No. 122 of 1925.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN WILLIAM ROBINS - - - *(Plaintiff) Appellant*

AND

NATIONAL TRUST COMPANY LIMITED, Executors of the Estate of Edward Chandler Walker, MARY GRIFFIN WALKER, ELIZABETH BREWSTER, MARY W CASSELL and the TRUSTEES OF HOTEL DIEU WINDSOR *(Defendants) Respondents.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an Appeal from the judgment of the Appellate Division of the Supreme Court of Ontario dated the 3rd April, 1925, dismissing the Appeal of the above-named Appellant (the plaintiff in the action) against the judgment of the Honourable Mr. Justice Mowat, dated the 24th May, 1924, in favour of the Respondents (defendants in the action). p. 613 p. 595

2. The main questions involved in this Appeal are as to the testamentary capacity of Edward Chandler Walker of Walkerville in the County of Essex in the Province of Ontario (herein called "the testator") and as to the validity of a Will alleged to have been made by the testator dated the 27th February, 1914 (herein called "the Will of 1914"), and as to onus of proof, admissibility of certain evidence and other matters arising out of the trial of the action.

3. The testator was at all material times the President of Hiram Walker and Sons, Limited, of Walkerville, the principal business being that of whiskey distillers. The Walker family, which comprised the p. 93, l. 21-32

RECORD.

testator and his brothers Franklin H. Walker (known as Frank or F. H. Walker) and J. Harrington Walker (known as Harry or J. H. Walker), also had large and varied interests in Walkerville. The testator was
p. 277, l. 3 very wealthy, having an income towards the end of his life of $400,000. He was born in 1851 and married the Respondent Mary Griffin Walker in 1896, but was childless.

p. 93, l. 10 The Appellant from 1888 was Manager of Hiram Walker and Sons
p. 97, l. 8 and afterwards of their Successors Hiram Walker and Sons, Limited, and became a Director of that Company in 1896. From the outset, the
p. 97, l. 34 Appellant and the testator were on terms of intimacy and a strong
p. 98, l. 14 regard and affection existed between them.

4. By the terms of the alleged Will of 1914, the testator revoked all prior Wills and appointed the Respondents National Trust Company, Limited (herein called " the Trust Company ") his executors, and made various devises and bequests in favour of the other Respondents. A
pp. 627-635 copy of this Will is to be found at pages 627 to 635 of the Record.

5. The testator died on the 11th March, 1915, and on the 11th September, 1915, the Trust Company obtained probate of the said Will
p. 739 in common form in the Surrogate Court of the County of Essex. The
p. 653 estate of the testator was valued for Succession Duty at $4,295,806.

pp. 615-625 6. By a Will made by the testator dated the 21st December, 1901 (herein called " the Will of 1901 "), he appointed his brothers Franklin Hiram Walker and James Harrington Walker and his friends William Aikman, Junior, and the Appellant his executors and trustees, and devised and bequeathed to them all his property upon the trusts therein mentioned. The testator thereby gave to the Appellant $100,000 par
p. 621, l. 36 value of the capital stock of Hiram Walker and Sons, Limited, which
p. 625, l. 10 legacy he declared was not attached to the office of executor. A copy of this Will is to be found at pages 615 to 625 of the Record (excluding the red and black ink alterations). The Appellant was not named an executor under the Will of 1914 or given any benefits thereby.

p. 133, l. 3-7 7. The Appellant left Walkerville in March, 1914, and thereafter-
pp. 142, l. 31, 143, l. 26 wards lived in England. It was not until April, 1922, that he heard that he was a legatee under the Will of 1901.

8. As soon as practicable thereafter the Appellant instituted this action. The Writ was issued on the 23rd June, 1923, in the Supreme Court of Ontario against the Trust Company as defendants.

pp. 3, 4 9. The Appellant delivered his Statement of Claim on the 21st September, 1923, and therein alleged that the Will of 1901 was the only true and last Will of the testator, and that for several years prior to his death and at the time of making the Will of 1914 the testator was incapable of understanding and of making a Will, that the said Will was not the testator's Will, and that the same was procured through undue influence; and further that at the time of making the said Will the testator was not of sufficient testamentary capacity to understand the

contents thereof, and that the execution thereof was not made in accordance with the Wills Act. The Appellant claimed that the Will of 1914 might be declared not to be the last Will and Testament of the testator; that probate of the same should be annulled; that the Will of 1901 might be declared to be the true and last Will and Testament of the testator and that probate thereof should be granted to the Appellant as the surviving executor thereof, and further and other relief.

10. The Trust Company delivered their Defence on the 8th October, 1923, traversing the allegations made in the Statement of Claim, and alleging that they had administered the estate of the testator in accordance with the Will of 1914 and paid and satisfied legacies and bequests made thereby; that the Appellant had stood by and permitted probate of the Will of 1914 to be granted and the estate to be administered thereunder; that the Appellant was guilty of laches and delay and was estopped from bringing the action and from obtaining the relief claimed. pp. 4-6

On the 9th October, 1923, issue was joined between the Appellant and the Trust Company. p. 6

11. By Order of Court, dated the 20th November, 1923, the Respondents above-named, other than the Trust Company, were added as parties defendants in the action, together with other beneficiaries named in the Will of 1914. pp. 6-8.

