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UNIVERSITY OF LONDON
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LEGAL STUDIES
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25 RUSSELL SQUARE
LONDON, W.C.1.

Judgment
52/1964
78704

IN THE PRIVY COUNCIL

No. 16 of 1958

ON APPEAL

FROM THE SUPREME COURT OF BRITISH HONDURAS

IN THE ESTATE OF ROBERT SIDNEY TURTON, deceased

B E T W E E N :

ROBERT SIDNEY ACOSTA (Plaintiff) Appellant

- and -

ALFRED OWEN LONGSWORTH)
AURA JONES and)
MARGARET TURTON) (Defendants) Respondents

CASE FOR APPELLANT

Record

10 1. This is an appeal from an Order of the
Supreme Court of British Honduras (Mr. Justice
Cools-Lartigue) made on the 2nd September 1957
granting the Respondent Margaret Turton leave
to reopen her defence in this action and to
call one W. P. Thompson to give evidence in
support of her case.

M.R. p. 91 No. 49

20 2. The action was brought in the Supreme
Court of British Honduras by Writ of Summons
dated the 24th February 1956 by the Appellant
as Plaintiff against Lindsay Jeffery, Aura
Jones and Margaret Turton, administrators
of the estate of Robert Sidney Turton deceased,

M.R. p. 1. No. 1.

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as Defendants to revoke the probate of the
 M.R.Ex.P. 14, Will of the deceased dated the 10th May
 p. 94.
 M.R. p.5. No.4 1918 and the grant of letters of administra-
 tion with will annexed to the said Defendants
 M.R.p.74 No.33 and to pronounce for the Will of the deceased
 M.R.p.92 No.51 dated the 12th November 1955. By Order made
 on the 16th February 1957 Alfred Owen Longs-
 worth was appointed additional administrator
 of the estate of the deceased and by Order made
 on the 7th September 1960 the said Longsworth 10
 was substituted for the said Jeffery as a
 Defendant to this action without prejudice to
 this Appeal then pending

3. The deceased died on the 15th November
 1955.

M.R.p.5 No.4 4. The Appellant alleged in the Statement
 of Claim that the Will of the 12th November
 1955 could not be found but the same was a
 valid and subsisting Will and that its contents
 were in substance and effect as stated in two 20
 affidavits of Doyle Prince dated the 27th
 M.R.p.3 No.3 and M.R. p.7
 No.5. February 1956 and the 5th June 1956. The
 M.R.p.7 No.6 and M.R.p.37
 No.21. Respondent Margaret Turton (who as well as
 being represented by one W.H. Courtenay,
 Solicitor, who appeared on behalf of the
 Administrators of the estate of the deceased,

was also separately represented) by her separate Defence denied the existence of the Will of the 12th November 1955 and counterclaimed probate of the Will of the 10th May 1918.

5. A summary of the evidence in support of the Will of the 12th November 1955 is set out in paragraph 6 of this Case.

6. (1) In August 1955 the deceased had a serious illness and while recovering from it he asked his friend Nellie Price, who had been a Solicitors' Clerk and was then a Public Stenographer, to prepare his will, Nellie Price agreed to do so and returned the next day but at first the deceased was busy and later he said he was not feeling well. The proposed will was not drawn up.

S.R. pp.6-7,

(2) After recovering from this illness the deceased in August 1955 visited the United States of America and returned to British Honduras at the end of September or early October, 1955. About a fortnight prior to his death (which was on the 15th November 1955) the deceased began

S.R. p. 24,
l. 19-28.

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Record

complaining about his health.

- M.R.p.15 l.26b.
p.17 l.18
- M.R. p.15 l.39.
- M.R.p.17 l.7-11.
- M.R.p.30, l.23-38.
- (3) On Saturday the 12th November 1955 the deceased called Doyle Prince, a clerk who wrote business and confidential correspondence for him, and told him that he (the deceased) had "spoken to Miss Nellie Price and told her that he wanted her to do it but somehow they did not get together and he wanted it done now." The deceased took a paper from his right hip pocket and dictated to Doyle four drafts of a Will, making alterations in each draft and finally expressing himself satisfied with the fourth draft which was then and there executed by the deceased as his Will in the presence of Prince and Roland Dewgard who were the two witnesses to the Will.

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- S.R.p.7, l.22 -
p.8, l.40.
S.R.p.12 l.23 -
39.
- (4) On Sunday the 13th November 1955 the deceased called on Nellie Price and took her for a drive. During this drive the deceased showed her a will dated the 12th November 1955, which he took out of a brownish envelope and said to her: "as you did not come to make the will for me which I spoke to you about I got Doyle Prince to write a will for me."

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Record

He told her to prepare a Codicil and to make three copies of the Codicil. The deceased then placed the will with other papers in his right hip pocket.

(5) On the evening of Sunday the 13th November 1955 the deceased was taken ill and was undressed in his bedroom by two of his employees who took off his trousers and handed them to the Respondent Margaret Turton who put them in a wardrobe in the bedroom.

