NOTE.—Please substitute for copy of Judgment previously issued.

Privy Council Appeal No. 122 *of* 1925.

William Robins - - - - - - - - - *Appellant*

v.

The National Trust Company, Limited, and others - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH FEBRUARY, 1927

Present at the Hearing:
VISCOUNT FINLAY.
VISCOUNT DUNEDIN.
LORD PARMOOR.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT DUNEDIN.]

The late Edward Chandler Walker was at first senior partner of the firm of Walker & Sons, and thereafter when that firm was changed into a limited company was president of Walker & Sons, Limited, whiskey distillers, in Walkerville, Ontario. He was a very wealthy man, married but with no children, and he died on the 11th March, 1915, leaving a widow. He left a will of date 27th February, 1914, and the respondents are the trustees and the principal beneficiaries under the said will. The said will revoked all prior wills. The testator had made a prior will on 21st December, 1901, under which the appellant is a beneficiary. The present action is at the instance of the appellant to set aside the will of 1914, and restore the will of 1901. The grounds on which he seeks to set aside the will of 1914 are :—

1. Want of testamentary capacity in the testator on the date of the execution of the said will;

2. Fraud or undue influence by which the testator's brothers obtained the execution of the said will.

The appellant was manager of the Company, both as a firm and afterwards as a limited company, for a long period, and was on terms of great intimacy with the testator. The appellant left Walkerville in 1914, and went to England. He alleges that he only came to know of the will of 1901 under which he was a beneficiary, and of the state of affairs as at the date of the will of 1914, in April, 1922. On the 23rd June, 1923, he raised the present action against the executors, and the beneficiaries were afterwards added as defendants.

The action was tried before Mowat J. without a jury. Evidence was read on both sides. The evidence was voluminous and contradictory, and the trial lasted six or seven days. The learned judge found that no testamentary incapacity of the testator had been made out, and that it had not been shown that the execution of the will was induced by fraud or undue influence, and he dismissed the action. Appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that Court unanimously affirmed the judgment of the Trial Judge. Appeal has now been taken to the King in Council, and the appellant has sought to induce their Lordships who sat on this Board to examine and revise the evidence and to come to the conclusion that the result arrived at by the Trial Judge and the Court of Appeal was wrong. This raises in a quite distinct way the question of whether their Lordships will examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact. Whether a man at the time of making his will had testamentary capacity, whether a will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian law, be it Hindu or Moslem, as such. Indeed it is obvious that if such a rule is a good rule to be applied to the findings of the Courts in India, there could be no reason for suggesting that the findings of the Courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board.

Being as has been said a rule of conduct, and not a statutory provision, the rule is not cast iron, but it would avail little to try to give a definition which should at once be exhaustive and accurate, of the exceptions which may arise. It will be sufficient to quote what has been said on this subject in the past :—

In *Moung Tha Hnyeen* v. *Moung Pan Nyo* (27 I.A. 166) Lord Hobhouse delivering the judgment of a Board which included Lord Macnaghten and Lord Lindley, said :—

"There has been nothing to show that there has been a miscarriage of justice or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognised here and commonly observed in second Courts of Appeal, that such a Court will not interfere with concurrent judgments of the Courts below on matters of fact; unless very definite and explicit grounds for that interference are assigned."

And in *Rani Srimati* v. *Khajendra Narayan Singh* (31 I.A. 127) Lord Lindley repeated the view :—

"The appellants have failed to show any miscarriage of justice or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact."

There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important would amount to a miscarriage of justice. The expression means no such thing. It means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all. There is, however, also another way of preventing the application of the rule. If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all. Such an attempt was made with great skill and pertinacity by Mr. Bevan for the appellant in the present case. He laid stress on the law as it had been authoritatively settled in England, and in Ontario in such matters the law of England rules. Now the English Courts have gone what some might think pretty far on the question of what duty lies on those who propound a will. Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago. These propositions will be found to be settled by the following cases :—

Barry v. *Butlin*, 2 Moo. P.C. 480. *Cross* v. *Cross*, 3 Sur. and Tr. 292. *Tyrrell* v. *Painton*, 1894, Prob. 151.