12. Of such defendants, the above-named Trustees of the Hotel Dieu and the Governors of the University of Toronto respectively delivered Defences submitting their rights to the Court. pp. 8, 10

The Board of Governors of St. Andrew's College, Toronto, delivered their Defence on the 15th January, 1924, but did not appear at the trial. p. 9

The above-named Respondent Mary Griffin Walker delivered her Defence on the 16th January, 1924, traversing most of the allegations in the Statement of Claim, and objecting to the jurisdiction of the Court so far as the claim related to the Will of 1901. pp. 10, 11

The above-named Respondents Elizabeth Brewster and Mary W. Cassell delivered their Defence on the 4th February, 1924, whereby they denied the allegations in the Statement of Claim, and alleged that the legacies bequeathed to them by the Will of 1914 had been satisfied by the Trust Company, that they had received the same in good faith and without notice of any irregularity or defect in the said Will, that the Appellant was estopped by acquiescence, delay and laches, and that the Court had not jurisdiction to grant the relief claimed as to the Will of 1901. On the 6th February, 1924, issue was joined between the Appellant and the said Respondents. pp. 11, 12 p. 12

13. The action came on for hearing before the Honourable Mr. Justice Mowat without a Jury, and was heard on the 14th, 15th, 16th, 19th, 20th, 21st, 22nd and 23rd May, 1924. Only the Appellant and the Respondents, the Trust Company, Mary Griffin Walker, Elizabeth

RECORD.

Brewster, Mary W. Cassell and Trustees of the Hotel Dieu were represented. Oral and documentary evidence was given on behalf of the Appellant and Respondents, a transcript whereof is to be found at pages

pp. 17, 739 17 to 739 of the Record.

14. The Appellant's witnesses included the doctors who had

pp. 17-37 regularly attended the testator from 1891 until his death. Dr. Hoare's evidence was to the effect that he attended the testator from January, 1891, to July, 1907, and in the course of that period his attendances

p. 23, l. 24-33 numbered 1,317, although the testator had been much away from home.

p. 17, l. 17 He stated that in 1893 the testator was suffering from syphilis (referred to at the trial as "specific infection" or "infection"), which required fairly constant treatment up to 1900.

p. 18, l. 26-43 In 1900 infection of the nervous system became manifest, which became progressively worse, and in the early part of 1905 culminated in aphasia, with interference with speech, confusion of the mental condition and a mixing up of words. There were probably ten or twelve

p. 18, l. 46
p. 19, l. 42 attacks of aphasia up to July, 1907. Between 1900 and 1905, the manifestations of the infection were numbness of the face, hands and legs, very pronounced arterio sclerosis and degeneracy of the mental and

p. 20, l. 2-10 nervous system also developed, which were typical of infection. There was practically a collapse of the arterial system, the heart's action was

p. 22, l. 20-34 not good and there were degenerative changes going on, both mental and

p. 23, l. 34 to p. 24, l. 10; p. 556, l. 10 physical. During Dr. Hoare's attendance several nerve specialists were consulted from time to time. Infection was present in 1907, when Dr.

p. 32, l. 26 Hoare ceased to attend the testator, and in his opinion it could not have been eliminated later on.

p. 24, l. 10-22 Dr. Hoare, who knew Dr. Shurly as a man of standing and had read his evidence, considered that the description of testator's condition as stated by Dr. Shurly was the logical outcome of testator's physical condition as Dr. Hoare knew it in 1907.

pp. 37-60 15. Dr. P. A. Dewar, another local physician, who attended the

p. 38, l. 1, et seq. testator between 1910 or 1911 and November, 1913, also gave evidence.

p. 39, l. 1-12 From the outset, he diagnosed that the testator was suffering from

p. 40, l. 18 specific infection. He however gave no treatment for it, as Mrs. Walker was very strenuously objecting to that being done, and the testator saw other doctors in reference to it. Dr. Dewar's diagnosis was that it was

p. 45, l. 16 "a specific condition due to a specific trouble"; testator's arteries were

p. 43, l. 42 similar to those of a very old man; his physical changes were for the

p. 49, l. 35 worse all the time; his conversations were confined to simple subjects

p. 39, l. 39-47 and never long maintained; he was often confused in his speech; there

p. 44, l. 13 was prevalent confusion of ideas; at most times he would answer rather

p. 40, l. 6 incoherently, and at times would not be able to finish what he commenced

p. 50, l. 39 to say; and often it was extraordinary, because his conversation was not

p. 44, l. 24 really to the point. Dr. Dewar considered that the conditions described by Dr. Shurly were the logical result of the testator's condition at that

RECORD.

time. Dr. Dewar did not consider the testator was in 1913 competent to make the Will of 1914. p. 43, l. 26

