38,1956

No. 6 of 1955.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF GIBRALTAR

BETWEEN

JUDAH I. LAREDO and DAVID M. BENAIM, Executors and Trustees of the Will of SIMY MARACHE, deceased . . . . . *Appellants*

AND

SAMUEL ABRAHAM MARRACHE, Executor and Sole Beneficiary of the Will of SIMY MARACHE, deceased . . . . . *Respondent.*

Case for the Appellants.

RECORD.

1. This is an Appeal by Leave of the Honourable Mr. Justice Bacon Chief Justice of the Supreme Court of Gibraltar from the majority verdict (7 to 2) of a Special Jury and from the Judgment of the Court dated the 17th day of November, 1954, whereby the Court pronounced in favour of a Will dated the 29th day of May, 1953, of Simy Marache spinster late of 222 Main Street, Gibraltar (hereinafter called "the deceased") who died on the 2nd day of June, 1953, aged 86 years. The Appellants Judah I. Laredo and David M. Benaim are the executors and trustees of a Will dated the 4th day of July, 1946, and of two codicils thereto dated respectively the 5th day of September, 1946, and the 20th day of July, 1951. p. 25.

2. The Respondent to this Appeal as the sole executor and beneficiary under the said Will dated the 29th day of May, 1953, propounded the same by a Writ of Summons dated the 18th day of June, 1953, and by a Statement of Claim dated the 15th day of December, 1953. The Appellants as the executors and trustees of the earlier Will and two codicils thereto filed a Defence but made no Counter-claim. p. 1. p. 3. p. 4.

3. By their Defence delivered the 15th day of January, 1954, the Appellants alleged that the said Will was not duly executed; that the deceased was not of sound mind memory and understanding; that the said Will was obtained by the undue influence of the Respondent; that the said Will was obtained by the fraud of the Respondent and that the deceased did not know and approve of the contents of the said Will. They asked that the said Will be pronounced against. pp. 4–5.

pp. 5–6. 4. Particulars of the said Defence were delivered on the 11th day of February, 1954, and on the 16th day of February, 1954. On the 11th day
p. 30. of November, 1954, by Leave of the Court at the trial the Particulars of Defence were amended, the trial having commenced on the 9th day of November, 1954, before the Honourable the Chief Justice and a Special Jury.

pp. 48–50. 5. The action was tried on the 9th, 10th, 11th, 12th, 15th, 16th and 17th days of November, 1954. On the 16th day of November, 1954,
pp. 52–53. after submissions and argument the allegations of undue influence and of fraud were withdrawn from the Jury. The Honourable the Chief Justice 10
summed up the evidence, and the issues of due execution, testamentary
p. 83. capacity and knowledge and approval were left for the Jury. As to these : the Jury retired at 12.35 p.m. on the 17th day of November ; at about 3.20 p.m. the Jury were divided (6/3) ; after further deliberation they
p. 74. answered all three questions left to them in the affirmative by a majority
p. 76. of 7/2 and Judgment was given accordingly.
p. 145.

pp. 77–78. 6. On the 8th day of December, 1954, a Motion for a new trial was dismissed *in limine*, not being in proper form, and a Motion for Leave to Appeal was adjourned pending the new Notice of Motion for a New Trial. On the 17th day of December, 1954, a Notice of Motion dated the 8th day of 20
p. 80. December, 1954, for a new trial was dismissed and the costs thereof were
p. 85. ordered to abide the result of this Appeal. The Appellants were granted
p. 86. conditional Leave to Appeal and on the 14th day of February, 1955, final Leave to Appeal was granted to the Appellants.

7. No question arises on this Appeal on any of the issues withdrawn from the Special Jury and the sole question is whether, having regard to the evidence and the summing up to the Special Jury, they were adequately and properly directed on the issue of whether the deceased knew and approved of the contents of the Will.

SUMMARY OF THE EVIDENCE. 30

8. Simy Marache who died on the 2nd day of June, 1953, a spinster had two brothers Benjamin and Samuel both of whom pre-deceased her. The Appellant Laredo was related by marriage to Benjamin Marache
p. 30. who was the Appellant's uncle by marriage. Although the jury were twice informed during the opening of the Respondent's case that the
p. 15–16. Respondent was related by blood to the deceased being a third cousin no evidence was given of this blood relationship and the evidence given to the Court was to the effect that the deceased herself had declared that
p. 32. he was no relation. It is right to say that the Appellant Laredo stated
p. 35. in cross-examination that it was the custom of the community that the 40
" nearest relatives " should place a deceased's body in the grave and that
p. 35. when the deceased died the Respondent and a Mr. Benyunes did so, but
p. 17. that he did not : and that the draughtsman who typed the Will propounded said that the deceased said of the Respondent " he was the only relative
p. 18. she could rely on." In cross-examination the draughtsman said " T. told me Plaintiff was the only person in whom she had confidence and for whom she had affection."

9. In 1940 the deceased and her two brothers and the wife of Benjamin were evacuated to Tangier ; in May, 1941, the Appellant Laredo joined his wife in Tangier and they subsequently lived at the Villa de France, Tangier, to which address the deceased and her brothers had moved. p. 30.

10. In December, 1944, the wife of Benjamin Marache died in Tangier and he died there in February, 1945, intestate. Benjamin Marache left a notebook containing last wishes comprising a list of gifts and an expression of his wish as to the ultimate destination of the family estate which was destined for the benefit of the Talmud Torah, a Hebrew School in Gibraltar. The deceased and Samuel Marache returned to Gibraltar where the Appellant Laredo and his wife followed in two months' time, joining the deceased and Samuel in their house at 222 Main Street, Gibraltar, where Samuel had offered the Appellant a flat and an option to use a room as an office. The Appellant's flat had been requisitioned. p. 30. Ex. 7. p. 116. p. 31. p. 31.

