14, 1927

IN THE PRIVY COUNCIL.

Council Chamber, Whitehall, S.W.,

Tuesday, 18th May, 1926.

Present:

VISCOUNT HALDANE,
LORD SHAW OF DUNFERMLINE,
LORD WRENBURY,
LORD DARLING,
LORD SALVESEN.

On Appeal from the SUPREME COURT of ONTARIO.

Between:

WILLIAM ROBINS Appellant

and

NATIONAL TRUST COMPANY,LIMITED, and MARY GRIFFIN WALKER, ELIZABETH BREWSTER, MARY W. CASSELL and THE TRUSTEES OF HOTEL DIEU, WINDSOR, ONTARIO.
Respondents.

(Transcript of the Shorthand Notes of Marten, Meredith & Co., 8, New Court, Carey Street, London, W.C.2.).

MR. STUART BEVAN, K.C., MR. O.E.FLEMING, K.C., (Of the Canadian Bar), and SIR ROBERT ASKE, instructed by Messrs. Collyer-Bristow & Co., appeared for the Appellant.

MR. GLYN OSLER, K.C., and MR. H.C.WALKER, (Both of the Canadian Bar), instructed by Messrs. Blake & Redden, appeared for the Respondents, National Trust Co., Ltd., and Trustees of Hotel Dieu, Windsor, Ontario.

MR. I.F.HELLMUTH, K.C., (Of the Canadian Bar). instructed by Messrs. Freshfields, Leese & Munns, appeared for the Respondents, M.G.WALKER, E. Brewster and M.W.Cassell.

MR. STUART BEVAN: My Lords, I appear for the appellant in this case.

VISCOUNT HALDANE: We have read the Cases and the Judgments, and we find that this is simply a question of dealing with concurrent findings of fact by the two Courts. The question is as to the validity of the will made in 1914, and both Courts have found that the testator executed the will properly, being of sane mind, and also that he was not subject to any undue influence in doing so. No doubt there was a conflict of testimony, but the Court below had the witnesses before them, there was a trial extending over eight days, and they came to a definite and detailed conclusion, and the Court of Appeal of Ontario, without calling upon the other side, affirmed the conclusion of the Court of First Instance, which was a conclusion of fact, and thereby disposed of the appeal. No doubt it is quite true that any body has a right to appeal from the Supreme Court of Ontario in a case that is within the limits as regards money, as this case is, and no doubt it is true that concurrent findings of fact do not form an absolute bar; if, for instance, we saw on the face of them that there had been some obvious error committed by the two Courts, we should not feel ourselves bound by the rule; but it has been laid down in a succession of cases, by Lord Cairns, Lord Kingsdown and other eminent Judges, that, when there are concurrent findings, the Board will not entertain appeals. I put this to you, having regard to your position as a Counsel of great eminence at the Bar, before you begin to open the case, that, if we are to run up against concurrent findings and if we find there are concurrent findings, we should not proceed with the appeal.

MR. STUART BEVAN: I appreciate that; I am indebted to your Lordship for pointing out at the commencement of the case, or I might say even before the commencement of the case, the

difficulties that exist in your Lordship's mind. I need hardly say that my learned friends and myself have very carefully considered the position and we have come to the conclusion that we are justified in opening this case before the Board, on the ground that the concurrent findings of fact in this case are not a bar to the appeal within the meaning of the decisions to which your Lordship has referred.

VISCOUNT HALDANE: Are the findings concurrent?

MR. STUART BEVAN: The facts are found concurrently.

VISCOUNT HALDANE: First, that the testator could make the will and was advised by one of the most eminent people in Ontario, the late Mr. Lash, K.C., who drew it for him?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: And that he was with him on the day when he executed it?

MR. STUART BEVAN: No, my Lord.

VISCOUNT HALDANE: He was with him before?

MR. STUART BEVAN: Yes, a month before.

VISCOUNT HALDANE: And in correspondence with him about its provisions and then he sent it down. Then two witnesses of repute, in his business, were with the testator when he executed it, and on that very day he went down to his office and transacted business and signed cheques. It is on that evidence that Mr. Justice Mowat found that he had properly executed the will and the Court of Appeal xx almost contemptuously dismissed the appeal. How do you think you are going to get over that?

MR. STUART BEVAN: There are various ways in which I hope to get over it. I anticipated that at a very early stage this position would be placed before me and that I should be asked how I proposed to deal with it. In the first place I want to draw your Lordships' attention to the fact that one of the grounds of appeal is that the learned trial Judge and the

learned Judges in the Court of Appeal all misdirected themselves as to the onus of proof. They have regarded the onus of proof as being on the plaintiff throughout the trial. My case is that the onus of proof is on the defendants who are propounding the will; it is for them to prove the signature and that the mind went with the signature.