16. In May, 1913, the testator and his wife with a maid and valet (Gilbert) visited Europe, and while at Dinard from about August 1st the testator was seriously ill for several weeks under the care of a doctor, and a male nurse (Simms) and a female nurse were brought over from London. In the course of his evidence, Gilbert stated that during that illness the testator did not seem to understand very well or to know what was being said to him; his health afterwards improved, but he then had numerous relapses. Mrs. Walker gave practically all instructions to the valet, the testator seldom giving any instructions or having any conversation with him. Testator returned home in November, 1913. p. 257, et seq. p. 259, l. 10 p. 259, l. 12,45. p. 259, l. 29-33 p. 261, l. 45 p. 263, l. 1-5 p. 266, l. 30 p. 268, l. 42

The testator's butler, Byrne, gave evidence corroborating the impaired mental condition of the testator after his illness in 1913, and his failure to grasp the meaning of simple matters. p. 88, l. 40 to p. 89, l. 1-3

17. Dr. Burt R. Shurly gave evidence on commission, which was read. He first saw the testator on November 17th, 1913, and four times afterwards in that month; five times in December; six times in January, 1914; twelve times in February, including the 27th (the date of the Will of 1914), and many times afterwards up to the time of his death. Dr. Shurly's evidence was to the effect that the testator was suffering from general senile decay which had been going on for some years; that he would not know what was being said to him part of the time and it was very difficult to talk any definite thing with him; he was often dazed and vague, and unable really to control his own mental affairs at all, and could not understand business if it were mentioned to him; that he was treated just like a child; that all matters were arranged for him by his wife and that his processes were very largely mechanical and machine-like. Early in February, 1914, the testator had an attack of influenza (sometimes alluded to as "grippe"), and Dr. Shurly visited him every day from the 10th to 17th inclusive, and on the 20th, 22nd and 27th (on which latter date the Will was signed) This illness took a great deal of testator's strength; he was much worse from then on as far as being able to do anything was concerned; mentally and in every way he was not so strong, and thereafter he certainly did not know very much about what was going on about himself. Dr. Shurly considered that the deceased could not appreciate or understand the contents of his alleged Will. pp. 63-85 p. 63, l. 31 p. 64, l. 13-25 p. 64, l. 1-10, 43. p. 66, l. 31 p. 68, l. 39 p. 79, l. 30 p. 83, l. 42 p. 80, l. 15, 45 p. 81, l. 34-45. p. 82, l. 2 p. 64, l. 30 p. 64, l. 21 p. 65, l. 26 p. 79, l. 45 p. 73, l. 39, to p. 74, l. 13. p. 80, l. 22 p. 68, l. 3 p. 74, l. 15 et seq. p. 97, l. 34, to p. 98, l. 14

18. The Appellant gave evidence as to the warm friendship between the testator and himself, which so far as he was aware never weakened. He proved that he rendered valuable service to the Walker family, which was appreciated by them, and that he remained in their service and that of the Company from 1888 until 31st August, 1912. In 1901 the testator informed the Appellant of his intention to make a new Will and asked the Appellant to be an executor, to which Appellant assented. The testator said nothing about the provisions of the prospective Will, and did not allude to the subject again. p. 141, l. 21-26 p. 505, l. 12 p. 584, l 17. p. 129, l. 23, et seq.

RECORD.

p. 98, l. 40 to p. 99, l. 21 p. 115, l. 35 to p. 116, l. 14.

p. 127, l. 11-30

Sometime after 1900, the Appellant noticed a change in the testator, in that he was at times unable to comprehend ordinary subjects, and these periods recurred more and more frequently, until in 1905 the Appellant became alarmed and consulted Dr. Hoare about it. Thenceforward, the testator's mental condition gradually deteriorated. The cross-examination of the Appellant was largely as to the circumstances under which he left the service of the Company, and upon letters passing between him and the testator and his brother and Mr. Lash, their legal adviser, and is set out at pages 146 to 231.

pp. 146-231

p. 271, l. 1-47, p. 274, l. 45

19. Evidence was also given that after the death of the testator, his widow, the Respondent Mrs. Walker, alleged that the Will of 1914 was not the Will of the testator at all, and threatened to fall back on the Will of 1901, and to bring back the Appellant to Canada as being the executor and that by reason of such threat the Walker brothers made the Agreement with her hereinafter mentioned. On March 19th, 1915, she had an interview with Mr. Z. A. Lash, the solicitor for the residuary legatees under the Will, and who was also the vice-president of the Trust Company the executors, regarding her interest under the Will, and on the 22nd March, 1915, Mr. Lash wrote on behalf of the brothers Walker to her promising large benefits additional to those given to her by the Will. In this letter it is stated that Harry Walker thought the testator had under-estimated the expense of keeping up the homestead, and the phrase is used "What your husband evidently thought he was doing." Subsequently, Mrs. Walker wrote to Harry Walker that she had not accepted the Will or any of its provisions. On the 18th June, 1915, Mr. Lash wrote to the Trust Company asking that the application for probate should be proceeded with as he had heard from Walkerville and stating "they are now ready." On the 12th July, 1915, Mr. Lash wrote to the Trust Company enclosing copy of an Agreement to be made between Franklin Hiram Walker and James Harrington Walker and Mrs. Walker, stating: "The brothers and Mrs. "Walker are desirous that when notice is taken in the press of the "application for probate, Mrs. Walker's interests should appear as they "will be under the Will plus this Agreement Will you kindly prepare and "send me for approval such a memorandum as you would propose to "give to the press."

