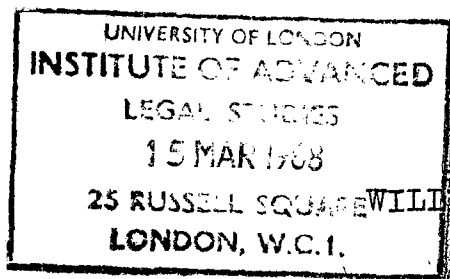


91426

1967/12

IN THE PRIVY COUNCILAppeal No.47 of 1964

ON APPEAL
FROM THE SUPREME COURT OF BERMUDA

B E T W E E N:

WILLIAM EDWARD ARTHUR SWAN (Plaintiff)
Appellant

- and -

MARISCHAL PHILLIPS HUNTINGTON (Defendants)
and RICHARD CLEVELAND FOX Respondents

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C A S E FOR THE RESPONDENTSRecord

1. This is an appeal against the Judgment of the Supreme Court of Bermuda dated the 3rd day of July 1964 by which the Chief Justice of Bermuda, Sir Myles John Abbot, delivered Judgment for the Respondents as Defendants against the Appellant as Plaintiff admitting to Probate in solemn form a copy of a Will of Margaret Young Horne, also known as Margaret Young Huntington, hereinafter called "the deceased", dated the 24th day of January 1950.

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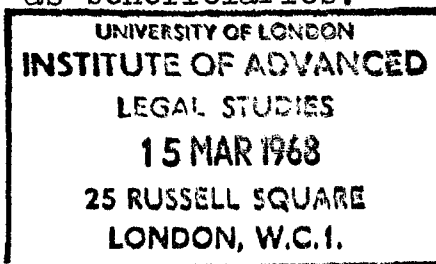
Page 101

2. The deceased was at all material times the owner and proprietor of "Warwick Villa", a guest house in Bermuda, the Appellant was a general handyman employed by the deceased from 1950 until her death. The first Respondent is the only son of the deceased and the second Respondent was a general handyman employed by the deceased from 1937 till 1951.

3. The deceased died on the 28th day of March 1961, six days after her admission to hospital, at the age of 64. On the 1st day of April 1961

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- Record
- Page 1 the first Respondent entered a caveat in the Supreme Court of Bermuda that nothing be done in the personal estate of the deceased unknown to him which caveat was warned and Appearance was entered to the warning.
- Page 2 4. The Appellant thereupon commenced this action against the first Respondent by his Statement of Claim endorsed on the Writ issued on the 6th day of May 1961, claiming as executor Probate in solemn form of the Will of the deceased dated the 22nd day of March 1961, and made six days before the death of the deceased (hereinafter called "the 1961 Will") whereby the Appellant was appointed sole executor and beneficiary of the deceased's estate. By his Affidavit of scripts sworn on the 9th day of June 1961 the Appellant averred that he had no knowledge of any testamentary disposition of the deceased other than the 1961 Will. 10
- Page 137
- Page 3 5. The first Respondent by his Defence delivered on the 13th day of June 1961 admitted the appointment of the Appellant as executor of the 1961 Will, but alleged that for some time prior to and at the making of that Will the deceased was incompetent and not of sound mind; that she had died intestate and a widow; that he was the only lawful son and heir-at-law and the only person entitled to her estate. He counterclaimed for a pronouncement against the Will. 20
- Page 4
- Page 7 By his Affidavit of scripts the first Respondent averred that he understood that the deceased had made a Will some years before in which he was to be a beneficiary. 30
- Pages 8 & 10 6. Further Affidavits sworn on behalf of the first Respondent revealed the existence of a carbon copy of an original Will made by the deceased, dated the 24th day of January 1950 (hereinafter called "the 1950 Will") whereby the two Respondents and one Edward Astwood, who died before the deceased, were appointed executors and trustees of the property comprised in that Will. Under the 1950 Will the trustees and a certain charity are named as beneficiaries. 40



91426

7. Following the discovery of this earlier Will or its carbon copy:-

Record

(i) The second Respondent applied for and obtained leave to be joined as a co-Defendant in the action.