VISCOUNT HALDANE: Let me remind you that your client was no relation of the testator; he was a beneficiary under an old will. The testator struck him out of the will by getting rid of the will of 1901, under which your client was to benefit, and he did not put him into the will of 1914. Then your client allowed six years to elapse before bringing the action, and the will had been admitted to probate. How can you say the burden of proof was not on him and on him very heavily?

MR. STUART BEVAN: I submit it was not on him according to the authorities. Probate was granted in common form.

VISCOUNT HALDANE: Probate having been granted in common form, he brings his action after six years, when the witnesses, or many of them, are dead, to set aside the will. All I am saying is that the burden of proof is on the plaintiff in such a case most emphatically.

MR. STUART BEVAN: I hope to have an opportunity of dealing with that, because, notwithstanding the lapse of time, I am going to submit that the burden was on the respondents.

VISCOUNT HALDANE: The will was admitted to probate.

MR. STUART BEVAN: That makes no difference.

VISCOUNT HALDANE: It was admitted to probate six years before. Surely, if you wanted to revoke the probate, you had to make out a case.

MR. STUART BEVAN: No, with great respect, upon the authorities. My I draw attention to another matter, which is very material indeed upon this question of concurrent findings

of fact? There is a statement contained in the judgment of the trial Judge which has a great bearing upon this. Your Lordships will find it at page 589, line 20. The learned Judge says: "I wish to point out that the evidence in this case has impressed me favourably, on both sides. I do not believe that there ever was a case tried where a more respectable body of witnesses appeared in court. I do not intend to go over the evidence in detail, though I have it clear in my mind, both as to the appearance and demeanour of the witnesses, and what they said; I shall not deal with the vital points of their evidence because it has all been taken down and it can be treated in a higher place, if this case goes further, just as well as if I expressed my opinion. There was no contradiction in the facts of the case, there was no discrepancy which would need me to give my opinion as to the comparative truth of different witnesses, and another court can come to a conclusion upon their evidence the same as if I had stated my conclusion." I pray that in aid as putting this case in exactly the same category as those cases where evidence is received by affidavit or taken on commission and is found in the depositions.

VISCOUNT HALDANE: The Trial lasted eight days.

MR. STUART BEVAN: I agree. Your Lordship sees what the trial Judge says about it.

VISCOUNT HALDANE: What he says is the result of the evidence given as to the facts. That is what he says.

MR. STUART BEVAN: With great respect, I do not think he says that; I may be misreading it. As I understand it, he says the witnesses all impressed me; they were witnesses of truth; there is nothing in the demeanour of one of them which enables me to prefer the evidence of one to that of another, because his demeanour was not as favourable; the

evidence is before me; I take it all as of equal value and any Tribunal before whom this case goes in the future will be in just as good a position as I have been in this case to draw the proper inferences of fact.

LORD SHAW OF DUNFERMLINE: Having said that, which I quite appreciate, He states the result in a single sentence at the fact of page 589.

MR. STUART BEVAN: Yes, my Lord. "The result of this evidence pieced together, dovetailed together, combined and considered as a whole, does not make me think that there was anything which would affect the mind, or which would show the incapacity, of the late E.C.Walker to make his will when he did." I am challenging that. The learned Judge says: Here is the evidence before me for the purpose of my decision; I can treat it as if it was affidavit evidence or depositions and as if the witnesses had not been called.

LORD SHAW OF DUNFERMLINE: The reason I am interposing is, that being the state of his mind as to the proper way of dealing with the evidence, the Court of Appeal tried the case upon the same footing presumably, and the question is whether the rule which has been stated to you by the noble Viscount does not apply equally to such a case?

MR. STUART BEVAN: I submit not, because, as I am going to submit, the learned Judge in that process, which he picturesquely described as piecing together, dovetailing facts, combining them and considering them as a whole, has drawn wrong inferences from those facts; and not only so, but many of the facts on which he has entered into the piecing and dovetailing together were not the facts as proved at the trial. He has misstated or forgotten certain facts, overlooked other facts and in respect of most of the facts, as I submit, both he and the Appellate Court have drawn the wrong inferences.

VISCOUNT HALDANE: How can you say that? Look at what Mr. Justice Orde, who is a little more plain in his language, says, at the bottom of page 607. "Eight years after the testator's death this will is attacked on the ground that the testator was not mentally competent to make a will at the date of its execution. This attack involves the implication either that Mr. Lash spent a whole day with, and received instructions from a man who was not aware of what he was doing, or that he was in some direct or indirect way a party to a fraud upon the testator in drawing and procuring the execution of a will which did not in fact embody the testator's wishes, assuming him to have been capable of expressing them. In the circumstances the plaintiff's task would appear to be well nigh hopeless, but he undertakes it with an energy and determination worthy of a better cause."