p. 143- l. 6 to 22.

pp. 244, l. 20. p. 245, l. 17

p. 245, l. 25

p. 246, exbt. 28

p. 107, exbt. 10

p. 107, l. 27.

p. 108, exbt. 11

exbt. 12, p. 638

The Agreement referred to was completed and dated July 19th, 1915. Thereby Mrs. Walker received an additional annuity of $25,000; the whole of the household effects, pictures, etc.; a sum not exceeding $25,000 to build and furnish a seaside house; and $2,500 for gratuities to the servants. This Agreement contained a recital that these benefits were given by the Walker brothers "believing that the other provisions hereof would be in accordance with the wishes of the testator." In Clause 6 reference is made to a legacy intended by the testator to be given, but which had been omitted.

RECORD.

20. On the 12th December, 1913, the testator, although he was at home in Walkerville and had recently returned from abroad, signed a full general power of attorney in favour of his brother James Harrington Walker. On the 1st June, 1914, a partnership agreement was purported to be made between the testator and his two brothers The general business of the partnership was therein stated to be to look after such investments as the respective partners might transfer to it, and to invest and look after such moneys as the respective partners might transfer to it, and investments and moneys transferred to or entrusted to the partnership became partnership property, and could not be withdrawn without the consent of all the partners. From a letter written by James Harrington Walker to Mr. Lash of the 6th May, 1914, it would appear that James Harrington Walker and Frank Walker were arranging this partnership.

p. 237, exbt. 25

pp. 728, 9, exbt. 37

p. 729, l. 18 to 34.

p. 721, l. 35

21. At the close of the Appellant's evidence, the Respondents moved for a non-suit. The learned Judge stated that the evidence of Drs. Hoare, Dewar and Shurly was pretty strong and refused the application.

pp. 297, 8

The Respondents did not call any of the various doctors who had attended to the testator except Dr. Vedder, who was a New York hotel doctor, but relied on the evidence of Drs. Beemer and Armour, who had never seen the testator and could only give opinions based on the conflicting evidence given in Court. The recollection of the latter witnesses as to the evidence was defective on several important points. Neither did the Respondents call the widow of the testator, who was his constant companion throughout all the material time, but sought to rely on her evidence given on commission at the instance of the Appellant, during which she refused to answer many crucial questions. The doctors who attended the testator in Dinard and London and the nurses who nursed him during his illness in the month preceding the making of the Will of 1914 and up to the very date of the Will were not called.

22. Dr. Vedder stated that he first met the testator in 1906; then in 1909; June, September and November, 1910; January, June and September, 1911; 1912, and next and last on testator's return from Europe at the end of October, 1913. His professional attention to the testator was in June, 1910, a general examination and some laboratory tests, including a single negative Wassermann's blood test; followed by a consultation with Dr Delafield in November, 1910, regarding testator's arterio sclerosis, and a consultation as to the advisability of an operation for prolapse of the rectum in September, 1911.

p. 469, l. 31, to p. 471, l. 24, and p. 472, l. 24, to p. 478, l. 44

He expressed the opinion that the testator never had any mental trouble, and said he never noticed any confusion of thought or speech, nor any thickness of articulation, but he stated that the testator was never under his treatment, and that he was called in more to examine him and to give general advice. He also admitted that even if the

p. 471, l. 26
p. 472, l. 4

p. 470, l. 26
p. 475, l. 41

RECORD.

Wassermann test was correct, the damage would have been done if there had been infection.

pp. 529-582 Dr. Beemer and Dr. Armour expressed the opinion that the testator was competent. Their evidence is set forth at pages 529 to 582 of the Record. Dr. Beemer conceded that he would have been in a very much better position to form an opinion if he had examined the testator and if he had conferred with Dr. Shurly, and that he would not like to question the diagnosis of Dr. Heare or Dr. Dewar. He considered that every symptom that had been pointed out up to the testator's death was consistent with specific infection.

p. 579, l. 10
p. 579, l. 24
p. 579, l. 43 to p. 580, l. 14
p. 582, l. 1

Dr. Armour, while stating that he would have been in a better position to give an opinion if he had seen the testator, said that he did not think he had heard any part of the evidence or the evidence as a whole which would seem an adequate cause for declaring the testator incompetent to make a Will.

p. 540, l. 31
p. 530, l. 9

At the end of his evidence, the questions addressed to him by the learned Judge and his answers thereto were as follows :—

p. 571, l. 37 His Lordship: Dr. Dewar, who was a local physician and who saw him, says this: "I wouldn't think Mr. Walker would in 1913 be capable of instigating that Will (Mr. Lash's Will of 1914) or carrying it through." Do you agree with that? A. No, I don't think I do, because it was in 1913 he went abroad, and was able to discuss many questions; he was able to play golf at Dieppe, according to Mrs. Walker's letter, on the way from London to Dinard.