Page 16

(ii) The first Respondent delivered an Amended Defence in which he set out his claim as an executor and beneficiary under the 1950 Will in the alternative to his former Defence and Counterclaim.

Page 18

(iii) The second Respondent delivered his Defence alleging that the deceased was not of sound mind, memory and understanding at the time of her execution of the 1961 Will, and in the alternative that if she was of sound mind at that time the Appellant procured the execution of the Will by undue influence. The second Respondent counterclaimed for Probate in solemn form of the 1950 Will.

Page 32

8. Pursuant to leave granted by the learned Chief Justice at the trial and with consent both Respondents amended their Defences to Counterclaim for Probate of a copy of the 1950 Will instead of the Will itself.

Page 41

9. The issues at the trial may be conveniently summarised as follows:

(a) Was the deceased of sound mind, memory and understanding at the time when she made the 1961 Will?

(b) Did the Appellant procure the execution of the 1961 Will by undue influence?

(c) Is the copy of the 1950 Will a true copy?

(d) Was the original Will of 1950 destroyed by the deceased amino revocandi?

With the exception of (b), the above are the issues to be determined on this Appeal.

Record

10. The action was heard on the 17th, 18th, 19th, 23rd, 24th and 25th days of June 1964 before the learned Chief Justice of Bermuda sitting without a jury.

11. The following witnesses were called on behalf of the Appellant:-

(i) The Appellant

Pages 47-48
49-57

A full note of the Appellant's evidence is set out in the Report of Proceedings.

The Appellant testified that he was employed by the deceased at "Warwick Villa" from about 1950, first as a gardener and later as a general handyman. He stated that the deceased had once asked him how he would like it if she left him the cottage at "Warwick Villa"; that she had once told him that one day he would have the headaches which she was having with "Warwick Villa"; that on 22nd March 1961 before the deceased went into hospital she asked him for his full name; and that she told him that if anything happened to her he should contact Mr. Madeiros, her attorney, when he would be taken care of. He explained that none of these incidents gave him the impression that he was to benefit under the deceased's Will.

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In 1957, he said, the deceased told him that she was going to change her Will. He testified that in about 1957 she second Respondent said that if he ever came across a will made by the deceased he should let the second Respondent see it and then destroy it.

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He denied that he was in a position to influence the deceased in her decisions, and further denied that she was constantly litigating, although he agreed that she was completely obsessed about some land which she thought she owned.

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He further denied that the deceased maliciously damaged a television set which she had seized from one of the

guests at "Warwick Villa". He testified that his Affidavit of scripts, sworn on 9th June, 1961, was untrue, in that he knew of the existence of the 1950 Will.

Record

(ii) Mr. M.E.B. Nash

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Mr. Nash, the Medical Superintendent of King Edward Hospital where the deceased spent her last illness, testified that he saw the deceased once in hospital and noticed nothing unusual about her. He did not see her long enough completely to observe her physical and mental condition. He stated with reservations that the deceased was a very sick woman on admission to hospital.

Page 42

(iii) Mr. L.J. Madeiros

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This witness, an attorney of the Supreme Court, testified that on the afternoon of 22nd March 1961 he took instructions from the deceased to draw up her Will. He said he had no reason to doubt her mental capacity; he had known her before and had always considered her eccentric but sane. Her condition in his view had not deteriorated when he saw her in the hospital.

Page 45

(iv) Mr. E.A. Jones

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Mr. Jones, an attorney and barrister-at-law, testified that he acted on behalf of the deceased in 1957 when she wanted to set aside a Judgment of the Privy Council against her. Despite his advice she continued with her action.

Page 57

(v) Mr. S.H. Pettit

This witness testified that he lived as a paying guest in "Warwick Villa" from November 1960 to April 1961, during which time the deceased managed the property very efficiently.