MR. STUART BEVAN: That is perfectly right, up to a point. The attack does involve the implication that a month before the will was executed Mr. Lash spent, I will not say a whole day, but some part of a day with the testator and received instructions from a man who was not aware of what he was doing. I do not think a charge of fraud is necessary.

VISCOUNT HALDANE: That is found against you.

MR. STUART BEVAN: There is plenty of evidence, in my submission, which will support this view and will only support this view.

VISCOUNT HALDANE: There is also plenty of evidence the other way, as the Court has found, and you have concurrent findings.

MR. STUART BEVAN: May I deal with the law first? It is very difficult, if I may say so with great respect, to deal with what your Lordship has extracted from the judgments for the purpose of putting my difficulties to me, because I am challenging every finding of fact in the judgments, as not being founded on the evidence. It is the finding of a Judge not

supported by evidence at all. I do not mean the finding as to the testamentary capacity.

VISCOUNT HALDANE: You do not challenge that, do you?

MR. STUART BEVAN: I am challenging the fact of the testamentary capacity, and there are various facts upon which the trial Judge relies as showing testamentary capacity; I am challengingthose in many cases as not being facts at all; and, with regard to the inferences from the facts, I say they are inferences which the facts do not support.

VISCOUNT HALDANE: They had the facts before them; they had the people who were about the testator before them and they had his own partners and brothers.

MR. STUART BEVAN: His brothers were dead, my Lord.

VISCOUNT HALDANE: They had his partners and people from his firm, and the two witnesses to the will were reputable people employed in the firm, who came to the house.

MR. STUART BEVAN: They added nothing by their testimony. All they said was that they said to the testator: "How are you?", and he said: "Pretty well."

VISCOUNT HALDANE: He knew what he was doing and he went to his office afterwards and transacted business at his office on the same day.

MR. STUART BEVAN: Your Lordship may have got that from the judgment, but there is no evidence of it at all. I say with a full sense of responsibility that I cannot respond to your Lordships' invitation to withdraw this case from the consideration of the Board upon the ground that it is determined by those authorities which deal with concurrent findings of fact. The matter is well summed up in the Privy Council Practice.

VISCOUNT HALDANE: I would rather you referred us to the judgments of Lord Kingsdown and Lord Cairns.

MR. STUART BEVAN: I will; I have all the authorities here. I am anxious, if I may, to remove the impression that is in your

Lordship's mind that by no manner of means is it open to me to persuade this Board that the appeal is open to me in view of these findings of fact.

VISCOUNT HALDANE: I did not say that concurrent findings of fact were absolutely conclusive; but, unless there is a manifest error, they are conclusive and it is a waste of time to occupy our time, unless you are going to show that there is a manifest error.

MR. STUART BEVAN: May I read from Safford and Wheeler's Privy Council Practice, 1901 Edition, at page 884? "The Judicial Committee will disregard the concurrent judgment of two lower Courts, and decide the case upon the evidence contained in the record where the lower Courts have never dealt with the real question raised by the issues, and have drawn wrong inferences from the evidence." That is my case here.

VISCOUNT HALDANE: I have no doubt that is true; but here the question was whether the man executed his will knowing what he was doing and whether he was unduly influenced. You do not dispute that Mr. Lash advised him and went over the will very carefully with him some time before?

MR. STUART BEVAN: I do dispute it.

VISCOUNT HALDANE: And yet you did not bring your action for six years?

MR. STUART BEVAN: Because my client left Canada in 1914. The testator died in March, 1915, a year and a month or two afterwards. He had been told before 1901 that the testator would like to make him one of the executors of his will; he had not been told whether or not he had been made executor, but he rather assumed that he had.

VISCOUNT HALDANE: That was fourteen years before the testator's death?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: Then he left the testator's employment?

MR. STUART BEVAN: Yes, in 1912, and he left Canada in 1914. The testator died in 1915. My client did not enquire whether he was executor under the last will of the testator or not; he had left the country, which would have been a good reason, if he ever had been executor under the 1901 will, for his having been removed from that office.

VISCOUNT HALDANE; He was not a relative?

MR. STUART BEVAN: No.

VISCOUNT HALDANE: He had no claim?