S.R.p.21 1.32 -
p.22 1.14.

S.R.p.26, 1.15 -
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(6) On Monday, the 14th November 1955 at about 8.30 a.m. the deceased's friend Mrs. Helen Clarke visited the deceased. When she was left alone with him the deceased asked her to fetch the trousers which he was wearing the previous day but Helen Clarke was unable to find them. The deceased said he wanted the trousers in order "to get something out of it to have it handy when Miss Price came that morning." The deceased called the Respondent Margaret Turton and told her to fetch his trousers but she hesitated and the deceased became annoyed. Helen Clarke tried to

S.R.p.30, 1.12 -
p.31, 1.32.

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pacify the deceased and told him that he could not do anything as he was ill. The deceased agreed reluctantly and the Respondent Margaret Turton left the room.

- S.R.p.8, 1.40 - (7) On Monday the 14th November 1955 Nellie
46 Price prepared the Codicil and called to see the deceased but he was too ill to discuss anything throughout that day.
- S.R.p.8, 1.46 - (8) On Tuesday, the 15th November 1955,
S.R.p.9, 1.6
S.R.p.26, 1.30 - Nellie Price again visited the deceased
35. and saw him in the presence of the Res- 10
pondent, Margaret Turton, the deceased tried to speak but was able only to say; "three copies, Nell" and he held up three fingers.
- S.R.p.4, 1.27 (9) The deceased died between 9.30 and 10
S.R.p.8, 1.46. a.m. of the morning of Tuesday the 15th November 1955.
- (10) On the morning of Thursday, the 17th
November 1955 the Respondent Margaret
S.R.p.33 1.19- Turton and Anna Jones (another daugh- 20
36. ter of the deceased) were seen with
S.R.p.37, 1.25- the trousers which the deceased had worn
37. on the previous Sunday and they were looking through papers from the trouser pockets.

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- (11) On that same morning, namely Thursday the 17th November 1955, Miss Sarah Moe, who was in domestic employment in the deceased's house, was clearing up the house when the Respondent, Margaret Turton took papers out of a brown looking envelope, tore them up and instructed Sarah Moe to burn them, which Sarah Moe did.
- 10 (12) After the death of the deceased a search was made of the deceased's effects and the Will of the 10th May 1918 was found but the said Will of the 12th November 1955 was not found. Between the date of death of the deceased and February 1956 Nellie Price told a number of persons (including the Respondent Margaret Turton) of the Will of the 12th November 1955. In February, 1956 two of the Administrators namely the said Margaret Turton and Aura Jones, decided to visit the United States of America to search for a will of the deceased. On learning that the Administrators were going to the
- S.R.p.27 1.32 -
S.R.p.28 1.43.
- S.R.p.34,
1. 11 - 20.
- S.R.p.9 1.20-38
S.R.p.10 1.7-37
S.R.p.13 1.20-30
S.R.p.15 1.25.
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M.R.p.19 1. 1
 M.R. p.20 1. 48
 M.R. p.21 1. 20.

United States, Doyle Prince saw the said
 W. H. Thompson, then Registrar General
 of the Supreme Court, and informed him of
 the Will of the 12th November 1955 and
 of the contents thereof. The Registrar
 wrote a note which Prince took to the
 Chief Justice and the Chief Justice sent
 Prince back to the Registrar. Prince then

M.R. p.97 Ex.P.8.

gave the Registrar a statement setting out
 the terms (so far as he could remember
 them) of the Will of the 12th November
 1955 and the Registrar typed it. Prince's

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M.R. p.19 1.2.
 M.R. p.21 1.1.

two visits to the Registrar were about
 the 6th and 8th February 1956 and both
 took place at the Registrar's lodgings
 where he was ill.

M.R.p.30 1.40 -
 p.41 1.4.
 M.R. p.31 1.38 -
 p.32 1.8.
 M.R.p.33 1.14 -
 1.25.

(13) The Registrar Thompson sent for Roland

Dewgard who told the Registrar of his
 part in witnessing the Will of the 12th
 November 1955 and the Registrar told

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Dewgard to return the following day. On
 the following day Dewgard returned to
 the Registrar who handed Dewgard a type-
 written statement which Dewgard signed.
 Dewgard's two visits to the Registrar
 were at the Registrar's lodgings where

M.R. Ex.P.11 p.99

Record

he was ill.

- (14) On the 13th February 1956 the said Lindsay Jeffery wrote to his co-administratrices, the Respondent Margaret Turton and Aura Jones, a letter in which he stated (inter alia) :-

S.R.p.16, 1.41-46

M.R. p.84, 1.30

M.R. p.100, Ex.D2, D6.

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"Since your departure for the United States the Registrar sent for me with reference to a supposed missing will purported to have been written by D.A.E. Prince and witnessed by Roland Dewgard. He has instructed me by order from the Chief Justice to make another diligent search for this will."

