no 122 of 1925

In the Privy Council.

RECORD

On Appeal from The Supreme Court of Ontario

BETWEEN:

WILLIAM ROBINS

(Plaintiff) Appellant,

and

NATIONAL TRUST COMPANY, LIMITED, Executors of the estate of Edward Chandler Walker; ~~Stephen A. Griggs, Executors of the estate of Mrs. Stephen Griggs; the Churchwardens of St. Mary's Church, Walkerville; The Board of Governors of the University of Toronto; The Board of Governors of St. Andrew's College, Toronto;~~ The Trustees of Hotel Dieu, Windsor; ~~The Churchwardens of All Saints' Church, Windsor; Stephen A. Griggs; National Trust Company, Limited,~~ Administrators of the estate of Franklin Hiram Walker; Harrington E. Walker, Hiram H. Walker, F. Caldwell Walker and National Trust Company, Limited, Executors of the estate of James Harrington Walker; Edward Chandler Farrington; Elizabeth Buhl; May Walker; Margaret Walker; Arthur H. Buhl and Detroit Trust Company, the last two named as Executors of the estate of Willis E. Buhl; Arthur H. Buhl; Lawrence D. Buhl; Elizabeth Buhl Sheldon; F. Caldwell Walker; Mary Margaret Small; Jennie Williams; Lucy Farrington; Board of Directors of the Detroit Art Museum; Edward Lothrop Warner; Edward Walker Elliott; Elizabeth Talman Walker; Harrington E. Walker; Hiram H. Walker; ~~Mrs. James Campbell; Susie Jonney; Alice Hoffe;~~ Mary Griffin Walker; Lillie Brewster; Mary W. Cassell, ~~Countess Ella Matuschka.~~

(Defendants) Respondents.

Case

FOR THE RESPONDENTS.

Mary Griffin Walker, Elizabeth Brewster (named in the style of cause as Lillie Brewster) and Mary W. Cassels (named in the style of cause as Mary W. Cassell).

1. This is an appeal by the Plaintiff from the unanimous judgment of the Appellate Division of the Supreme Court of Ontario dated 3rd April, 1925, dismissing the Plaintiff's appeal to that Court from the judgment of Mr. Justice Mowat delivered at the trial of the action on 23rd May, 1924, dismissing the action with costs. P. 598 to 612 P. 584 to 594

CASE FOR RESPONDENTS,
M. G. WALKER, E. BREWSTER AND M. W. CASSELL.

RECORD

2. The action was brought by Writ issued on 23rd June, 1923, to set aside the Probate of the Will of the Testator, Edward Chandler Walker,
P. 627 who died on 11th May, 1915, the Will being dated 27th February, 1914, and Probate thereof was granted by the Surrogate Court of the County
P. 739 of Essex on the 16th September, 1915.

Pp. 3 and 4 3. The grounds of the attack upon the Will were:

(1) Want of testamentary capacity of the Testator.

(2) That the Will was procured through undue influence.

P. 4 ll 25-30 4. The Plaintiff also claimed that a previous Will dated 21st De-
F. 615 cember, 1901, (Exhibit 2) of which the Plaintiff had been appointed an Executor, should be declared to be the true Will of the Testator, and that Probate thereof should be granted to the Plaintiff as the surviving Executor under that Will; but this claim could not in any event have been dealt with in this action, because the granting of Probate is a matter entirely within the jurisdiction of the Surrogate Courts of this Province.
P. 16 l 1-11 This was conceded by the Plaintiff at the trial.

5. The Testator at the time of his death was a partner with his brothers Franklin H. Walker and J. Harrington Walker in the firm of Walker Sons, which firm held practically all the shares of stock in Hiram Walker & Sons, Limited, a corporation operating a large distillery at Walkerville, Ontario, the brothers being the directors and chief officers
P. 137 l 9-18 of the Company. The three brothers were also associated as partners in many other business enterprises, and as directors in other Companies.

6. The business of Hiram Walker & Sons, Limited had been very successful in the ten or twelve years before the Testator made his Will of 27th February, 1914, and the Testator's means had accordingly increased greatly since the making of his former Will of 21st December, 1901. This is shewn by the statement prepared by the Plaintiff and filed
P. 641-642 as Exhibit 16.

7. The Testator died on 15th March, 1915, and this action was not launched until 23rd June, 1923. In the interval, his two brothers died; J. Harrington Walker in December, 1919, and Franklin H. Walker about
P. 235 l 39-47 two years before that. Mr. Z. A. Lash, K.C., the personal solicitor of the Testator as well as the solicitor and counsel for Hiram Walker & Sons, Limited, and who had prepared the Will in question, and several other persons, whose evidence would have been of great value, had also died after the Testator and before this action was commenced.