Q. It is to instigate that Will—pointing out it is a long Will—or the carrying it through; that is what he says, and I want your opinion? A. Well, instigate. ...

Q. That means to give instructions for, and thinking it out and all that? A. That was made rather easier by his Will of 1901, which was more or less of a pattern.

Q. Would it require to be made easier? Was his mental condition such that it would require to have it made easier? A. I think he showed, subsequent to his trip abroad, after Dr. Dewar had seen him the last time that year—I think he manifested signs of mental activity.

Q. Sufficient to make a Will of 20 pages? A. Sufficient to make corrections in the previous one

These were thus Dr Armour's final conclusions and were not only qualified in character, but were founded upon an assumption of incorrect facts. Mrs. Walker's letter referring to the testator playing golf did not relate to 1913 at all, but was in fact written in 1906

p. 123, l. 42

23. The only lay witnesses who gave opinion evidence on behalf of the Respondents as to testator's mental capacity between August, 1913 (the time indicated by the learned Judge as vital), and the execution of the Will, were Mr. J. H. Coburn, General Brewster, and Mr. McDougall and Mr. Daniels, witnesses to the Will.

p. 592, l. 24,
p. 310, l. 43, et seq.
p. 480 l. 28-41.

RECORD.

Mr. Coburn stated that he acted as Solicitor for the testator, and that in 1903 or 1904 the testator made a Codicil to the Will of 1901, by which he gave some small legacy. This Codicil was not produced. In November, 1913, the testator made another Codicil, whereby he revoked the appointment of executors and appointed the Trust Company executors, but did not otherwise alter the Will. In this Codicil, the day of the month is left blank, the date of the Will is first referred to as the 21st September, 1901, and afterwards 21st December, 1901. In December, 1913, the testator gave him instructions to prepare a third Codicil, revoking various legacies, including the legacy to the Appellant, and told him he was thinking of making a new Will. Mr. Coburn prepared the Codicil and took it to testator's office, where he met testator's brother Harry, who requested Mr. Coburn to give him the draft which he did. He was not aware whether it was ever executed. He considered the testator knew what he was doing, though he appeared to have difficulty in articulating.

p. 298, l. 38
p. 626, exbt. 3
exbt. 3
pp. 299-301
p. 626, exbt. 4
p. 303, l. 41
p. 304, l. 34

General Brewster, a brother-in-law of Mrs. Walker, stated in his evidence that he advised Mrs. Walker to obtain the services of an Attorney in consequence of the Will of 1914, which she did.

p. 484, l. 23

The other evidence called by the Respondents is set out at pages 315 to 495 of the Record. Certain of this evidence giving opinions as to the capacity of the testator was objected to by Counsel for the Appellant.

pp. 315-495
p. 302, l. 20 to p. 303, l. 32

After the evidence on commission of G. S. Harriss had been read, Counsel for the Appellant objected to any further opinion evidence for the Respondents being given as three witnesses had already given evidence of that character. He relied on Section 10 of the Evidence Act. The learned Judge held that the Statute did not apply to the evidence given, and a large number of witnesses afterwards gave evidence of the same kind.

pp. 366-369
p. 394, l. 1
p. 399, l. 34
p. 404, l. 19
p. 417, l. 25.
p. 432, l. 40
p. 434, l. 29.
p. 481, l. 21
p. 483, l. 23

24. Before the hearing, the evidence of Mrs. Walker (who was living in the United States) was taken on commission under an Order of Court obtained at the instance of the Appellant. The examination took place on the 22nd February, 1924, Mrs. Walker being then a defendant in the action. She was not called as a witness at the trial, and the Appellant did not put in the evidence taken on commission. The Respondents claimed to put in such evidence. In the course of her evidence, Mrs. Walker, on the advice of her Counsel, had refused to answer a large number of questions put to her by Counsel for the Appellant. The Appellant contended that the Respondents were not entitled to put in the evidence, and that the witness herself must be called. The argument on the right of the Respondents to read the evidence is set forth at pages 464 to 468 and 496 to 501 of the Record. The learned Judge admitted the evidence, which is to be found at pages 502 to 527 of the Record.

pp. 464-468
pp. 496-501
pp. 502-527.

RECORD.

p. 101 l. 16-32.

pp. 615-625

p. 109, l. 35 to p. 110, l. 16.
pp. 244, 5
p. 102, l. 15.
p. 103, l. 29.

