

Privy Council Appeal No. 47 of 1964

William Edward Arthur Swan - - - - - *Appellant*

v.

Marischal Phillips Huntington and another - - - *Respondents*

FROM

THE SUPREME COURT OF BERMUDA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 13TH APRIL 1967**

Present at the Hearing :

LORD HODSON

LORD GUEST

LORD UPJOHN

[*Delivered by LORD HODSON*]

This is an appeal from a judgment of the Supreme Court of Bermuda (Chief Justice Abbott) dated 3rd July 1964. The learned Chief Justice pronounced for the will of Margaret Young Horne, deceased, (also known as Huntington) as contained in a copy and pronounced against a later will dated 22nd March 1961 in which the appellant was named as sole executor and sole beneficiary.

The deceased died on 28th March 1961 aged 64 in hospital at Bermuda having been admitted to the hospital on the day on which the will was made.

She was a widow and had only one child a son, Marischal Phillips Huntington who is the first respondent and interested under a will of 24th January 1950. This will appointed the son, Richard Cleveland Fox, the second respondent who was her handyman, and her brother Edward Astwood, who predeceased her on 3rd May 1955, to be her executors and trustees. Her dwelling house "Warwick Villa" with its land and cottages, furniture and other personalty was left in trust for sale, their proceeds to be divided between her son, Fox, her brother and The Packwood Old Folks' Home in Sandys Parish, Bermuda.

The ultimate residue was left to her son. He was her only child being her son by her first husband who died when he was about 3 years old. He lived with his mother until he was 14, when the Bermuda courts took him from her. He had been treated by her with great harshness and severity amounting to cruelty. The son described in the evidence his relationship with his mother and the very few contacts he had with her thereafter. He joined the United States Navy during the second world war and has since lived in the United States seeing her only once or twice. The deceased managed the property "Warwick Villa" as a Hotel and managed it efficiently as the evidence of her son and others shows and in 1955 when her son visited his mother in Bermuda accompanied by his wife and children there was talk of his coming to help her in the Hotel at "Warwick Villa". In 1955 he wrote to her expressing his willingness to work for her if she would assign a portion of the property to him. He received no reply to this letter.

Although it was pleaded by the second respondent that the will of 1961 was obtained by the undue influence of the appellant no evidence was given to support the plea which was negatived by the Chief Justice.

The only live issue in this case was and is whether the deceased was of sound mind, memory and understanding at the time when the will of 1961 was made. The burden of proof of this issue lies on the appellant. As the evidence of the son shows the deceased was a lady of violent disposition. This was borne out by other evidence about her violence not only towards her son but in connection with her property also. On one occasion she led an attack on the house of a neighbour in connection with a boundary dispute. There was also an incident in May 1922 when she was acquitted by a jury after being charged with an offence in connection with the shooting of a man called Johnson. It is not surprising that her eccentricity caused people to say of her in a general way that she was unsound mentally. For example her son said so and a neighbour called Nora Mitchell who had become a nurse at the hospital where the deceased died said she always felt deceased was "mad as a hatter". When she was in hospital however she had further opportunity of seeing the deceased with whom as a neighbour she had formerly had little to do and expressed the opinion that when the deceased was admitted to hospital her mental balance was not disturbed. She then revised her previous impression that the deceased was as mad as a hatter and said that from her observation in hospital she saw nothing much the matter with her mentally. She saw her every day when she was in hospital and, according to this witness, the deceased said nothing peculiar except for an obsession about being poisoned.

This obsession is principally relied upon by the defence as an indication that the deceased's testamentary capacity was not established and must be considered as a relevant delusion in that it might have brought about a disposition by will which she would not otherwise have made.

The evidence in support of the later will was first that of the solicitor who prepared it and had no difficulty in obtaining instructions having seen the deceased some four months earlier. The will was not on the face of it inofficious. Her relations with her son were distant and the appellant had replaced Fox as her handyman. Her brother had died. Dr. Smith who attended her for about 11 years as her regular medical adviser from 12th December 1950 to 18th March 1961, was called as a witness against the last will but found her during that time quite sound in mind, memory and understanding. The last occasions on which he saw the deceased were 8th March and 18th March. In view of a so called delusion which is alleged it should be added that the deceased on 7th January 1961 complained to Dr. Smith of feeling pain like a nail in her arm.

Fox the second respondent had worked for the deceased as handyman from 1937 to 1951 and continued to be friendly with her and to see her once or twice a week at her request. He said she ran her own business correctly, was a bit funny at times, but he would not say she was out of her mind and saw nothing thereafter to make him change that opinion.