- (15) On the 24th February 1956 the Solicitor to the administrators, the said W. H. Courtenay, wrote to the Respondent Margaret Turton a letter in which he stated (inter alia) :-

M.R. p.43 1.24

M.R. p.84 1.29

M.R. p.101 Ex.D18.

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"As you have already been informed by Major Jeffery, a report has been made to the Court that your late father executed a will a few days before his death. A thorough search for this alleged will has been made of the office, except the safe, and the house

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must be thoroughly searched and report made to the Court. We understand that you have the keys to the safe and the house, and to enable the necessary search to be made of both places, we must ask you to return these keys immediately by airmail. I will see to it that your representative, Mr. Pinks, is present during the search of the house and that your personal belongings are not interfered with. We will also try to 10
arrange for an officer of the Registry to be present. It is my duty to tell you that the Administrators are officers of the Court and as such are liable to be removed from office and otherwise penalised if they do not carry out their duties properly or do anything which may be regarded as contemptuous of the Court. Please therefore comply with the request to return the keys by airmail immediately. 20
If they are not received here by the 10th March, a report will have to be made to the Court, and the matter of the alleged Will will be then investigated by the Court and pronouncement thereon made."

7. Prince's evidence as to his interviews with the

Registrar was as follows: Prince said in examination-in-chief:-

"I told Registrar of this Will, that was Mr. Thompson. I did so about the 6th February. I told him I had made a Will for the deceased on the 12th November 1955 and gave him details of Will. Registrar wrote a note, handed it to me and told me to hand it to the Chief Justice. Mr. Thompson said he was sick. Registrar was then at his home. I saw the Chief Justice and he sent me back to the Registrar at his home. That was two days afterwards. I then gave a statement to the Registrar and he typed it. Details of Will I gave here are what I told the Registrar."

M.R.p.19, 1.1.

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In cross-examination Prince said:-

"When I went to report to the Registrar I made notes of contents of Will for him. That was about the 8th February when I saw Registrar the second time.

M.R.p.20, 1.48

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When I first went to Registrar I explained contents of Will to him in the same form as I did here yester-

M.R. p.21, 1.20

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day. I told Registrar about "revoking all previous testamentary writings that may have been made before by me." - I used words "give and bequeath" when I spoke to Registrar. I used word "debentures" when I spoke to Registrar. I did not then know the meaning of word "debentures" I think I used the words "devises" and something about "legatees" when I spoke to Registrar. A deviser is when one gives a motor car or property on land. 10

I prefer to say I do not remember. I do not know meaning of word "incumbrance". I did use word "incumbrance" to Registrar.

M.R.p.24 1.11.

I know Mrs. Clark was an intimate friend of deceased. I included her name when I told the Registrar of this Will. He wrote it down."

M.R.p.26 1.40
M.R.p.3 No.3

"For affidavit I gave Registrar words as far as I remembered and he put it in legal language and asked me if it sounded correct. I said Yes. Affidavit sounded correct to me. I used words "bequeath" to Registrar. I think I used word "devise". 20

M.R.p.27 1.23.

"I gave Mrs. Helen Clarke's name to Registrar originally, but it was left out in my affidavit filed by Francis."

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The only reference in the evidence to the Registrar typing Prince's Statement was when Prince said: "I then gave a statement to the Registrar and he typed it." M.R. p.19, 1.10.

8. Dewgard's evidence as to his two meetings with the Registrar was as follows. Dewgard said in examination-in-chief:-

"I subsequently gave a statement to the Registrar which I signed. I do not remember the date I did so but I think it was sometime in February." M.R. p.30, 1.40.
M.R. p.99 Ex.P.11.

In cross-examination by Counsel for the Respondent Margaret Turton the witness said :-

"I signed document in office with a pen Prince passed to me. Document shown me is the one I gave to Registrar and signed. On document there appears "and then Mr. Turton passed it (the document) to me and I signed it." M.R. p.31 1.1
M.R. p.99 Ex. P.11.

I did not put date on statement I made to Registrar. M.R. p.31, 1.11.

I gave a statement to Registrar. I did not give one to Mr. Francis nor to any other lawyer in the case. M.R. p.31, 1.38.

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As far as I can remember I did not tell anyone I had given a statement to the Registrar. I was not told to keep the fact that I had witnessed the document in deceased's office confidential. I was sent for by the Registrar and that is why I gave him a statement. I went to Registrar's home. It was in morning sometime between 9 a.m. and 12 noon - I do not quite remember. Registrar asked if I know Mr. Turton and if I did what I knew about the affair. I told him what I knew and he wrote it down and asked me to come back the following day. I went back the following day to his home and he handed me typewritten document already

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M.R. p.99 Ex.P.11 shown me. He asked me to read it over.

I did so and signed it as being correct.