8. The administration of the Estate meanwhile proceeded and the Executors, the National Trust Company, Limited, have paid the debts

RECORD

and pecuniary legacies, have paid to the residuary legatees $1,600,000 and now hold the balance to secure the annuity of $70,000 to the Widow, and subject thereto for the representatives of the residuary legatees Franklin H. Walker and J. Harrington Walker, the Testator's brothers, who survived the Testator, but have since died as above mentioned. P. 495 II 4-15 II 27-30 P 495 I 19-22

9. The action came on for trial in May, 1924, and the hearing lasted eight days. The following material facts were established by the

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EVIDENCE AT THE TRIAL

10. The Testator was never a robust man. He had been subject to hemorrhages of the lungs as a young man, and though this trouble disappeared he had always to be careful of himself. P 17 I 24

He was not of an athletic disposition, but was fond of yachting and riding, and played golf and billiards. P 315 II 19-26

11. He was always deliberate in his movements. "Nobody ever "saw Edward Walker run—he always walked very slowly." He was a man of refined character and tastes. The Plaintiff describes him as "A "princely man—a man of very fine instincts, a perfect gentleman by na- "ture, most appreciative, kindly and gentle. I never knew a finer man;" and other witnesses refer to him in very similar terms. In manner he was very quiet and thoughtful—did not talk very much, took a long time to make up his mind, but when he did make it up, was not likely to change it. P 489 I 31 P 98 II 6-9 P 488 II 29-39 P 314 II 12-18

In money matters, he was careful, but generous. He was a public spirited citizen, and much interested in municipal affairs, and he was always interested in his parish church. P 325 II 19-27 P 307 II 11-20

He was a lover of art, the study of pictures was his "hobby," and he was a discriminating collector. P 489 I 36 to P 490 I 13

12. The Testator's character, habits, tastes and characteristics above mentioned were life-long and remained unchanged up to the time of his death.

He had no delusions and there is no evidence of any eccentricities. P 26 I 24 et seq.

13. The Testator had always taken an active part in the business in which he and his brothers were interested. As the years went by, he spent a good deal of his time in travelling, paying frequent visits to Europe. He, therefore, wished to be relieved of administrative details and handed such work over to subordinates. But he retained a general control and continued to take an interest in the business, though not

RECORD

P 503 II 32-41 such an active interest. This continued down to the time of his death and he was generally at the office each day when not confined to the house by illness.

14. The Testator married in 1896 Mary Griffin Walker, who survived him, and who was added as a Defendant in this action and is one of the Respondents in this appeal. He was 45 years of age at the time of his marriage. After his marriage, the Testator had built a fine house in Walkerville, "Willistead," in which they were living at the time of the Testator's death.

15. On 21st December, 1901, the Testator made a Will (Exhibit 2) of which he appointed his brothers Franklin Hiram Walker and James Harrington Walker, and his friends, William Aikman and William Robins, the Plaintiffs, his Executors.

P. 615 et seq.

P 617 I 44

By this Will (Clause 10) he gave his wife an annuity of $10,000 per annum, and the dividends upon $100,000 par value of the capital

P 618 I 8 et seq.

stock of Hiram Walker & Sons, Limited during her life, and gave to her all his household furniture and effects.

He gave pecuniary legacies to relatives, friends and various charities and made his two brothers the residuary legatees of his estate. By Clause 20, among other like bequests, he gave to his executors Wil-

P 621 I 32 et seq.

liam Aikman and the Plaintiff $100,000 each par value of the capital stock of Hiram Walker & Sons, Limited.

16. At this time the Plaintiff was in the employ of the Testator and

P 93 II 20-33

his brothers and was their trusted associate in business matters.

17. About the year 1900, friction developed between the Plaintiff

P 130 I 29 et seq.

and the Testator's brother Franklin (Frank) H. Walker. Disputes occurred more or less frequently which were patched up by the Testator

P 131 I 30 et seq.

and his brother J. Harrington (Harry) Walker. The final breach came in 1912 when the Plaintiff thought the Testator and J. Harrington Walk-

P 149 II 1-7

er should have put their brother Frank out of the business; and as they

P 132 II 36-45

were not willing to do so, the brothers recognized that their relations with the Plaintiff could no longer continue, and the Plaintiff's connec-

P 136 II 39 et seq.

tion with the Company and with the Walker Sons was terminated on

P 137 II 21-33

31st August by a letter from Walker Sons dated 14th August, 1912. (Exhibit 17).