25. No definite evidence was given in the case as to the instructions (if any) for the Will of 1914 which were given by the testator. It was stated to have been drafted by Mr. Lash. The Will of 1901 was produced, with certain notes thereon, which were stated to be in Mr. Lash's handwriting, but there was no evidence whether these were Mr. Lash's suggestions or instructions he had received. The Will of 1914 differed in many important respects from these notes. Letters of Mr. Lash to Mrs. Walker of 22nd March, 1915, and to the testator of the 28th January, 1914, and 16th February, 1914, contain references to the Will. There was apparently no reply by the testator to the two letters last mentioned and indeed there was no letter whatever written by the testator produced in the case. There was no evidence indicating that the testator appreciated and approved of the contents of the Will. Two of the legacies mentioned, at all events, were included by Mr. Lash of his own initiative. The signature of the testator was attested by two employees and the interview at which this was done was very short. Contrary to what had been done in the execution of the Will of 1901, the testator did not sign each page of the Will, but merely signed once at the end of the Will.

p. 538, l. 23

p. 104, l. 4

p. 625 l. 30.

p. 646, l. 38.

p. 376, l. 16.

p. 299, l. 29-40

p. 237, l. 41.
p. 384, l. 14-23.

26. The testator's brothers J. H. Walker and F. H. Walker were heavily indebted to him in an amount exceeding $700,000. The witnesses to the Will of 1914 were selected and taken to the testator's house for that purpose by Mr. J. H. Walker, one of the residuary legatees thereunder. Mr. J. H. Walker had also received from Mr. Coburn the unsigned Codicil (Exhibit 4), under which he and Mr. Frank Walker largely benefited. He had a general power of attorney signed by the testator. It was J. H. Walker who, on the 4th March, 1914, drew on the testator's account a cheque in favour of Mr. Lash in payment of his fees for drafting the Will, which is significant in view of the fact that all other cheques for that month on the testator's account were signed by the testator himself, one being dated the 3rd March and another the 5th March. Shortly afterwards although there was already existing a partnership between the testator and his two brothers, the testator signed an Agreement for a separate partnership with his brothers which, if carried out, would effectively tie up the testator's property. In fact, prior to the death of the testator, securities valued for Succession Duty at no less than $2,415,191·69 had been transferred under this Agreement into the control of his brothers. After the testator's death, application for probate was not made until Mr J. H. Walker and Mr. Frank Walker had reached the Agreement with Mrs. Walker for largely increasing the benefits mentioned in the Will. After that Agreement, they desired it to appear in the press that all those benefits were given by the Will itself.

p. 631, l. 13
p. 728, exhi. 37.

p. 650

p. 107, exhi. 10
p. 108, exhi. 11

27. The Appellant contended that it was not established that the testator was mentally competent to make the Will of 1914 or that he knew and approved of the contents thereof, but that, on the other hand, the evidence showed that he was not mentally competent and did not know

and approve such contents; and further that undue influence was exercised over the testator which vitiated the Will. The Respondents contended that none of these points were sustainable.

28. On the 23rd May, 1924, the learned Judge delivered judgment dismissing the action with costs. Transcript thereof is to be found at pages 584 to 594 of the Record. He held that the Will of 1914, having been admitted to probate, the onus of proof rested upon the Appellant; and that until he showed the Court something which beyond peradventure created a doubt as to the capacity of the testator, or as to the presence of undue influence which would influence the making of the Will, the onus rested upon him, and that it rested upon him until the completion of the trial. The learned Judge stated that he did not intend to go over the evidence in detail, and would not deal with the vital points of the evidence, because it had all been taken down and could be treated in a higher place, if the case went further, just as well as if he expressed his opinion; and that there was no contradiction in the facts of the case, and there was no discrepancy which would need him to give his opinion as to the comparative truth of different witnesses, and another Court could come to a conclusion upon their evidence the same as if he had stated his conclusion. He held that the Appellant had not discharged the onus, and that the evidence fell short of proving mental incapacity or undue influence. He however stated that he was not sure that the testator had not to some extent left to his solicitor the details of the benefits to be given to Mrs. Walker.

pp. 584-594
p. 585, l. 9-18
p. 589, l. 22-31
p. 590, l. 42 to p. 592, l. 7
p. 594, l. 8

Although the evidence of Dr. Shurly was given on commission and was of great importance, owing to his eminence in his profession and to his being the testator's medical attendant during the most crucial period, the learned Judge appears to have altogether disregarded it on the ground that he considered the witness was frivolous and that the witness did not think he was at the examination for any serious purpose; and he characterised Dr. Shurly's conclusions as rash statements not worthy of a doctor of his eminence. In refusing the application for a non-suit, however, the learned Judge had stated that the evidence of Dr. Shurly, with that of the other doctors, was pretty strong. The learned Judge attached great weight to the opinion of Dr. Armour, who had never seen the testator, and who the learned Judge considered was more emphatic than one would say was expedient in a scientific witness.

p. 24, l. 11
p. 44, l. 40
p. 64, l. 13-35
p. 592, l. 31-43
p. 297, l. 30
p. 589, l. 8-19

The learned Judge did not apparently take into account the important fact that the testator had a serious illness in France in 1913, followed by the "grippe" in 1914, which greatly affected his mental and physical condition.