M.R.p.32, 1.38. Registrar did not tell me that deceased was supposed to have made a will on 12th November. I heard that story later. Registrar did not tell me he had taken a statement

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M.R. p.33, 1.14. Registrar sent to call me and I went. He asked me if I knew deceased. I told him yes I did. He asked me when last I saw him prior to his death. I told him I saw him on the Saturday prior

to his death. Registrar wrote this information on a sheet of paper. He asked me exactly what transpired on that Saturday and I told him. He did not then ask me to sign it but asked me to return the following day. I had then given Registrar all information I had on the subject. Registrar did not say why he wanted me to return. He
 10 did not then read over to me what I had told him."

In re-examination the witness said:-

"I went to Registrar's home as message

I got was to see him there. He was sick". M.R. p.34, l.5.

9. The witness Alfred Owen Longworth, M.R. pp. 28-29.
 who was the Acting Registrar of the Supreme Court and as such in charge of Court Records,
 produced

(1) a typescript of a document purporting M.R. Ex.P.8 p.97.
 20 to be the contents of will dictated to the Registrar by Prince; the witness said he had searched for but had been unable to find the original of this typescript document;

(2) a statement purporting to be signed M.R. Ex. P.11 p.99
 by Dewgard (which statement was shown to

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M.R. p.31, 1.3. Dewgard in cross-examination and identified by him as the one made by him to the Registrar and signed by him);

Both these documents were found by the witness in an envelope in a safe which he had taken over in March 1956 from the previous Acting Registrar, one R. A. Pitts, who had since died. The envelope was marked "Confidential - Re Turton Estate" in the handwriting of the said Pitts and above these words were written the further words "W.P. Thompson - Eyre St." but the witness was not certain in whose handwriting these further words were. The envelope contained other documents including a letter dated 2nd May 1956 from the Respondent Margaret Turton to the said Pitts, and certified copies of the inventory of the deceased's estate dated 12th June 1956,

M.R.Ex.P.9
p.103

M.R. Ex.P.10
p.104.

10. The Respondents Margaret Turton Aura Jones and Lindsey Jeffery (who was originally a respondent) did not give evidence. Margaret Turton called the following witnesses:

(1) Sydney Joseph Turton, son of the deceased, who gave evidence as to the Respondent Margaret Turton and others searching for a will on Thursday the 17th November 1955, as to having seen Margaret

S.R. pp.32-40.

S.R. p.33 1.14

S.R. p.33,1.19

S.R. p.37,1.25

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Turton and Aura Jones looking through documents taken out of the trousers worn by the deceased on the Sunday previous to his death (as set out in paragraphs 6 (10) of this Case); as to a further search being made and the Will of the 10th May 1918 being found; as to the Respondent Margaret Turton being in the deceased's bedroom searching at the time when according to Sarah Moe's evidence the said Sarah Moe was given papers to burn by the Respondent Margaret Turton.

S.R. p.34 l.11

S.R. p.34 l.26-32.

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(2) George Arthur Ysaguirre, who said that Nellie Price told him that she did not think that the deceased had made a will as he had given her instructions for a will but had died before it was made.

M.R. pp.39-40

(3) Apolonia Alamilla, who said that Nellie Price told him that the deceased had instructed her to make a will but had died without it having been made.

M.R. pp.40-42.

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(4) Hazel Usher who proved the signatures on the Will of the 10th May 1918 and on the letter of the 24th February 1956 from Courtenay to Margaret Turton.

M.R. p.43.

M.R.p.94 Ex P.14

M.R.p.101 Ex.P.18

(5) Irene Gabourel who said that she ran

M.R. pp.36-37,38

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the Gabourel Guest House in Eyre Street: that the Registrar Thompson lived there from December 1953 to mid-February 56; that she cleaned his room and went into his room about twice a day; that throughout his stay she had never seen him use a typewriter and had never seen a typewriter in his room, but that she had heard a typewriter being used in his room; that she had not seen any visitors visiting the Registrar.

M.R. pp.35-36.(6) Elsie Smith, who lived at the Gabourel Guest House at 34 Eyre Street and was the sister of Irene Gabourel, said that the Registrar (the said W. P. Thompson) lived at the guest house from December 1953 to mid-February 1956, that he was ill at home from the beginning to mid-February 1956 off and on; that at one time he was taken to hospital; that she had never seen the Registrar use a typewriter in the house; that she herself could type and had a typewriter which was in the house throughout the Registrar's stay there but he had never borrowed it nor asked her to type anything for him; that she had been to the Registrar's room once or twice during his stay.

M.R. p.42 1.5. 11. On the 30th November 1956 Counsel for

the Respondent Margaret Turton informed the Court that the evidence of the said Elsie Smith and Irene Gabourel concluded the case for the Defendants except for a witness who would be called to put in certain documents. On the 3rd December 1956 Counsel for the Respondent closed his case. On the 6th December 1956 the Court (after hearing arguments by Counsel on the 3rd, 4th, 5th and 6th December 1956) reserved judgment,

M.R.p.43, 1.39.

M.R.p.70, 1.43.