MR. STUART BEVAN: No. He never knew that under the 1901 will he was a legatee of stock of the nominal value of 100,000 Dollars, but which was worth considerably more. He did not know it in 1915, when he heard of the death of the testator, and it was not until the year 1923, when the testator's widow was in England and saw him, that he heard from her, not only that he had been a legatee for this considerable sum of money under the 1901 will, but as to the circumstances under which the 1914 will had been executed.

VISCOUNT HALDANE: So he proceeded to try to set aside the 1914 will, in order to set up again the revoked will of 1901?

MR. STUART BEVAN: Certainly; but he had no opportunity of doing it before, because he knew nothing about it, and as soon as he heard he went over to Canada, made the necessary enquiries and started the suit.

VISCOUNT HALDANE: He does not seem to have expected it.

MR. STUART BEVAN: I do not think he expected anything.

VISCOUNT HALDANE: It is no use telling us this in general terms. The Judicial Committee is not bound by concurrent findings where there is an obvious error. What was the issue here? Did the testator execute his will knowing what he was

doing?.

MR. STUART BEVAN: That is the issue.

VISCOUNT HALDANE: Both Courts have found that against you.

MR. STUART BEVAN: Yes, and on the view that the burden of proving that he did not know was upon the plaintiff, and, therefore, every fact that was relevant to that issue they have looked at through distorted glasses.

VISCOUNT HALDANE: They had a lot of evidence before them at the trial, which took eight days.

MR. STUART BEVAN: Over and over again in his judgment the learned Judge refers to the burden of proof, which, in my submission, was never shifted. It is not a question of law; but, if I am right in my submission, the trial Judge and every Judge in the Appellate Court looked at the facts of this case and at the evidence on the one side and on the other with the view that the onus was on the plaintiff, and therefore they never have come to a proper conclusion on the matter; that is always supposing I am right in my submission as to the law.

VISCOUNT HALDANE: Assuming that it was so, the plaintiff called a great deal of evidence and the defendants called a great body of evidence, and the trial Judge said: I believe the defendant's witnesses.

MR. STUART BEVAN: That is not what he says.

VISCOUNT HALDANE: He found that the testator knew what he was doing?

MR. STUART BEVAN: He says: I believe all the witnesses on both sides.

VISCOUNT HALDANE: He found the will was duly executed.

LORD DARLING: It seems to me he started off wrongly in the way he laid down the law.

VISCOUNT HALDANE: When there is someone who challenges the

will he opens his case, evidence is taken and then in the course of time other evidence is taken, and the burden shifts.

MR. STUART BEVAN: In my submission the burden never shifted. May I put this case, in order to test the position I am contending for? A body of evidence was called by the Plaintiff and a body of evidence was called by the defendants; the learned Judge says to himself: There are estimable people on each side, really I do not know which way to decide; when I think of the plaintiff's witnesses I am rather inclined to think they must be right; but, at the same time, when I look at the defendants' witnesses I have my doubts, and in those circumstances your Lordships observe the importance of this question of the onus of proof. If the onus of proof is on the plaintiff, the learned Judge would find for the defendants.

VISCOUNT HALDANE: I cannot find any doubt in Mr. Justice Mowat's judgment. All sorts of things were imputed to the testator.

MR. STUART BEVAN: I am challenging those facts.

VISCOUNT HALDANE: You are challenging the finding that the testator knew what he was doing when he made his will? Mr. Justice Mowat finds emphatically on that.

MR. STUART BEVAN: For certain reasons, he says, I find that the testator knew what he was doing.

VISCOUNT HALDANE: On the evidence?

MR. STUART BEVAN: Yes. He summarises the evidence and says: The evidence of witnesses A., B., and C. amounts to this. I hope to show it does not amount to this, but to something entirely different.

LORD SHAW OF DUNFERMLINE: This is a vital question in this way, that it covers the whole ground. May I call your attention again to what the noble Viscount has been saying, to see whether you can justify what you have said. Will you look at page 589, where the learned Judge says: "The result of this evidence

pieced together, dovetailed together, combined and considered as a whole, does not make me think that there was anything which would affect the mind, or which would show the incapacity, of the late E.C.Walker to make his will when he did," He does not say: That does not incline me to think that the burden has not been discharged; but he says: It does not make me think that there was anything that would affect the mind or which would show the capacity of the late Mr. Walker.

MR. STUART BEVAN: He does say so there; but may I draw attention to where he puts it quite plainly?

LORD SHAW OF DUNFERMLINE: In Scotland the man challenging the will has the onus. Have you not a procedure here for application for probate?

MR. STUART BEVAN: Yes.

LORD SHAW OF DUNFERMLINE: And in the course of that proceeding, those objecting to probate come forward?

MR. STUART BEVAN: They are not bound to, and they cannot if they do not know of the will.