18. Prior to this, a lengthy correspondence was carried on between the Plaintiff on the one hand and the Testator and his brothers, Franklin H. Walker and J. Harrington Walker and Mr. Z. A. Lash, their solicitor and counsel, on the other. This correspondence continued after the termination of his employment in an endeavour to settle the demands made by the Plaintiff for compensation from the Walker Sons for what he

RECORD

claimed was a wrongful discharge, and in that connection was taken up the purchase back from the Plaintiff of the 1,000 shares of distillery stock in Hiram Walker & Sons, Limited, of the par value of $100,000 which had been allotted to him some years previously. P 135 ll 1-21 P 145 ll 19-25

Reference is made particularly to the following letters as bearing upon the reasons for the Plaintiff's dismissal and the settlement which was made with him, an understanding of which is necessary to shew the relations between the Testator and the Plaintiff on the date of the Will of 27th February, 1914.

June 4, 1912,	Plaintiff to Z. A. Lash	P 153 l 42 et seq.
July 13,	Plaintiff to Z. A. Lash	P 155 l 14 et seq. and P. 658
July 25,	Plaintiff to Z. A. Lash	P 155 l 45 et seq. and P 661
Aug. 6,	Plaintiff to Z. A. Lash	P 156 & P 662
Aug. 8,	Plaintiff to Z. A. Lash	P 157 l 11 et seq and P 662-666
Aug. 15,	Plaintiff to Z. A. Lash	P 162 l 8 et seq and P 666.
Aug. 16,	Plaintiff to E. C. Walker	P 173 l 34
Aug. 19,	Plaintiff to Z. A. Lash	P 164 & 668
Aug. 20,	Z. A. Lash to Plaintiff	P 170 & 670
Aug. 20,	Plaintiff to E. C. Walker	P 178 l 12 et seq.
Aug. 21,	Plaintiff to Z. A. Lash	P 172 & 673
Aug. 22,	Z. A. Lash to Plaintiff	P 183 & 674
Aug. 23,	Plaintiff to Z. A. Lash	P 184 & 675
Aug. 24,	Plaintiff to Z. A. Lash	P 192 & 679

19. The final outcome of these negotiations was that the Plaintiff was paid $300,000 by the Walker Bros. for the transfer of his stock and in full satisfaction of all his claims as is shown by the letters:

Oct. 15, 1912,	Z. A. Lash to Plaintiff	P 222 & 694
Oct. 16,	Plaintiff to Z. A. Lash	P 222 & 694

RECORD

P 159 l 17-23, l 42 to P 160 l 18

20. In the course of this correspondence, threats were made by the Plaintiff, if a satisfactory settlement was not made with him, of "revealing to the public" what he had done and how his retirement came about, and on August 16, 1912, the Plaintiff wrote in similar terms to the Testator himself, and referred to the possibility of "appealing to a jury."

P 181 l 27 to P 182 l 10

P 175 l 47 to P 176 l 20

These threats naturally had an effect upon the minds of the Walkers.

P 184 l 1-19

See Letter, Aug. 22, 1912, Z. A. Lash to Plaintiff.

21. While these negotiations were going on, the Testator left Walkerville on a holiday. He called upon the Plaintiff before leaving, but did not see him, and the Plaintiff and the Testator never spoke again nor had any communication with each other after the 19th of August, 1912.

P 177 l 30-35

22. In 1913, the Testator again went to Europe and when there was taken ill, but was able to return home in November, 1913.

P 259 l 1-17

P 299 l 42 to P 300 l 3

P 626

P 298 l 38 et seq.

P 615

23. In November, 1913, the Testator informed his local solicitor, Mr. J. H. Coburn of Walkerville that he intended making a new Will, but that he had not fully made up his mind what he wished to do, and meanwhile, instructed him to draw a second codicil (Exhibit 3) dated November, 1913, (a first Codicil having been prepared and executed in 1903 or 1904). By this codicil, he revoked the appointment of the personal executors named in his Will of 21st December, 1901, (Exhibit 2) of whom the Plaintiff was one, and appointed the National Trust Company, Limited, the sole executor and trustee.

P 300 l 3 et seq.

P 626

P 300 l 6-19

24. In December, 1913, the Testator gave Mr. Coburn instructions for another (third) Codicil, which was prepared (Exhibit 4) but never executed. By this last Codicil, the Testator made a number of changes in his Will; he revoked Clause 20 by which he gave to the Plaintiff, among others, a bequest of $100,000 of par value in the capital stock of Hiram Walker & Sons, Limited. When giving these instructions to Mr. Coburn, the Testator had his Will before him and indicated the sections which he wished to have altered, giving as his reasons that "circumstances had changed."