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12. (1) On the 17th January 1957 the Respondent Margaret Turton applied by Notice of Motion for leave to reopen her defence and to call further evidence. The grounds of her application were that such further evidence could not reasonably have been called at the trial and that such further evidence was now available and would form a determining factor in or an important influence on the result of the action. In her affidavit in support of the application the Respondent said that she was informed and verily believed that such further evidence would be given by the said Thompson formerly Registrar of the Supreme Court who will say :-

M.R. p.71 No.29

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M.R. p.71 No.30

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(i) That he did not type the document produced or any document in the presence of or on behalf of Doyle Prince a witness for the Plaintiff in the above-named action.

(ii) That he is unable to type.

(iii) That Doyle Prince did not at any time give him a written statement nor did Doyle Prince sign any statement in his presence.

(iv) That he did not reconstruct the 1955 Will in its present form from information given him by Doyle Prince or at all. 10

(v) That he did not send for Roland Dewgard a witness or the Plaintiff as alleged or at all.

(vi) That he did not take any statement from Roland Dewgard in manuscript.

(vii) That he did not type the statement which is an exhibit in this case for Roland Dewgard or at all. 20

M.R. Ex. P.11.
p.99.

(2) On the 29th January 1957 this Notice of Motion was adjourned generally to be brought on by fourteen days notice by either party subject to the approval of the Court.

(3) On the 13th day of February 1957 an order was made for cross-examination of the

M.R. p.73 No.32.

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Respondent Margaret Turton on her affidavit such cross-examination to be taken on the 5th March 1957.

(4) On the 27th February 1957 the Appellant's Solicitor gave notice of hearing of the Motion on the 18th March 1957. M.R. p.75 No. 34

(5) On the 5th March 1957 an order was made that as the Respondent Margaret Turton failed to appear her said affidavit be struck out and be not used as evidence. M.R. p.75 No. 35

(6) On the 18th March 1957 the Respondent Margaret Turton was granted leave to file an additional affidavit or affidavits and the said Motion was adjourned to the 16th April 1957. M.R. p.76 No. 36

(7) On the 16th April 1957 the said Motion was dismissed. M.R. p.82, 1.11,12
M.R.p.86, 1.19.

13. On the 11th May 1957 the Respondent Margaret Turton again applied by Notice of Motion for leave to reopen her defence and to call the said Thompson as a witness. The grounds of the said application of the 11th May 1957 were the same as the grounds of the application of the 17th January, 1957, that is to say :

(1) That further evidence (namely that

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of the said Thompson) was now available and would form a determining factor in or on important influence on the result of the action, and

(2) that such evidence could not reasonably have been called at the trial of the said action.

14. In support of her said application of
 M.R. p.77 No.38 the 11th May 1957 the Respondent Margaret
 M.R. p.79 No.40 Turton filed an affidavit exhibiting a statu- 10
 tory declaration made on the 25th April 1957
 by the said Thompson in which the said
 Thompson declared as follows :-

(1) that he is unable to type;

(2) that he did not at any time personally type out at the boarding house where he lived information given him by any person known as Doyle Prince purporting to be the contents of the deceased's alleged will made on the 18th November 20
 1955;

(3) that as he did not type such information, he did not therefore then sign the said writing;

(4) that he did not subsequent to this reconstruct the deceased's alleged last

will from information supplied by
Prince;

(5) That he had not the slightest re-
collection of subsequently sending a
message to Dewgard in connection with
the said will and he did not know
Dewgard;

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(6) that he did not take down in manu-
script form at his home any information
from Dewgard and Dewgard did not give him
any information;

(7) that he did not a few days later send
for Dewgard and present him with a typed
statement and get him to sign it;

(8) that he did not type this statement;

(9) that he did not when living at the
boarding house or at any time possess a
typewriter.

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15. The Appellant filed an affidavit
opposing the Respondent Margaret Turton's
application of 11th May 1957 on the grounds
that :-

M.R. p.81 No.41.

(1) the further evidence (namely that of
the said Thompson) could reasonably have
been discovered before the trial and
ought to have been discovered;

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(2) the Defendant Lindsay Jeffery received copies of the Statements made by Prince Dewgard in February 1956 and he (Jeffery) informed the Respondent Margaret Turton shortly thereafter that these statements had been made;

(3) the said Thompson was (except for a period from late February or early March 1956 until July 1956) in British Honduras until the 15th September 1956; the said Thompson as Registrar signed an Order made on the 29th August 1956 for the examination of Prince de bene esse in this matter; the Respondent Margaret Turton was represented by her Solicitors throughout these proceedings; 10

(4) the fullest investigation ought to have been made by the Respondent upwards of a year ago so as to ascertain the full facts, particularly as the said Thompson was ill and it could not be known whether he would survive the illness or not; 20

(5) before closing the defence in this action the Respondent Margaret Turton could have ascertained the whereabouts of the said Thompson in order to discover the

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true facts or alternatively would have asked for an adjournment to do so;

(6) the Motion dated the 17th January 1957 to the same effect as the present motion was dismissed on the 16th April 1957.

