raised at that stage of the case.

From the Judgment of Drake, J., there was an Appeal to the Full Court. In view of the Appeal the Full Court allowed the question of domicile to be raised and evidence on the subject to be adduced, and so this question, together with the main question, was argued before the Full Court on the Appeal.

The learned Judges in the Full Court held that the Plaintiff and the Intervenant had not proved that the testator had lost his domicile of origin. They all agreed with the trial Judge on the question of incapacity and undue influence.

On the argument before this Board the learned Counsel for the Appellants naturally put the question of domicile in the forefront of their contention. On that question there was only one judgment against them. Their Lordships see no reason to differ from the Full Court on this point. It is well settled, as has recently been declared in the House of Lords in the case of *Winans* v. *Attorney-General* (1904 A.C. 287), that it lies on the party alleging that the domicile of origin has been lost to prove clearly that another domicile has been gained and the domicile of origin abandoned. In the present case, apart from some slight indications tending to show that the testator meant to retain his domicile of origin there is absolutely nothing but long continued residence for business purposes in a foreign country, and that a residence in lodging houses and hotels until the last year of his life, when he bought an estate in California for and in the name of the lady whom he ultimately married. The learned Counsel for the Appellants relied much on this purchase; but their Lordships think that no conclusion can be drawn from it one way or the other. It may perhaps be observed that while, on the question of domicile, the learned Counsel relied upon this purchase as showing a fixed determination on

the part of a man capable of forming an independent judgment, when they came to the question of capacity, their case was, that during the last year of his life and for some time previously, the testator had no mind or will of his own.

On the question of capacity and undue influence, the learned Counsel for the Appellants were even in greater difficulties than they were on the question of domicile. It is well settled, as their Lordships had occasion quite recently to remind Counsel, that when the question is whether concurrent Judgments of the Courts below shall be reversed on the ground that the Judges have taken an erroneous view of the facts, it is incumbent on the Appellant to adduce the clearest proof that there is error in the Judgment appealed from, and to point out the blunder or mistake. It is sufficient to refer to the Judgment of this Board delivered by Lord Herschell in the case of *Allen* v. *The Quebec Warehouse Company* (12 A.C. 101). The question is not what conclusion their Lordships would arrive at if the matter came before them for the first time, but whether it has been established that the Judgments of the Courts below are clearly wrong.

The learned Chief Justice in the Full Court read a carefully prepared summary or *précis* of the voluminous evidence taken before the trial Judge. The learned Counsel for the Appellants most properly placed that summary before their Lordships instead of presenting a case built up afresh from the evidence of the witnesses. At the conclusion of this part of the case the learned Counsel who was addressing the Board was asked whether the Chief Justice's summary was a fair summary of the evidence. He frankly admitted that on the whole it was, although there were omissions, and in some cases he thought an

erroneous estimate had been made of the value of the testimony. On this admission there was, of course, an end of the case. After the concurrent and unanimous Judgments of the Judges in the two Courts below it would be hopeless to contend that the finding was against the weight of evidence.

Having listened to this summary of the evidence and having had an opportunity of considering the case since the argument, their Lordships may observe that, in their opinion, the case is quite plain. On the one hand there is the testimony of the New York doctor who attended the testator in his last illness, and some expert evidence to the effect that the testator must have been suffering for more than a year before his death from a disease which they diagnosed, more or less positively, as alcoholic dementia. On the other hand there is overwhelming evidence to the effect that the testator was, up to the very last day of his residence at San Francisco, a capable man of business. The story is really a very simple one. The testator appeared in two different characters to two different sets of witnesses. He had always made a point of keeping away from the office and abstaining from all business matters when under the influence of liquor. No one at the office, no man of business, ever saw him drunk or incapable. When these fits of intemperance came on, he kept aloof and remained in seclusion until they were over, whether they lasted only a day or two or continued for some weeks. He had wonderful recuperative powers, and returned to business from time to time gradually broken in health but apparently as shrewd and sensible a man as ever. The will was executed immediately after the marriage, and there is the testimony of the witnesses to the will and other wedding guests

and the evidence of the officiating clergyman to the effect that the testator was perfectly sober and capable on that day. On the other hand, when these fits of intemperance were on him, he appeared to the witnesses for the Plaintiff—bell boys at hotels, bar keepers and people of that class—to be in a condition bordering on insanity, or little removed from drivelling imbecility.

As regards the charge of undue influence, it is perfectly clear, when all the facts and circumstances of the case are considered, that the will was the will of the testator and the expression of his settled purpose. All those who had claims upon him were, in his opinion, sufficiently provided for already either by his mother or by provisions which he himself had made, or by directions which his brother undertook to carry out. He had implicit confidence in his brother, and he was resolved that his brother's control of the family business should not be hampered or interfered with by any person in any way whatever.

Their Lordships will, therefore, humbly advise His Majesty that these Appeals should be dismissed.

The Appellants will pay the costs of the Appeals.