P 627

P 302 l 3-11

P 627

P 615-625

25. Instructions for the new Will of 27th February, 1914 (Exhibit 5) were not given to Mr. Coburn, however, but to Mr. Z. A. Lash, K.C., who was the general solicitor and counsel for Hiram Walker & Sons, Limited, the Walker Bros. and for the Testator. Mr. Lash personally came up from Toronto in January or February, 1914, and spent at least one day in Walkerville and took instructions from the Testator for a new Will having before him the former Will (Exhibit 2.) Mr. Lash then returned to Toronto and prepared the new Will, (Exhibit 5) using the old Will (Exhibit 2) as a draft and marking thereon in his own handwrit-

RECORD

ing, the changes to be made and in some cases dictating new clauses to his stenographer. P 101 l 30 to P 102 l 10

Exhibit 2, the original Will of 21st December, 1901 is printed shewing Mr. Lash's notes thereon as to the changes to be made in it. P 615-625

26. When the draft Will was completed, Mr. Lash sent it up to the Testator for his consideration with a letter of January 28th, 1914, (Exhibit 8) and after being approved of by the Testator and returned to Mr. Lash, it was engrossed, and a fair copy sent up for execution, accompanied by another letter from Mr. Lash (Exhibit 9) dated February 16th, 1914, calling attention to some changes he had made and giving detailed instructions as to its execution. P 102 P 103 l 29 to P 104 l 10

27. The witnesses of the Will were old employees of the firm or Company, who had known the Testator for over twenty years, and who were asked by J. Harrington Walker to act as witnesses. Both were witnesses at the trial and gave evidence as to the Testator's condition at the time of his execution of the Will. P 373 l 7-18 P 394 l 1-4 P 398 l 25-29 P 399 l 34-36

28. The Testator died on 11th March, 1915. Probate was granted to National Trust Company, the Executors named in the Will, on 16th September, 1915, and the Executors proceeded to administer the estate of the deceased without protest or objection on the part of any one, until the Plaintiff issued his Writ in this action on 23rd June, 1923, more than eight years after the Testator's death.

During that time and up to December, 1921, the Executors had disbursed under the provisions of the Will approximately $2,000,000. P 495 l 1-15

AS TO TESTAMENTARY CAPACITY

29. In support of his first ground of attack, viz., want of testamentary capacity in the Testator, the Plaintiff called three doctors, Hoare, Dewar and Shurly, and three other non-professional witnesses gave evidence upon this point, of whom the Plaintiff himself was one, the others being Patrick Byrne and Frank Gilbert, who had been servants at "Willistead."

30. The medical witnesses were in attendance on the Testator at three different periods, viz.,

Dr. Hoare—Jan. 1891 to July, 1907 P 17 l 10

Dr. Dewar—1910 (or 1911) to 1913 P 38 l 1-7

Dr. Shurly—Nov. 1913 to March, 1915 P 68 l 20

RECORD

(a) Dr. Hoare's evidence was to the effect that his attendance upon the Testator "from 1893 to 1900 was for various ailments, infective con-"ditions, such as attacks of bronchitis, catarrhal conditions, and of late
P 17 l 40 to end "years intestinal disturbances, and very largely of nervous manifesta-"tions which came from his being self-centred."

That about 1900 an infection (which appeared, or was suspected to be of a syphilitic nature) manifested itself in the nervous system which result-
P 18 l 29-45 ed in attacks of aphasia, and that there was a "confusion of the mental condition" during the attack, and, he thought there was a "slightly pro-
P 19 l 33 and 11 42-46 gressive degeneration of the mental faculties and nervous system." But there was complete and entire recovery between these aphasic at-
P 30 l 15-28 tacks which were not frequent (about twelve from 1905 to 1907). Dr. Hoare also admits that he made no tests to determine if there was in fact
P 31 l 37 the infection spoken of, and he cannot say after 1907 that it had not
P 33 l 29-32 been eliminated; and that except during these aphasic attacks the Testator was transacting business at his office. Dr. Hoare had not attend-
P 30 l 39-46 ed the Testator since 1907, six or seven years before the date of the Will.

P 49 l 20-26 (b) Dr. Dewar who attended the Testator from 1910 (or 1911) to 1913 (but only once in 1913) was called in because the Testator was suf-
P 39 l 1-7 and l 35 fering from prolapse of the bowel. His evidence is that he attended "the family" and cannot "place the attendance" upon the Testator; that
P 39 l 45 the occasions when he saw him were "at his worst times," and that he
P 44 l 43 to P 45 l 8 only saw him in an "emergency" and when he was sent for. He saw the
P 45 l 21-36 Testator probably a dozen times, and he was then "physically in the worst conditions," and the sole cause of his attendance was the bowel trouble.
P 46 l 37 to P 47 l 29 Notwithstanding this, he found him always "polite, courteous—a polish-
P 48 l 17-24 "ed gentleman." He had no delusions and displayed no irritability or
P 56 l 1-12 change in his affections and he remembers no incoherency or obscurity in his conversation.