Page 58

Record

12. Fourteen witnesses gave evidence on behalf of the first Respondent, of whom four testified to eccentricities of the deceased before 1950 and to side issues not relevant to this appeal. The following witnesses gave material evidence on behalf of the first Respondent:-

(i) The first Respondent

Page 64

The evidence of the first Respondent was taken on commission on 13th May, 1963. He testified that he was the only son of the deceased and described the way in which she treated him when he was a small boy, frequently beating him for no apparent reason. He thought that the treatment he received was tantamount to insanity of some sort and that she was unsound mentally most of her life. He was taken away from the deceased when he was 14. He agreed, however, that she ran "Warwick Villa" efficiently, and he thought the deceased disliked him. He was contesting the Will for the sake of his heirs, not for himself.

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(ii) Mr. H.J. Elverson

Page 48

Mr. Elverson, the Administrator of King Edward Hospital, proved the hospital records, Exhibit C.

(iii) Mr. M.A. Gibbons

Page 60

This witness testified that as a result of a boundary dispute with the deceased in about 1950, the deceased and others pulled down the chimney of his cottage and broke some windows, for which acts she was convicted of wilful damage. In his opinion the deceased was a little abnormal and in need of medical attention.

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(iv) Miss C. White

Page 61

Miss White, a State registered nurse and a cousin of the deceased, testified that she had visited the deceased in hospital in March, 1961. She described how the

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deceased repeatedly alleged that someone was trying to poison her for her money and that she was very excited and nervous and her conversation was unbalanced. Miss White thought that the deceased was mentally ill.

Record

(v) Mr. E.G. Richards

10 This witness testified that he was an attorney of the Supreme Court and had acted in that capacity for the deceased between 1948 and 1951. He had drawn up a Will for her and produced a copy of that Will to the Court. He was sure that when she signed the Will the deceased was of sound mind, memory and understanding.

Page 65

Page 101

(vi) Mr. A.W. Sedgewick

20 Mr. Sedgewick, the Senior Magistrate of Bermuda, testified that in 1959 he gave judgment against the deceased for damages, in which case he had found as a fact that a television set, the subject-matter of the action, had been maliciously damaged by the deceased.

Page 66

(vii) Miss N. Mitchell

30 This witness, a nurse, testified that she had lived next door to the deceased and knew both the deceased and the first Defendant. She recalled that the deceased whipped the first Defendant unmercifully on several occasions. She had always felt that the deceased was as mad as a hatter, but when she saw her in hospital she said she revised her opinion.

Page 68

(viii) Mrs. J. Sharpe

40 Mrs. Sharpe, a cousin of the deceased, testified that she had known the deceased all her life and from early on she was eccentric and unreasonable. She had visited the deceased during her last illness with her husband and Miss White, and she confirmed Miss White's evidence.

Page 72

Record

She concluded from what she saw in hospital that the deceased was mentally unbalanced.

(ix) Mr. H. Sharpe

Page 63

This witness accompanied Mrs. Sharpe and Miss White on their visit to the deceased and agreed that their testimony was accurate.

(x) Dr. J.C. MacAuley

Page 77

This witness, a Registered Medical Practitioner, testified that he first treated the deceased on about 12th March, 1961. She was suffering from severe heart failure and liver failure, so that on her admission to hospital on 22nd March 1961, she was an extremely sick woman. As a result of her liver condition she was delusional. In his opinion when he saw the deceased on the evening of 22nd March, 1961, she was not in a fit mental state to make a will and he would not have thought that she at any time that day was of sound mind, memory and understanding.

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13. The following witnesses were called on behalf of the second Respondent:-

(i) The second Respondent

Page 74

The second Respondent testified that he had been employed by the deceased from 1937 to 1951 as a general handyman.

Page 101

In 1950 the deceased made a Will and showed it to him; that Will was identical to the copy Will of 1950 now before the Court. He saw the deceased put the Will in a suitcase. After the deceased's death the Appellant told him that the 1950 Will was in a bank vault for which the Appellant had the only key.