p. 259, l. 10-45
p. 65, l. 25
p. 80, l. 21

29. It is submitted that in many important respects, the learned Judge had misappreciated and misdirected himself as to the evidence given. Amongst such matters are the following:—He stated that Dr. Dewar "says he took the history not from his own observations but from the predecessor who had attended Mr. Walker four or five years before";

p. 592, l. 17-22

RECORD.

and also "Dr. Dewar's treatment was confined to the relief of the intestinal trouble . . . and that is apparently all he had in his mind." Dr. Dewar in fact stated that he made a diagnosis, and he described in detail all the conditions which he had in mind.

p. 39, l. 10

The learned Judge also said of Dr. Dewar: "Of course he does not know whether or not Mr. Walker was capable of understanding the Will of 1914, because the last time he saw him was in August of the year before." In fact, Dr. Dewar saw the testator up to November, 1913, which was later than the last date when the Respondent's witness, Dr. Vedder, saw him.

p. 592, l. 24

p. 48, l. 35

The learned Judge said of Dr. Hoare and Dr. Dewar: "They do not say that aphasia such as they mention, alone was caused by the infection which he had nor do they say that some other causes might not have been for it." The evidence actually given is at page 18 (lines 25-33), page 39 (lines 12, 26), page 45 (lines 15-17) of the Record.

p. 592, l. 14

The learned Judge referred to "prolapse of the large bowel . . . which might bring on that aphasia and intermittent aphasia." The evidence was that the aphasia was the result of the infection, and that during the attacks of aphasia between 1905 and 1907 there was no prolapse.

p. 588, l. 35

p. 18, l. 25 to 32

p. 25, l. 35

The learned Judge did not think that the evidence of Drs. Armour and Beemer was to be diminished in value by the fact that they did not see the testator; whereas both these witnesses frankly stated they would have been in a much better position to give an opinion if they had seen and examined him.

p. 593, l. 5

p. 540 l. 30

p. 579, l. 10

He stated: "The evidence of the different employees of the Walker establishment is that of witnesses who saw the most of Mr. E. C. Walker in his lifetime." There was no evidence whatever as to this.

p. 589, l. 36

He said: "Then the Will arrives, and Mr. Walker is expecting it, and gets his brother J. Harrington Walker to have witnesses brought." There was no evidence to support this.

p. 591, l. 30

The learned Judge found that "Mr. Lash took the old Will of 1901 and went over it with Mr. Walker . . . Mr. Walker must have given the suggestions which appear in the old Will." There was no evidence as to this, and the Appellate Court afterwards held that these matters were mere conjecture.

p. 591, l. 18

p. 606, l. 42

The learned Judge said: "Mr. Walker told Mr. Coburn that he did not propose to sign a Codicil then." The only evidence was that Mr. Coburn thought the Codicil had been signed.

p. 586, l. 41

p. 310, l. 39

The learned Judge said: "Mrs. Walker claims that she did not say, or did not mean to convey the impression . . . in her conversation with Mr. Robins as Mr. Robins has contended." The fact was that Mrs. Walker refused to give any answer at all dealing with this point.

p. 593, l. 22

p. 517, l. 12-23

The learned Judge said: "There is no evidence that his wife influenced him, although that was the suggestion at the early part of the trial." This suggestion was not made.

p. 591, l. 42

RECORD.

The learned Judge laid stress upon an alleged effort made by the Appellant to buy back at $175 per share the stock which he had sold to the Walkers at $300 per share as being a factor upon which the testator and his brothers would look with disfavour. The evidence is that the Appellant did not sell the shares at $300 per share nor did he ever attempt to buy them back at any price. Moreover it would appear from a letter of Mr. Lash of the 31st October, 1912, that the matter was not mentioned to the testator or to his brothers.

p. 587, l. 45
p. 223, l. 18, to 23
p. 212, l. 46 to p. 213, l. 18
p. 224, l. 11-23
p. 225, l. 2-7

30. The Appellant appealed to the Appellate Division against the said judgment and alternatively for a new trial. The Appeal came on for hearing before the Chief Justice and Middleton, Masten and Orde, JJ., and was heard on the 5th, 6th, 7th, 17th and 18th November, 1924.

The Appellant on the hearing of the Appeal applied to put in further evidence by Carl L. Fuller, Rena Oviatt Caster, Lavinia Hatton and Oscar Ernest Fleming. Copies of the Affidavits in support of such application are annexed to a Petition for Leave to read the same as evidence on this Appeal, which Petition is being lodged with this Case. The grounds of the said application were that the evidence had not been and could not reasonably have been discovered by the Appellant before the trial of the action and that the evidence was of vital importance as dealing with matters at or about the time of the making of the Will of 1914. Lavinia Hatton was the professional nurse actually attending the testator at the time the Will of 1914 was signed and Rena Oviatt Caster was the professional nurse attending him within two days of that date. Dr. Fuller attended the testator in the following May and June. He was actually in Court during the trial of the action upon subpœna on behalf of the Respondents, was there interviewed by one of the Counsel for the Respondents, who thereafter informed Dr. Fuller he would not be required.