Now their Lordships will assume that these cases are right. The reason for this form of expression is that the appellant represented that the Appellate Division of the Supreme Court of Ontario in the case of *Larocque* v. *Landry*, 52 O.L.R. 479, had taken

another view, in that it held that once probate was granted, though only in common form, the onus was on him who sought to set it aside, and the Court in this case held itself bound by that case. It is questionable whether that is the result of the decision. But assuming that it is, when an Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board. But in the present case their Lordships do not consider it necessary to settle which of the two possible views as to onus is right; they will assume for the purposes of this discussion, that the English rule is right. But given the law, the appellant, in their Lordships' opinion, fails in its application to the facts. Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion because it is self-evident that he had been born. But to assert that he was born on a certain date if the date is material, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or, as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered. That seems to their Lordships the case here. After reviewing the evidence as to capacity the learned Trial 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."

The Court of Appeal first stated the grounds put forward by the appellant for the reversal of the judgment of the Trial Judge, thus :—

> "that the evidence established that the testator was not mentally capable of making a will at the time when the alleged will was executed,"

and after examining the evidence it concludes thus :—

> "the plaintiff clearly fails upon the first of his grounds for the reversal of the judgment."

There is a passage at the beginning of the Trial Judge's judgment which shows that on the question of onus he agreed with what had been laid down by the Supreme Court of Ontario, and the appellant argued that the learned judges of the Court of Appeal must be presumed to have had the same views, and that, consequently, the whole judgment was vitiated by this wrong view as to onus. But, as has been already explained, there was no question of onus in the determination as it came to be made. It was a considered result of the evidence, and onus as a determining factor never arose for the learned judges could, and did, come to a positive conclusion on the evidence laid. Learned counsel laid stress on the fact that the Trial Judge expressed the result of his view in a negative fashion :—

> " the evidence does not make me think that there was anything which would show the incapacity of the testator,"

and he argued that that was no positive finding of capacity as the authorities require. The learned Judge was not dealing with onus. He was stating a result in ordinary English, and to say that the above sentence was not a positive finding of capacity seems to their Lordships as out of the question as to say that if one said of a man that he was not dead on a certain date there was no finding that he was alive.

Their Lordships therefore think that the attempt to avoid the effect of the concurrent finding rule fails. Much was sought to be made of the unfair way in which the appellant argued the Trial Judge had treated the evidence of a certain Dr. Shurly. Some of the criticisms he made do not particularly recommend themselves to their Lordships, but in the end he came to his result on a consideration of the whole evidence. That the Court of Appeal looked at the evidence in rather a different way matters not, for the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons. Thus in *Ram Anugra Narain Singh* v. *Chowdhry Hanuman Sahai* (30 I.A., p. 41) the judgment of this Board states :—

> " The rule (as to concurrent findings) is none the less applicable because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence."

No question of this sort arises as to the procuring of the will by fraud or undue influence, because it is admitted that in that case the onus is always on the person who attacks the will. See *Craig* v. *Lamoureux*, [1920] A.C. 349.

In their Lordships' opinion the rule as to concurrent findings clearly applies in this case, and the appeal falls to be dismissed. A petition was lodged for the admission of new evidence. This application had been made to the Court of Appeal and refused. Their Lordships will be slow indeed to interfere with the decision of the local Court on what is really a question of discretion and procedure. This petition therefore falls to be dismissed with costs.

Their Lordships will humbly advise His Majesty in accordance with the above opinion. The appellant will pay the costs of the appeal.

In the Privy Council.

WILLIAM ROBINS

v.

THE NATIONAL TRUST COMPANY, LIMITED, AND OTHERS.

DELIVERED BY VISCOUNT DUNEDIN.

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