LORD SHAW OF DUNFERMLINE: The person asks for probate, probate is granted and that stands on the record?

MR. STUART BEVAN: Yes. When it is granted in common form, it is the same as if it had not been granted; but, when it is granted in solemn form, that probate stands against the party who has contended it for all time afterwards.

LORD SHAW OF DUNFERMLINE: I can quite understand there is very considerable force in what you are presenting. The onus is on the propounder of the will?

MR. STUART BEVAN: Yes. It does not affect those propounding the will in the vest least. The Courts have said it would be absurd if people interested in property by stealing a march could get the probate in common form and they could shift,

what up to them had been the burden upon them, upon the shoulders of somebody else. The Court has laid down that, whether probate in common form is granted or not, the onus of proving the execution, the signature of the testator and the onus of proving the understanding state of mind are on those who are propounding the will.

VISCOUNT HALDANE: Those two things are found as matters of fact.

MR. STUART BEVAN: There is no doubt about the fact that he executed it with his own hand; but we say his mind didnot go with his hand, when one sees what the witnesses way. There were two witnesses to the will.

VISCOUNT HALDANE: Two people who knew the testator well in business.

LORD WRENBURY: May I make one observation as to those words on page 589, to which attention has been called? I am assuming, for the purpose of what I am going to say to you, that you are right in saying that the person who propounds the will has to prove affirmatively mental capacity. The learned Judge says: "The result of this evidence pieced together, dovetailed together, combined and considered as a whole, does not make me think that there was anything which would affect the mind." If he had said: It does not make me think there was anything that would affect the mind, that would be another matter?

MR. STUART BEVAN: Yes.

LORD WRENBURY: What he says is: It does not make me think there was anything which would affect the mind?

MR. STUART BEVAN: Yes.

LORD WRENBURY: There you say he went wrong?

MR. STUART BEVAN: Yes.

LORD WRENBURY: You say he ought to have arrived at a conclusion that there was nothing which would affect the mind?

MR. STUART BEVAN: The passage that both your Lordship and Lord Shaw/have put to me would rather seem to indicate that he was considering the question apart from the question of onus altogether.

LORD SHAW OF DUNFERMLINE: He is throwing the onus the wrong way in that sentence you say?

MR. STUART BEVAN: Yes. While there might be some doubt, I should accept your Lordship's view with regard to that.

LORD WRENBURY: I suppose you say that at the conclusion of the case they ought to have expressed the opinion as to whether the testator was of mental capacity?

MR. STUART BEVAN: He finds for the will because we had not been able to satisfy him.

LORD DARLING: He says: It does not make me think there was anything which would show the incapacity of Mr. Walker. You say that was not the question, but that he ought to have said there was something which would make him think Mr. Walker was absolutely capable?

MR. STUART BEVAN: Yes; it does not rest upon that.

LORD SHAW OF DUNFERMLINE: The defence was put in to the effect that he was incapable; then says the Judge: There is nothing that will make me think he was anything of the sort?

MR. STUART BEVAN: That is to say, taking it on that construction, there is nothing which the plaintiff has brought forward to show that he was incapable of making a will. The learned Judge is addressing himself to the wrong issue. He says: Have the defendants satisfied me that he was capable of making the will?

LORD SHAW OF DUNFERMLINE: A case of this kind will not depend on a distinction like that.

MR. STUART BEVAN: I am not putting my case upon any such distinction.

LORD DARLING: Supposing somebody submitted at the end of a

case that there was no case to go to the Jury, it would be enough for the Judge to say: I do not think anything has been proved which I ought to leave to the Jury; but he ought not to say: I think nothing has been proved to show that I ought not to leave this case to the Jury?

MR. STUART BEVAN: Yes, my Lord. That is what the learned Judge has said.

VISCOUNT HALDANE: The Board will be rising at 3.30 tomorrow. It is obvious that this case cannot be finished by then, and the question is whether, in those circumstances, it will not be better that it shall go over until next term.

MR. STUART BEVAN: If your Lordship pleases.

MR. HELLMUTH: My Lords, it will be quite impossible for me to be here next term, and I should ask that it might not be taken before the term following.

MR. STUART BEVAN: I do not object to that; I do not want to incommode my friends in any way.

VISCOUNT HALDANE: Very well, then it will stand over until the term beginning in October.

IN THE PRIVY COUNCIL.

Between:-

WILLIAM ROBINS Appellant

and

NATIONAL TRUST COMPANY, LTD.,
and OTHERS
Respondents.

On Appeal from the Supreme
Court of Ontario.

Tuesday, 18th May 1926.

BLAKE & REDDEN,
17 Victoria St.
S.W.1.