M.R. p.71 No. 29

M.R. p.82 l.12
M.R. p.86 l.19.

(7) no mention was made in the application as to the state of health of the said Thompson who was then out of the jurisdiction or whether he was willing and able to come and give evidence in Court.

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16. The Respondent Margaret Turton in reply filed an affidavit sworn on the 16th August 1957 in which she stated "that it was impossible to anticipate that the Plaintiff (Appellant) would have made it a part of his case that Mr. Thompson typed a statement given him by Doyle Prince when in truth and in fact Mr. Thompson is unable to type." On the 29th August 1957 she was cross-examined on her said affidavit. Her evidence (as given on affidavit and in cross-examination) was as follows:

M.R. p.82 No. 42

M.R. p.84 No. 44

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(1) The Respondent Lindsay Jeffery obtained the statements from Prince and

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Dewgard while she was in the U.S.A.; at that time she had no legal adviser acting for her personally but the said Courtney was acting for the Administrators of the deceased's estate and she had the said Jeffery were two of the Administrators

M.R. Ex.D.18
p.101

M.R. Ex.D.2 and
D.6. p.100

(2) She received a letter dated the 24th February 1956 from the said Courtenay and also two letters dated the 13th February 1956 from the said Jeffery in which the said Jeffery informed her that the Registrar General (namely the said Thompson) had sent for him with references to a supposed missing will purported to have been written by Prince and witnessed by Dewgard and that the said Thompson had instructed him (Jeffery) by order from the Chief Justice to make another diligent search for this will; 10

(3) she returned to British Honduras on the 7th March 1956 and on the 8th March 1956 the said Courtenay showed her a copy of the will alleged by Prince; 20

(4) she claimed that it only became relevant to enquire from the said Thompson as to his further evidence after the witness Prince and Dewgard had given evidence and it had

been made part of the Plaintiff's case that the said Thompson typed the statement he obtained from Prince.

17. It was submitted by Counsel on behalf of the Respondent Margaret Turton that it could not be anticipated that it would be part of the Plaintiff's case that the said Thompson typed the will dictated by Prince and it thereupon became relevant to enquire whether the said Thompson was able to type or not. Counsel further submitted that the facts set out in the said Thompson's statutory declaration were directly in issue having regard to the unusual manner in which the 1955 will came into Court and his evidence went to the whole root and fabric of the case. He further submitted that the principles on which a case would be re-opened entitled the moral elements of the case to be taken into consideration and the authorities enabling further evidence to be called on appeal apply a fortiori in a case when judgment had not yet been given..

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M.R. p:85 l.20

M.R. p.86 l.5

M.R. p.79 No. 40

18. Counsel for the Appellant argued that pp. 86 - 88. the further evidence, namely that of the said

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Thompson should not be admitted and he submitted:-

- (1) that the Respondent could reasonably have foreseen the necessity for the said Thompson's evidence because by March 1956 she knew about the alleged will and was contesting its authenticity, on 1st October 1956 Prince gave evidence de bene esse and said that the Registrar put in bequeathing words, at the trial the evidence of Prince 10 was given on the 22nd November 1956 and the evidence of Dewgard on the 26th November 1956 and the Respondent called the witnesses Smith and Gabourel on the point to be covered by the said Thompson's evidence and then without asking for an adjournment she closed her case on the 3rd December 1956;
- (2) that there was no material put before the Court to show that the said Thompson's 20 evidence could not have been discovered and procured before the case for the Defendants was closed;
- (3) that the proposed evidence went to credit only and not to any particular issue;

M.R. p.107
Ex. P.7.

(4) that an application of this kind must be made promptly and the present application was not made till the 11th May 1957, that is five months after the case was closed.

19. The evidence was given by Prince de bene esse on the 1st October 1956 was (insofar as it related to his interviews with the Registrar) as follows:

10 Prince said in examination-in-chief :-

"I gave a statement to the Registrar in February 1956. I told him what I remembered the contents of the Will to be. I went to him on February 6th 1956 in the evening. At that time he told me he was an ill man and he started to tremble and he wrote a note and sent me with it to the Chief Justice. I remember what I told Mr. Thomson was in the last will. I think I remember it or some of it."

M.R. p.109 1.49

(The witness then stated the terms of the will)

20 "Later I heard that the administrators were about to go to the United States in search of another will as they had not found any will later than 1918. When I

M.R. p.111 1.12

Record

knew for certain that they were going I went to the Registrar as I thought this might save them expense as I knew they would not find anything later than 12th November 1955 and there was a will made on the 12th November 1955."

The cross-examination by Counsel for the Respondent Margaret Turton, Prince said:

M.R. p.113
1.38

"I went to the Registrar about February 6th this year."

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M.R.p.114 1.46

"I heard about the probate of the 1918 Will about a month or two after Mr. Turton's death. I can't say how long after I heard this I went to the Registrar. I went to the Registrar sometime after I heard about the probate of the 1918 Will. I didn't go to the Registrar immediately I heard this because a search was still going on for a later will."

