Privy Council Appeal No. 12 of 1917.

Sarah Elizabeth Green and Others - - - *Appellants,*

v.

Lawrence Dumsday and Another - - - *Respondents,*

FROM

THE SUPREME COURT OF WESTERN AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JULY, 1917.

Present at the Hearing:

VISCOUNT HALDANE.
LORD SHAW.
SIR ARTHUR CHANNELL.

[*Delivered by* VISCOUNT HALDANE.]

Their Lordships are of opinion that they can dispose of this case at once.

The point is a very narrow one. It is first a question of fact, and there has been a finding of fact by the Courts below that the respondent Lawrence Dumsday told the truth, and that his evidence must be accepted. If that is so, the remaining question is one only of law—what presumption is to be made? The law upon that subject has been laid down by Courts of great authority, and particularly in *Barry* v. *Butlin* (2 Moo. P.C. 480), and the later case in the House of Lords, which followed and approved of that case, *Fulton* v. *Andrew* (L.R. 7, H.L. 448). The law, as laid down, is that the party who has drawn a particular clause under which he benefits, has to show that the testator knew what he was doing. It is material in this case that no exception is taken to the will as a whole. It is admitted that the testator was in a condition to make a will, and did make it. The only question is whether clause 16, which gives commission for management to Mr. Dumsday, should be struck out. The testator appears to have been in a perfectly clear state of mind when he made the other parts of the will, and, on the evidence, the respondent Mr. Dumsday brought enough to the testator's notice to make it clear to him that the commission which the testator suggested was the commission which the Trust Company would receive. The delay in putting in the clause arose, not

from any doubt on the part of the testator, because the testator said that his proposal was that Mr. Dumsday should have such commission as the Trust Company would have had, but from Mr. Dumsday desiring to find out what the commission was, because it might not have been enough. This was an estate which the testator desired to be realised and apparently to be turned over to a company, which might be a very troublesome piece of business, and the initial work of dealing with the Company might form the bulk of what the executor had to do. Under those circumstances it is by no means clear that the main business was not business to be paid for at once, and liberally. Mr. Russell for the appellants says that Mr. Dumsday might have died, whereas the Trust Company being a Corporation, would have gone on. But that is a state of things which may often occur when an executor is required to do a large piece of business which has to be accomplished at a very early stage, if it is accomplished at all. In such a case most people when they depend on personal service are content to take the risk of the death of the executor, and there is no reason to suppose that the testator did anything different in this case.

Under these circumstances their Lordships are of opinion that the question being only one of satisfying the burden of proof, that burden of proof has been satisfied, and the concurrent findings of the Courts below are findings which their Lordships accept. They are also in agreement with the Courts below in the view they have taken of the law.

For these reasons their Lordships will humbly advise His Majesty that the appeal fails, and should be dismissed with costs.

Privy Council.

SARAH ELIZABETH GREEN AND OTHERS

v.

LAWRENCE DUMSDAY AND ANOTHER

DELIVERED BY
VISCOUNT HALDANE.

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