(c) Dr. Shurly who attended the Testator from November, 1913, to
P 63 l 15 to P 64 l 10 the time of his death in March, 1915, said that the Testator was suffering from general senile debility; that he was in bed most of the time when he saw him; that he found him slow in thought and movement—"like a
P 64 l 34-38 "vegetable" part of the time, and that his bowels gave him a good deal of trouble; that he was rather vague in his conversation and interested
P 67 l 37 in few things besides himself; that he had an attack of influenza in Feb-
P 67 l 28-32 ruary, 1914; that "he got over it, but it left him weaker and not quite so
P 73 l 30-38 "good;" that he did not explain his own symptoms, though he cannot say there was anything unusual in his reticence.

It is somewhat remarkable that Dr. Shurly does not mention any syphilitic trouble, nor does he refer to aphasia.

When shown a copy of the Will in question, without reading more than the first page of it, or knowing anything about the facts in

RECORD

connection with its preparation and execution, he ventured the opinion that "it would be too complicated for him." P 74 ll 15-19

The Appellate Division thought there was so much in Dr. Shurly's evidence which "is plainly contradicted by the facts that its value is "completely destroyed." P 609 l 1-7

31. Of the non-medical witnesses upon the question of the mental capacity of the Testator, the Plaintiff says that shortly after 1900 (before 1905) the Testator was "getting unreliable in his memory and at "times unable to understand things for a short period," but this was only a "passing phase;" that in the years 1907-1910, he thought the Testator was "gradually getting worse" and that he fell asleep and repeated questions more frequently. In 1911, however, he had frequent conferences with the Testator and says he did not see any change though he thinks that up to the time the Plaintiff left the business, the Testator was "go-"ing down." P 115 l 37 to end; P 127 ll 11-23; P 128 ll 15-33

P 295 ll 29-31
P 147 l 31 et seq.

The Plaintiff's views as to the Testator's competency in 1912 are best illustrated by the discussions he had with him with reference to the Plaintiff's leaving the firm; P 164 l 8 et seq.; P 172 ll 20-25; P 169 l 4-8
by the conferences he says the Testator had with his brothers, P 165 l 46
and with Mr. Lash; P 173 l 34 to P 176 l 4
by the long letters which the Plaintiff wrote to him on the subject and which he says he expected the Testator to understand as well as the figures which he submitted to him; P 178 l 13 to P 181 l 34; P 176 l 18 and l 32-38; P 181 l 10 to P 182 l 10
by the fact that the Plaintiff recognized it might be impossible to conclude any arrangements with his brothers in the Testator's absence; and the Plaintiff testified that the Testator's discussions with him "showed that he (the Testator) had no difficulty in grasping all the facts "and considerations I put before him." P 202 ll 16-46; P 208 ll 31-34

As to the Testator's condition after 1912, the Plaintiff cannot testify as he never spoke to him after the 19th of August, 1912.

32. The witness, Patrick Byrne says that after the Testator's return from Europe in November, 1913, he had an illness and did not take the same interest in things as formerly; he went to bed earlier and was forgetful; but he says the Testator used to go to the office. He remembers Mr. Lash's visit in February, 1914, and that he was at the house for two meals, and that the Testator went down to the office on the day of Mr. Lash's visit. P 88 ll 36-43; P 90 l 29-35; P 90 l 47 to P 91 l 13; P 91 l 27

33. Frank Gilbert accompanied the Testator to Europe as his valet in 1913, and says that the Testator was in very good condition on the voyage over and during his stay in London, but that he was taken ill in Dinard when he became "quite feeble" and during his illness "when "speaking to him he did not seem to understand just what you were P 257 ll 3-10; P 258 ll 12-17

RECORD

P 259 l 29 "saying" but that the Testator gradually recovered and they returned
P 261 l 29 home, arriving in Walkerville on November 3rd, 1913.

From that time till the end of February, 1914, the witness acted as Testator's valet and says the Testator was "very good for a while," but had "numerous relapses" for a day or so at a time, but when they
P 261 l 40 to P 262 l 2 had passed he would feel very well again. He was troubled with the prolapsed bowel.

During that period the Testator frequently walked down stairs to dinner, and in February, 1914, he went down to his office quite often.
P 265 l 21-45 He remembers Mr. Lash being there, he thinks, two days at the time the
P 268 l 34-37 Will was drawn. He drove with the Testator down to the office, following Mr. Lash.

34. On the other hand, the evidence of the medical witnesses for the Defendants, Drs. Vedder, Armour and Beemer is cogent to establish the Testator's mental competency.