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The second Respondent related that he had remained friendly with the deceased after he stopped working for her, and he visited her frequently. He had seen the deceased by chance at Dr. Smith's surgery in

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January, 1961, when she told him she had a piece of steel moving up and down her arm; he found this statement peculiar, and thought it was a figment of her imagination.

Record

When he was working for her the deceased was fussy, but not out of her mind, and he saw nothing thereafter to make him change his opinion.

(ii) Dr. C.A. Smith

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This witness testified that he was a registered medical practitioner and that the deceased was his patient from December, 1950, until 18th March, 1961. During that period he found the deceased to be of sound mind, memory and understanding.

Page 67

14. The reserved Judgment was delivered on the 3rd day of July, 1964.

Page 85

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The learned Chief Justice first outlined the course of the pleadings and pointed out that the first Respondent made no averment in the final version of his Defence and Counterclaim to support his alternative contention that the deceased was incompetent to make the 1950 Will, and so died intestate.

15. The learned Chief Justice found that the Appellant had told a large number of lies in his evidence, and concluded that he was not a reliable witness. In particular the learned Chief Justice did not accept that:-

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(a) The Appellant never thought that he would benefit by the deceased's Will, despite the clear indications given to him on several occasions.

(b) The Appellant did not know of the existence of the 1950 Will.

(c) The Appellant was told by the second Respondent that if he found an earlier Will he should destroy it.

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(d) The Appellant did not know the television set was maliciously damaged while in the possession of the deceased.

Record

16. Reviewing the deceased's mental condition prior to March, 1961, the learned Chief Justice said there was a long history to be gleaned from the evidence of the deceased's eccentricities, and that that was a mild word to use in some respects. It was clear that her treatment of the first Respondent was sadistic and cruel almost beyond belief. She was completely obsessed about a piece of land which she thought she owned. She was very litigious. She believed there was a piece of steel running up and down her arm and refused to believe the diagnosis of sciatica by her medical adviser.

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Pages 77, 61,
Pages 72, 63.

17. The learned Chief Justice then reviewed evidence of the deceased's mental condition in March, 1961, at the time she made her last Will. He found it impossible to reject the evidence of Dr. MacAuley, Mrs. White, Mrs. Sharpe and Mr. Sharpe, all of whom were disinterested witnesses and who testified to the deceased's mental disturbance. He could not and did not accept the evidence of those who said the deceased was mentally sound at the time she made the 1961 Will, and accordingly he pronounced against its validity. The onus of proof was on the Appellant to prove that at the time of execution of the 1961 Will the deceased was of sufficiently sound mind, memory and understanding and he had failed to discharge that onus.

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18. The learned Chief Justice did not find established the allegation of the second Respondent that the Appellant had exerted undue influence on the deceased to procure the execution of the 1961 Will.

19. With regard to the copy of the 1950 Will, the learned Chief Justice found the following facts:-

(a) The copy was a true copy of the 1950 Will.

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(b) The original 1950 Will was in the possession of the deceased after its execution and some time thereafter had been lost or destroyed.

(c) On the balance of probabilities the original 1950 Will was not destroyed amino revocandi by the deceased.

Record

(d) At the time of the making of the 1950 Will the deceased had the necessary testamentary capacity.

In view of his findings the learned Chief Justice pronounced that the 1950 Will was valid and was the last Will and testament of the deceased. He decreed Probate in solemn form of the copy of the deceased's Will of 24th January, 1950.

Page 101

20. On 9th September, 1964, the learned Acting Chief Justice of Bermuda granted the Appellant final leave to appeal to Her Majesty's Privy Council.

Page 98

21. It is submitted that the learned Chief Justice correctly interpreted the weight and effect of the evidence before him and drew the proper inferences from that evidence.

22. It is submitted that there was overwhelming evidence adduced on behalf of the Respondents that the deceased was not of sound and disposing mind and memory when she made her Will on 22nd March, 1961.

Page 137

Of the witnesses who observed the mental condition of the deceased at the material time, those who testified that she was mentally balanced were:-

(a) Dr. Nash, who did not have sufficient time completely to observe either her physical or mental condition.