In cross-examination by Counsel for Everalda Turton (who had been cited and had appeared to the citation) Prince said:

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M.R.p.116
1.17

"I told the Registrar that Mrs. Helen Clarke was a legatee for \$30,000. At the time I said Mrs. Clarke to the Registrar."

M.R.p.116 1.49

"When I went to the Registrar they (the

Administrators) had not left the Colony yet."

"The wording of this clause (i.e. clause M.R. p.117 1.10 about debentures) is worded by the Registrar from what I told him of what I recollected from what Mr. Turton dictated."

In cross-examination by the Solicitor-General appearing for the Crown, Prince
10 said:

"I told the Registrar the gist of Mr. M.R. p.117 1.24
Turton's dictation. I can remember to p.118 1.4.
fairly accurately what I said to the Registrar. I told the Registrar that
..... (the witness stated the terms of the will). I didn't profess to be giving the Registrar Mr. Turton's exact words. I couldn't remember the exact words used by Mr. Turton in
20 every line."

20. Mr. Justice Cools-Lartigue by Order M.R. p.91 No.49
made on the 2nd September 1957 granted the Respondent Margaret Turton's application to re-open her defence and to call the said Thompson. He gave an oral judgment in which he stated:

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M.R. p.91 No.48. "I hold on the facts that the evidence could not have been reasonably obtained by due diligence on the part of the Defendant before her case was closed. Thompson was not in the Colony when Prince and Dewgard gave their evidence and the Defendant could not have foreseen that Prince's evidence about typing or Dewgard's evidence (referring to the Registrar) would have been given. I hold also that the evidence must have an important influence on the result and in the interests of justice I feel I should grant this application." 10

M.R. p.91 No.49 21. The learned Judge further ordered that the Appellant be granted leave to call the Chief Justice to give evidence in rebuttal of the evidence of the said Thompson.

22. The Appellant being dissatisfied with the judgment of Mr. Justice Cools-Lartigue on the 3rd March 1958 obtained from the Supreme 20

M.R. p.92 No.50 Court of British Honduras final leave to appeal from the said Order to Her Majesty in Council.

23. The Appellant will contend that it appears from the Record that the following matters were proved or admitted:-

Record

- (1) From November 1955 onwards the Respondent Margaret Turton knew that there was alleged to be a missing Will purported to have been written by Prince and from February 1956 onwards she knew of the statements made to the Registrar Thomson by Prince and Dewgard and that the said Will was alleged to have been witnessed by Prince and Dewgard. On the 8th March 1956 the Solicitor to the Administrators showed her a copy of the said alleged Will.
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- (2) The Registrar Thomson left British Honduras for Canada in February or early March 1956. He returned in June or July 1956 and remained in Belize until the 14th or 15th September 1956 when he resigned from his office of Registrar and left for Canada. On the 30th August 1956 he signed the Order for examination of Doyle Prince de bene esse.
- 20
- (3) On the 1st October 1956 Prince gave
- S.R. p.9 1.7 - 27
S.R. p.10 1.8, 32
S.R. p.12 1.42 -
p.13 1.30
M.R. p.81 1.17
M.R. p.83 1.16
M.R. p.84 1.24
M.R. Ex. D2 and 6
p.100
M.R. Ex. D18, p.101
M.R. Ex. P.8, p.97
M.R. Ex.P.11, p.99
- M.R. p.85 1.4.
- M.R. p.81 1.23
M.R. p.29 1.26
M.R. p.28 1.23
- M.R. p.13 No. 12.
- M.R. Ex.P7 p.107

Record

M.R. p.109 1.49 to
p.110 1.6.

M.R. p.111 1.15.

evidence de bene esse in the course of this evidence Prince described his interviews with the Registrar Thomson and how he came to give a statement to the Registrar. (The relevant passages, in Prince's evidence are set out in paragraph 19 of this Case). The Respondent Margaret

M.R. p.113 1.21,
38 - 47

M.R. p.114 1.48
to p.115 1.4.

M.R. p.116 1.17,49

M.R. p.117 1.10-20

M.R. p.117 1.10 to
p.118 1.4.

Turton was represented by Counsel who cross-examined Prince as to his interviews with the Registrar. Counsel for Everalda Turton and the Solicitor-General likewise cross-examined Prince as to his interviews with the Registrar. 10

(4) The trial of this action began on the 20th November and ended on the 6th December 1956.