(a) Dr. Vedder, who saw the Testator from time to time from 1906 to 1913, says that during that time he had not changed at all, except
P 471 ll 19-35 that he looked older, that he never had any mental trouble, that his speech
P 472 ll 5-7 was always slow, but there was no change in that respect, and there was
P 472 ll 10-17 no confusion of thought or speech; and he says that arterio sclerosis does not necessarily mean mental disturbance.

P 474 l 33 to P 475 l 3 Dr. Vedder also says he applied the Wassermann test, which was negative.

P 529 (b) Dr. Armour gives his opinion of the Testator's capacity upon the whole evidence as follows:

"I don't think that I have heard any part of the evidence, or
P 530 l 9-11 "the evidence as a whole, which would seem an adequate cause for de-
P 539 l 14-23 "claring him incompetent to make a Will;" and again that he was "en-"tirely capable" of understanding and making this Will. Both in his
P 530 to 572 examination in chief and upon cross-examination, Dr. Armour gives in great detail the reasons for his conclusions.

P 572 l 31-37 (c) In Dr. Beemer's opinion the Testator was shown to be compet-
P 574 l 2 to ent to make and understand the Will, and he gives convincing reasons
P 575 l 24 for his opinion at some length.

P 511 l 12-31 35. In addition to the evidence of the three medical witnesses called
P 524 l 27-42 for the Defendants, there was the evidence of Mrs. Walker, that of General Brewster and of many other witnesses as to the Testator's everyday
P 526 l 44-46 life and conduct before and at the time of the preparation and making

RECORD

of the Will, which established that (except when the Testator was seriously ill and suffering from the aphasia, which was only transitory) the Testator was perfectly competent to make his Will. P 480 l 15 to P 481 l 24; P 482 l 29-31 & 42-44; P 483 l 1-10

36. There is also very convincing evidence of the Testator's competency in the letter of March 22nd, 1915 from Mr. Lash to Mrs. E. C. Walker (put in by the Plaintiff) which shews that when giving instructions to Mr. Lash, the Testator had thought out beforehand the main changes he wished made in his Will, and had himself decided upon the list of legacies and gifts of pictures, and his general instructions regarding "Willistead" and Mrs. Walker's interest in it, though he had not come to a decision as to some of the details about "Willistead." P 244 l 21 to P 245 l 15

37. On the question of undue influence, there was really no evidence offered. The only person who is suggested as having exercised any influence upon the Testator is Mr. Lash, his trusted solicitor, who had no interest in doing other than carrying out the Testator's wishes, and the only evidence of any "influence" is that Mr. Lash suggested that the specified purpose of the legacy to the Toronto University should be changed to another purpose in connection with the University, and that the legacy intended for Upper Canada College should be given to St. Andrew's College, the reasons for the changes being expressed in the letter accompanying the Will when sent up for execution. P 591 l 1-13; P 104 l 4-10

38. The evidence of the Respondent, Mary Griffin Walker who was examined as a witness for the Plaintiff upon a commission issued by the Plaintiff was read by the Defendants at the trial although the admission of her evidence was objected to by the Plaintiff on the ground that she had refused, under the advice of counsel, to answer certain questions. P 502 to P 527

The trial Judge allowed Mrs. Walker's testimony to be read, and this forms one of the grounds of the Plaintiff's appeal to the Appellate Division, and of this appeal, and is referred to later. P 501 l 43 to P 502 l 5

JUDGMENT AT THE TRIAL

39. The Trial Judge, Mowat J., delivered judgment at the trial, dismissing the action with costs. He reviews the evidence at some length, and finds that "the result of this evidence pieced together, dovetailed to-"gether, combined and considered as a whole, does not make me think "that there was anything which would affect the mind, or which would "show the incapacity of the late E. C. Walker to make his Will when he "did." P 584; P 589 l 45

He further says: "Now, the fact that Mr. Walker advised Mr. "Lash that he was going to make a new Will, and that Mr. Lash had

"this interview apparently by arrangement, and that afterwards Mr. "Lash sent to Mr. Walker a copy of some of the main clauses, but leav- "ing the purely legally expressed clauses to Mr. Lash, shows that Mr. "Lash had not the slightest doubt that he was dealing with a man who
P 591 I 24 "was mentally capable of making his Will."

40. In view of all the evidence as to the instructions to Mr. Coburn for the Codicils, making changes in the former Will, the instructions to Mr. Lash for, and the preparation by him of, the last Will, after personal interviews, and the submission of the draft of the new Will to the Testator with carefully written explanations, it is inconceivable that any Court could find that a Will so prepared was not the true Will of the Testator.

APPEAL TO THE APPELLATE DIVISION

P 596 41. The Plaintiff appealed to the Appellate Division of the Supreme Court of Ontario and the appeal was heard on the 5th, 6th, 7th, 17th and 18th November, 1924, before the Second Divisional Court consisting of Chief Justice Latchford and Middleton, Masten and Orde—Justices in Appeal. The Respondents were not called upon, but the Court did not delived judgment at the conclusion of the argument, stating that a written judgment would be delivered by the Court.