He gave evidence in support of a supposed delusion about a piece of steel moving up and down her arm and about the deceased saying that Dr. Smith had told her she had sciatica but that his diagnosis was wrong.

The appellant's own evidence was not accepted by the Chief Justice, but except for his account of the business efficiency of the deceased he said nothing to assist his case. There was no allegation in the defence of either defendant as to any specific details of mental infirmity apart from alleged delusions. The son did not mention delusions but Fox, in his defence, made the allegation that the deceased underwent a period of irrationality while a patient in the King Edward VII Memorial Hospital Bermuda in March 1961. Some six delusions were alleged by him. First, that she was being poisoned by the medical staff which allegation was untrue. Delusions numbered 2, 3, 4 and 5 related to claims to property and a false accusation against a cousin. These were not treated as delusions by the Chief Justice and can be disregarded. The 6th delusion alleged that she believed that there was a piece of steel

running up and down her arm and refused to believe the diagnosis of sciatica by her medical adviser. There appears to be some confusion about this last matter as Dr. Smith, who was her medical adviser, spoke of her feeling pain like a nail in her arm which can hardly be elevated into a delusion much less a delusion which bears upon a testamentary disposition nor is Dr. Smith likely to have spoken of sciatica in the arm. Moreover even if Fox's evidence is regarded to the effect that she believed a piece of steel was in fact running up and down her arm the deluded belief can have no relevance to the making of the will.

The Chief Justice in dealing with the two delusions numbered one and six to which reference has been made must have had in mind that delusions must be such as to be relevant to testamentary disposition in order to be worthy of consideration. He was referred to *Banks v. Goodfellow* [1870] L.R. 5 Q.B 549 when Cockburn C.J. laid down the accepted test as to delusions at page 565 as follows: "It is essential . . . that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which if the mind had been sound, would not have been made". He did not however explain why he considered the delusions, which he found proved, had a bearing on the testamentary capacity of the deceased. Their Lordships cannot accept that the so-called delusion about the pain in her arm can have any significance. It is however otherwise with the delusion as to poisoning if this has been shown to exist when the will of March 1961 was made. True it is that in the notes produced from the hospital no support is to be found for this delusion. There is a nursing entry on 22nd March 1961 which reads "Wanting the front windows closed because of the carbon monoxide fumes coming in from the cars on the street. States 'she is afraid of being poisoned by these fumes'." This lends no support to the idea of delusion and the notes generally are consistent with mental capacity. The deceased must have given accurate details of her circumstances and relatives on her admission and nothing is entered to cast doubt on her mental capacity except that she gave a jumbled garrulous story presumably on admission and that an impression of possible senility was found on admission. The matter was however carried further by other witnesses who visited the deceased during her last illness and supported the allegation that the deceased had delusions of poisoning. Cassie White a nurse and cousin of the deceased who had known her for many years visited her on 23rd March 1961. The deceased told her that they were trying to poison her, saying "you know £36,000 is a lot of money". Cassie White formed the opinion that the deceased was mentally ill and that the balance of her mind was disturbed. Mrs. Sharpe also a cousin who had known the deceased all her life confirmed this evidence, she having accompanied Cassie White on a visit to the hospital. Mr. Sharpe, her husband bore out his wife's evidence. Upon this material it appeared that Dr. MacAuley, upon whom the respondents mainly rely, depended. He came on the scene very late and saw little of the deceased so that his opportunities of observation were scanty. He did however attach importance to the delusion of poisoning. He first saw the deceased about 12th March 1961 and saw her twice in the next ten days when she finally agreed to go into hospital. He said that she was an extremely sick woman and as a result of her medical condition she was undoubtedly delusional and felt that previous doctors had tried to kill her. He added that she was continually complaining about nursing staff and saying that they were trying to poison her. He further said she thought he himself was trying to poison her. He concluded that by the evening of her admission to hospital she was not in a fit state to make a will and that it was most unlikely she was at any time that day of sound mind, memory and understanding. He claimed to have treated her for mental disturbances and that the short time which he had known her was sufficient for him to observe her mental condition. The delusion as to poisoning must in their Lordships' opinion be held to have been established and if so it cannot be disassociated from the will dated 22nd March 1961.

Upon this evidence bearing in mind the burden of proof which lies upon the appellant their Lordships agree with the Chief Justice that the onus was not discharged. No argument was adduced to their Lordships as to the validity of the will of 24th January 1950 under which the appellant takes no interest.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

In the Privy Council

WILLIAM EDWARD ARTHUR SWAN

v.

**MARSCHAL PHILIPS HUNTINGTON
AND ANOTHER**

**DELIVERED BY
LORD HODSON**