M.R. p.19 1.1-12

M.R. p.20 1.48 to
M.R. p.21 1.2

M.R. p.21 1.20-35

M.R. p.24 1.12

M.R. p.26 1.40-45

(5) The evidence of Prince as to his interviews with the Registrar (which save for his evidence that the Registrar typed his statement was substantially similar to his evidence de bene esse) was given on the 22nd, 23rd and 26th November, 1956, and that of Dewgard as to his interviews with the Registrar was given 20

M.R. p.30 1.40

M.R. p.31 1.3,11,38

M.R. p.31 to p.32 1.9

Record

- on the 26th and 27th November 1956. M.R. p.32 l.38 to 41
M.R. p.33 l.14 to 25
M.R. p.34 l.5 to 8.
- (6) On the 26th November 1956 the Respondent cross-examined the Appellant's witness Longsworth as to whether the said Thompson could type and on the 27th and 30th November she called Elsie Smith and Irene Gabourel for the purpose of showing that the said Thompson did not type and did not have a typewriter in his room and that no visitors were seen to visit him at his lodgings. M.R. p.29, l.21.
M.R. pp.35 - 37.
- 10 (7) On the 3rd December 1956 the Respondent closed her case without applying for an adjournment and after argument by Counsel reserved on the 6th December 1956. M.R. p.43, l.49.
- 20 (8) On the 17th January 1957 the Respondent applied for leave to re-open her defence and to call the said Thompson. This application was dismissed on the 16th April, 1957. M.R. p.70, l.43
M.R. p.71 No. 29
M.R. p.82, l.11.
M.R. p.86, l.19.
- (9) On the 11th May 1957 the Respondent M.R. p.76, No. 37.

Record

M.R.p.77 No.38.

M.R.p.79 No.40.

M.R. p.91 No.49

again applied for leave to reopen her defence and to call the said Thompson and she exhibited to her Affidavit in support of her application a statutory declaration made on the 25th April 1957 by the said Thompson. This application was successful and the present appeal is from the Order granting this application.

- (10) There was no evidence at the trial of this action or in support of the said application of the 11th May 1957 (or in support of the application of the 17th January 1957 which had been dismissed) showing that the said Thompson who was abroad when the action was tried could not be called or that any attempts had been made to call him or to obtain his evidence on commission or otherwise or to ascertain from him whether he was willing and/or able to give the evidence set out in his Statutory Declaration made on the 25th April 1957 or any other and if so what evidence before the Respondent closed her case.

M.R. p.79 No.40

M.R. p.71, No.30.

24. In her affidavit sworn on the 17th

January 1957 the Respondent Margaret Turton stated that she was informed and verily believed that the said Thompson would give the evidence set out in his Statutory Declaration made on the 25th April 1957 (which evidence is set out in paragraph 12 (1) of this Case) but she did not state the source of her information nor whether anyone had been in touch with the said Thompson. The only evidence as to the date when the Respondent or anyone on her behalf was first in touch with the said Thompson was that of the Respondent herself who said that she had never communicated with the said Thompson and did not know of anyone getting in touch with him until about the time when the Statutory Declaration made on the 25th April 1957 came from him.

M.R. p.79 No. 40

M.R. p.85 1.5.

M.R. p.79, No.40.

25. The Appellant respectfully submits that the Order made on the 2nd September 1957 by Mr. Justice Cools-Lartigue and dated the 28th September 1957 should be set aside for the following amongst other

M.R. p.91 No.49.

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R E A S O N S

(1) The Respondent Margaret Turton having in the exercise of her judgment closed her case without calling or attempting to call the said Thompson or applying for an adjournment for the purpose of calling the said Thompson and there being no evidence that the said Thompson could not be called before she closed her case, the learned Judge was wrong in granting the Respondent's application to reopen her defence and to call the said Thompson. 10

(2) There was no evidence on which the learned Judge could hold that the evidence of the said Thompson could not have been reasonably obtained by due diligence on the part of the Respondent before her case was closed.

(3) The proposed evidence of the said Thompson as appears from his Statutory Declaration is inadmissible and/or irrelevant.

(4) The proposed evidence of the said Thompson not such as to have an important influence on the result of the case. 20

(5) The Respondent's application of the 17th January 1957 having been dismissed by Order made on the 16th April 1957 it was not

open to the Respondent to make the said application of the 11th May 1957 which application was in substance and effect the same application as that of the 17th January 1957 which had been dismissed.

(6) The Learned Judge failed to direct his mind (a) to the Respondent's obligation to use due diligence to discover the proposed evidence and to bring it before the Court, and (b) to the time which had elapsed between the closing of the Respondent's case on the 3rd December 1956 and the making of the applica-
10 tion on the 11th May 1957 and to the events occurring between the said dates.

(Sgd) DIMITRY TOLSTOY.

No. 16 of 1958
IN THE PRIVY COUNCIL
ON APPEAL
FROM THE SUPREME COURT OF
BRITISH HONDURAS

IN THE ESTATE OF ROBERT TURTON
DEC'D

ROBERT SIDNEY ACOSTA

- v -

ALFRED OWEN LONGSWORTH & ORS.

CASE FOR APPELLANT

HY. S. L. POLAK & CO.,
~~Suite 23,~~
~~67/69 Chancery Lane,~~
~~W.C.2.~~
46, Museum Street, W.C.1.