The Judgment of the Court was written by Mr. Justice Orde and was delivered on 3rd April, 1925, dismissing the appeal with costs.
P 598 In this Judgment, the facts of the case are set out at some length, and
P 608 I 32 et seq. are clearly stated by the Appellate Divisoin, and their conclusion that the Plaintiff's attack upon the Will under such circumstances is "well
P 608 I 7 "nigh hopeless" is well founded upon the evidence.

42. No circumstances of bodily ill-health and occasional temporary aphasia, to which the Testator may have been subject, at various times prior to, but not at the time of the instructions for or the execution of the Will, could prevail against the facts referred to in the Judgment of the Appellate Division as establishing the competency of the Testator and the validity of the Will.

43. This is not the case of an inofficious Will. The Plaintiff who is the only person attacking the Will was not a relative of the Testator by blood or marriage and had no legal or moral claim upon him. A perusal of the Will shows that the Testator took into consideration, and made provision for, not only his relatives, but also for many friends and other people for whom he had regard, but who had no claim upon him. The circumstances which forced Walker Sons to dismiss the Plaintiff from their employ, the claim which he made upon them for compensation, and which they considered exorbitant, the long-drawn out corres-

RECORD

pondence and negotiations with regard to the settlement of the Plaintiff's claim, and the threats which he made during these negotiations, naturally affected the friendship which had formally existed between the Plaintiff and the Testator, and were very good reasons why the Testator should no longer consider the Plaintiff a proper object of his bounty. Having regard to their changed relations, it would have been strange indeed if the Testator had not revoked the legacy which he had given to the Plaintiff by his former Will.

The Appellate Division suggests that if under the circumstances, the Testator had not revoked the bequest to the Plaintiff under the prior Will, it would have been evidence of imbecility on his part. P 610 l 43

44. The only ground upon which the Testator's Will, which has been admitted to Probate, could be set aside, whether under the allegation of want of testamentary capacity or of undue influence would be that it is not the true Will of the Testator.

If the Will of February, 1914, was for any reason set aside, the prior Will of December, 1901, would then have to be taken as the true Will of the Testator. It is inconceivable that the prior Will could in any sense be the true Will of the Testator having regard to the changes in the circumstances of the Testator and of those persons mentioned in the prior Will, the large increase in the value of his estate, the relatively inadequate provision for his widow in the former Will, the death of many legatees mentioned in it and his altered relations with the Plaintiff.

45. Upon his appeal to the Appellate Division, the Plaintiff claimed in the alternative that he should be granted a new trial, because:-

(a) The evidence of the Defendant, Mary Griffin Walker was improperly admitted.

(b) The Trial Judge allowed more than three witnesses to be called by the Defendants to give "opinion evidence" contrary to the provisions of the Ontario Evidence Act (Revised Statutes of Ontario, 1914, Cap. 76, Sec. 10) P 596

(a) As to the first of these grounds: Mrs. Walker's evidence was taken on 22nd February, 1924, upon an Order dated 15th October, 1923, for the issue of a commission to take her evidence as a witness for the Plaintiff, the Order having been made before she was added as a Party Defendant under the Order of 20th November, 1923. After Mrs. Walker had been made a Defendant, the Plaintiff could have examined her for discovery, and would have been entitled to read her evidence so taken, or part of it, as evidence on his behalf at the trial, but instead of doing so, the Plaintiff issued a commission pursuant to the Order and pro- P 502 l 14 P 496 l 6 P 6 l 14

RECORD

ceeded to examine Mrs. Walker as his own witness, she being at the time a resident of the City of Washington in the United States of America, and not compellable to attend to give evidence at the trial. Upon her examination, Mrs. Walker was not shewn to be an unwilling witness, notwithstanding which counsel on the examination repeatedly asked leading questions, which were objected to, and he asked other questions which bore no relation to the issues in the action. These questions were objected to by counsel for the Defendants, the National Trust Company. Most of the questions objected to were answered notwithstanding the objections. A few questions, however, Mrs. Walker declined to answer on the advice of counsel. If the Plaintiff was not satisfied with the examination, without the questions objected to being answered, his remedy was to move for the Court's ruling upon the propriety of such questions. If this had been done and the Court had decided that the questions unanswered were proper questions and should have been answered, the witness could have been ordered to attend and answer those questions; but the Plaintiff did not take this course; not having done so, he cannot at the trial contend that the whole of the evidence of Mrs. Walker (who was his own witness, although a Defendant) must be altogether excluded because some questions objected to were not answered. The notes of Mrs. Walker's evidence shew that she answered all the questions put to her, which were not objected to, fairly and fully, and her evidence as taken was properly admitted by the Trial Judge. In any event, the questions which Mrs. Walker did not answer were not material to the issues involved. The Appellate Division thought the question was largely one for the trial Judge, and the admission of the evidence was not ground for a new trial.