31. Judgment was delivered on the 3rd April, 1925, and transcript thereof is to be found at pages 598 to 612 of the Record. The Court held that the evidence did not establish that the testator was not mentally capable. The Court while stating that the evidence of Dr. Shurly, if it stood alone, would undoubtedly create the impression that during the period of his attendance, *i.e.*, from November, 1913, the testator was wholly lacking in mentality, considered that there was so much of Dr. Shurly's opinion that was plainly contradicted by the facts that its value was completely destroyed. The Court failed to take into account the fact that Dr. Shurly was in attendance on the testator after Mr. Lash and Mr. Coburn had seen him, and during the serious illness of the testator in February, 1914, and also that his evidence was supported by Drs. Hoare and Dewar and Byrne and Gilbert.

pp. 598-612
p. 608, l. 46

The Court held that after probate in common form had been granted, mere suspicious circumstances surrounding the execution of a Will were not sufficient to shift the onus of establishing the validity of the Will to

p. 611, l. 2-11

the executors; and further that the Appellant had failed to show such suspicious circumstances. It held that more than three expert witnesses, within the meaning of Section 10 of the Evidence Act, had not been called for the Defence. The Court held that the evidence of Mrs. Walker taken on commission was properly admitted, and that the fresh evidence tendered by the Appellant on the Appeal could not be admitted so as to afford a ground for a new trial, as it was admittedly merely corroborative at most of the evidence already given on behalf of the Appellant. The Appeal was dismissed with costs. No admission was made by Counsel for the Appellant that the evidence last referred to was merely corroborative.

p. 611, l. 14, et seq.

p. 612, l. 15.

p. 612, l. 31.

32. The Appellant humbly submits that the judgments of the Supreme Court and of the Appellate Division should be reversed and set aside and the appeal of the Appellant allowed or alternatively that a new trial should be had for the following amongst other

REASONS.

1. Because there was no evidence upon which the learned Judge or the Appellate Division was entitled to find that the testator was mentally competent when he executed the Will of 1914.

2. Because the finding that the testator was mentally competent was against the weight of evidence.

3. Because the learned Judge and the Appellate Division were wrong in holding that the onus of proving that the testator was not mentally competent was upon the Appellant.

4. Because, in the alternative, if any onus was originally upon the Appellant, it was merely an onus to make a *prima facie* case that the testator was not mentally competent, and because the Appellant discharged that onus and the Trial Judge refused to non-suit the Appellant and such *prima facie* case was not displaced by the Respondents.

5. Because the evidence adduced by the Appellant proved that the testator was not mentally competent or alternatively created a reasonable doubt whether the testator was so competent, and such doubt was not removed by any evidence called by the Respondents.

6. Because the decision of the Appellate Division in Larocque *v.* Landry (1922) 52 O.L.R. 479, upon which the Appellate Division founded its judgment in the present case, was wrong in law.

7. Because the learned Judge and the Appellate Division were wrong in finding that the Appellant had failed to show such suspicious circumstances as would shift the onus upon the Respondents and would justify the Court in holding that the Will of 1914 should not be sustained.

8. Because the learned Judge and the Appellate Division misdirected themselves as to the evidence adduced and drew conclusions of fact not warranted by the evidence.

9. Because the learned Judge and the Appellate Division wrongly disregarded the evidence of Dr. Shurly and failed to appreciate the serious effects upon the testator's mental condition of his illnesses between the Autumn of 1913 and the date of the Will.

10. Because evidence of more than three expert witnesses was improperly admitted on behalf of the Respondents contrary to the provisions of Section 10 of the Evidence Act.

11. Because the Respondents were not entitled to put in the evidence of Mrs. Walker taken on commission and such evidence was wrongly admitted and because such evidence was one of the determining factors in the findings of the learned Judge and of the Appellate Division.

12. Because the Appellate Division wrongly refused to admit or alternatively improperly exercised its discretion in refusing to admit the additional evidence tendered on behalf of the Appellant.

13. Because if the fact be that such evidence was merely corroborative, it is not to be excluded on that ground.

14. Because such evidence was not merely corroborative.

15. Because it was established by the evidence that the execution of the Will of 1914 was obtained by undue influence.

16. Because the judgments of the learned Judge and of the Appellate Division were wrong and ought to be reversed.

STUART BEVAN.

O. E. FLEMING.

ROBERT ASKE.

No. 122 of 1925.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN

ROBINS (Plaintiff) - - - - *Appellant*

AND

NATIONAL TRUST COMPANY, LIMITED and Others (Defendants) *Respondents.*

CASE FOR THE APPELLANT.

COLLYER-BRISTOW & CO.,
4, Bedford Row, W.C. 1,
Solicitors for the Appellant.

SHELL & SON, Verbatim Reporters and Printers, 46, Essex Street, Strand, W.C. 2, and at Manchester.