Page 42

(b) The Appellant, who was found to be unreliable and in any event was a materially interested witness.

Pages 47 and 49

(c) Mr. Madeiros, a lawyer, whose conduct in taking instructions for the Will was criticised by the learned Chief Justice.

Page 45

Record

Page 63

(d) Miss Mitchell, who gave such contradictory evidence that little or no weight should be placed on her testimony.

Page 77

23. Conversely, it is submitted that the witnesses who testified that the deceased was not of sound mind, memory and understanding were all disinterested witnesses. The evidence of Dr. MacAuley, who of all the witnesses was in the best position to form a balanced view of the deceased's mental condition was of considerable importance, and having regard to the onus of proof on the Appellant the finding of the learned Chief Justice is amply justified. 10

24. It is submitted that the learned Chief Justice was correct in inferring from the evidence that the 1950 Will was not destroyed amino revocandi by the deceased.

25. It is submitted that where there is proof that a will was duly executed by a testatory who later loses her testamentary capacity and the will is not forthcoming on the death of the testator, the burden of showing that the will has been destroyed amino revocandi by the testator when of sound mind is on the party alleging revocation, and that the presumption of amino revocandi does not apply in such a case. 20

Amongst the cases in which Judges recognise this principle are:-

Harris v. Berrall (1858) 1 Sw. & Tr. 153. 30

Sprigge v. Sprigge (1868) L.R. 1 P.&D. 608.

Benson v. Benson (1870) L.R.2 P.&D. 172.

There being no evidence to show when or indeed if the Will was destroyed by the deceased, the Appellant having set up revocation has failed to establish it; see Sprigge v. Sprigge (supra).

26. It is further submitted on behalf of the first Respondent that if contrary to both of the Respondents' contentions, the learned Chief Justice was wrong in holding that the 1950 Will 40

was not destroyed amino revocandi, then the learned Chief Justice having pronounced against the 1961 Will, the deceased died intestate and a widow and the first Defendant as the only lawful son and heir-at-law is the only person entitled to the real and personal estate of the deceased.

10 27. It is submitted that it is a question of fact whether the delusions of the testator have affected her disposition: Dew v. Clark and Clarke (1826) 3 Add. 79. Having found as a fact that the deceased was irrational at the time she executed the 1961 Will, the learned Chief Justice was amply justified in inferring therefrom that her irrationality affected the disposition of her property.

20 28. It is submitted that having regard to the untruthfulness of the Appellant in several important respects the learned Chief Justice was fully justified in preferring the evidence of the second Respondent to that of the Appellant.

29. It is submitted that the appeal should be dismissed and that the Appellant should be directed to bear the Respondents' costs in the Privy Council for the following, among other,

R E A S O N S

- 30 1. BECAUSE the learned Chief Justice was acting as a tribunal of fact, and having the advantage of seeing and hearing the witnesses called on behalf of the parties he correctly interpreted the weight and effect of the evidence before him.
- 40 2. BECAUSE in considering questions of the onus of proof upon the parties the learned Chief Justice rightly directed himself that the onus of proof lay upon the Appellant to prove that at the time of the execution of the 1961 Will the deceased was of sufficiently sound mind, memory and understanding and that he had failed to discharge that onus.

Record

3. BECAUSE in granting Probate to the 1950 Will the learned Chief Justice applied the correct legal principles to the facts as found by him.
4. BECAUSE the learned Chief Justice drew the correct and reasonable inferences from the facts and evidence available to him.
5. BECAUSE the Judgment and Order of the Supreme Court of Bermuda were correct and should be upheld.

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E.H. LAUGHTON-SCOTT.

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT
OF BERMUDA

BETWEEN:

WILLIAM EDWARD ARTHUR SWAN
(Plaintiff) Appellant

- and -

MARISCHAL PHILLIPS HUNTINGTON
and RICHARD CLEVELAND FOX
(Defendants) Respondents

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