P 612 ll 15-30

(b) Upon the second ground upon which a new trial is asked: namely, that more than three witnesses were allowed to give opinion evidence, it is submitted that there were in fact only two witnesses called by the Defendants to give "opinion evidence" viz., Dr. Armour, and Dr. Beemer who were well-known specialists in mental and nervous cases. They were present during the whole of the trial, and upon the whole evidence adduced gave their opinions as experts as to the Testator's competency. The third medical wintess for the Defendants, Dr. Vedder, was not strictly called to give "opinion evidence" but evidence as to the facts of the Testator's physical and mental condition on the occasions when he attended him, although he was asked to express his opinion as to the Testator's competency, and may, therefore, in a secondary sense be considered (as the Appellate Division said) as giving "opinion evidence."

P 611 l 42

But the evidence of the non-professional witnesses did not come within the category of "opinion evidence," although they testified that from what they heard the Testator say, and what they saw the Testator do, and from his general appearance and manner, there was nothing to lead them to believe he was not competent to make his Will. Such evidence is not "opinion evidence" within the meaning of the Statute.

On a point of practice such as this, the unanimous opinion of the Appellate Division should not be disturbed.

These Respondents submit that the appeal of the Appellant should be dismissed and that the Judgment of the Apellate Division of the Supreme Court should be affirmed for the following, among other, reasons:

Because:

(1) The Appellant has failed to discharge the onus upon him of proving want of testamentary capacity in the Testator.

(2) The evidence shews that the Testator had complete testamentary capacity, and that the Will of 27th February, 1914, is the true Will of the Testator.

(3) The evidence shews that although the Testator was more or less physically infirm, and when actually suffering from attacks of aphasia might not be able to fully understand a long document, such as this Will; yet he was at the time he gave instructions for it, fully able to express his wishes to his personal solicitor, a gentleman of high standing and long experience, and the Will was carefully prepared from such instructions and submitted to and approved of by the Testator, before being engrossed for execution.

(4) Between the "attacks" to which the Testator was subject, he was quite normal and able to attend to business.

(5) Not one witness has suggested anything in the way of hallucinations, delusions, eccentricities or change in the affections of the Testator.

(6) His life-long character as a quiet, thoughtful, considerate man; artistic in his tastes; deliberate in speech and action; not hasty in making up his mind, but determined when he had made it up; generous, but careful in money matters, "a perfect gentleman," never changed; as he was described in early life, so he remained; and this persistence in character is the strongest evidence that there was no material impairment of mentality.

(7) The change in the Testator's circumstances since the Will of 1901 and in the circumstances of those persons mentioned in it, required that a new Will should be made to carry out the Testator's wishes and instructions.

(8) The changes in the relations between the Testator and the Plaintiff, the controversy with the Plaintiff with regard to the claim presented by him and the threats he made, were ample justification

firstly, for the instructions for the Codicil revoking the bequest to the Plaintiff, and later, for the provisions in the new Will, which contained no reference to the Plaintiff.

(9) The changes which were made by the new Will were in all respects reasonable and proper, and the bequests were in the main determined by the Testator himself without consultation with his solicitor and furnished to Mr. Lash in the shape of written lists.

(10) The Will of 27th February, 1914 is the true Will of the Testator and is on its face clear, reasonable and wise.

(11) The Will of 21st December, 1901, in the event of the Will of 27th February, 1914, being set aside, would then become the last Will of the Testator. In view of all the changes in the circumstances of the Testator and of others mentioned in the former Will, and the provisions made in the later Will to meet these changed conditions, it is inconceivable that the Will of 1901 could be considered the true and valid Will of the Testator at the time of his death.

(12) It is the Court's duty to ascertain and declare what is the true Will of the deceased, and that can only be the Will of 27th February, 1914.

(13) The reasons for the Judgment of the Trial Judge and of the Appellate Division are correct and the Judgment itself should be affirmed.

I. F. HELLMUTH,
D. W. SAUNDERS

In the Privy Council

ON APPEAL FROM THE SUPREME COURT OF ONTARIO

BETWEEN

WILLIAM ROBINS,
Plaintiff (Appellant)

AND

NATIONAL TRUST COMPANY, LIMITED, AND OTHERS
Defendants (Respondents)

CASE

for the Respondents, Mary Griffin Walker, Elizabeth Brewster and Mary W. Cassels

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