11. The Appellant Laredo gave evidence that the notebook had been produced to him by Samuel Marache on the day of Benjamin's death and that Samuel said that he wanted to proceed in agreement with the deceased as soon as possible to legalise the wishes in the book. He further said that the book was re-discovered in the house of the deceased after her death and that he knew of the wishes as expressed in the book but that he had not known of the book until it had been shown to him in Tangier. He further said that Benjamin had noted that certain legacies were to be paid on the liquidation of the stock-in-trade of the shop. In answer to the Court he said " when B. died in Tangier S. showed me the book and its contents here relevant." Ex. 7. p. 30. p. 31. p. 38. p. 31. p. 36.

12. A translation of exhibit 7 (agreed with the Respondent's advisors) is as follows :— pp. 116–117.

(*Translated from the Spanish.*)

At the death of us the house and all the furniture that remains in the house to be sold and the proceeds invested in the War Loan the rest of the resulting total half of the interest to become the property of the Talmud Torah and the other half to give a meal to the children of T. Torah.

Appoint two executors.

On the death of us four the house is to be sold by public auction and the result to be invested in the W. Loan.

From the proceeds of the sales pay these donations :—

	£
Esther Levy	200
J. Laredo	300
E. & R. Laredo	300
I. Elmaleh	50
Daughters of Pariente	50
Daughters of R. Benzimra ..	50
Daughters of Bendelac	50

Ex. 10, p. 120. 13. Of the gifts referred to in the said notebook Samuel Marache on the 15th September, 1945, paid £50 each to Bonina Attias de
p. 121. Benzimra and Esther S. Bendelak; on 22nd October, 1945, he paid the Appellant Laredo £300; on 15th April, 1946, he paid £50 to Donna Wahnon de Elmaleh. All these persons signed receipts in similar terms, stating that the sums had been paid out of a desire to respect the wishes of Benjamin Marache.

Ex. 8, p. 119. 14. At some time in 1946 a draft Will was prepared for Samuel and engrossed. It was never executed but the proposed executors were the Appellant Laredo and the deceased. After a life interest to the deceased the income from the estate was given to The Talmud Torah, as to one-half for the teaching of the Hebrew religion and language and as to one-half for the provision of meals for poor children attending Jewish classes. Effect was thus given to the wishes of Benjamin expressed in the said notebook.

Ex. 18, p. 139. 15. A draft Will purporting to be that of the deceased bearing
p. 34. date " 1946 " and of which the executors were Samuel Marache and the Appellant Laredo, in similar terms to Samuel's draft will was produced from the records of the late A. B. M. Serfaty a lawyer, but no evidence was adduced that the Will was ever shown to the deceased.

pp. 31, 35, 38. 16. Samuel died on 22nd June, 1946; Laredo was a principal
p. 31. functionary at his funeral. While Samuel was alive the deceased by mutual agreement with him did nothing about a Will.

Ex. 15, p. 126. 17. On the 4th day of July, 1946, the deceased executed a Will
p. 31. which was prepared with the help of her then lawyer the said A. B. M. Serfaty since deceased. The Appellant Laredo had nothing whatever to
pp. 31, 35. do with the preparation of the Will of which he was appointed one of the executors and trustees. The said Will so far as the residue of the estate was
p. 128. concerned benefited the Talmud Torah as to one-half of the income for the purpose of the teaching of the Hebrew religion and the Hebrew language, and as to the other half for the purpose of providing clothing and/or footwear for the Jewish poor children attending Jewish religious classes. The
p. 42. reason for the change according to what the deceased said was that after the war there was no space for a canteen in The Talmud Torah.

p. 126. 18. It is right to say that the said Will left legacies to seventeen persons including all those referred to in Benjamin's notebook some of whom Samuel had already benefitted and that the total legacies were £1,900.

p. 30. 19. The Appellant Laredo had known the deceased since he was a small boy. From time to time he helped Benjamin and Samuel and, after the latter's death, the deceased asked him to continue to help her
p. 31. which he did. He helped her at her request in religious observances on
p. 31. Fridays, Saturdays and Feast Days; the deceased sent for him to help

her in business matters and he advised her. He made out cheques and checked her Bank Pass Sheets. His evidence was that the deceased was always very friendly towards him. pp. 31, 32. p. 37. p. 32.

20. On the 5th day of September, 1946, the deceased made a codicil to her said Will increasing the value of certain of the legacies and confirming her said Will. The said A. B. M. Serfaty was one of the attesting witnesses. Ex. 16. pp. 132, 133.

21. On the 16th day of February, 1947, and on the 26th day of March, 1947, the deceased paid £150 each to Rachel Laredo and to Esther Laredo, and £200 to Esther Levy. They signed receipts in similar terms stating that the sums had been paid out of a desire to respect the wishes of Benjamin Marache. Ex. 10. p. 121.

22. On the 20th day of July, 1951, in view of the death of certain legatees, the deceased made a second codicil to her said Will, and the said A. B. M. Serfaty was one of the attesting witnesses. By the said codicil, which confirmed the existing Will and codicil, the deceased increased the legacies of certain of the surviving legatees to the total value of the legacies which had failed, namely, £550. Ex. 17. pp. 136, 137.

23. On 23rd day of August, 1951, the deceased paid the sum of £50 to Esther Pariente, out of a desire to respect the wishes of Benjamin that £50 should be given to Esther Clara and Rachel Pariente. A receipt was signed in the presence of the said A. B. M. Serfaty, and at that date all the persons referred to in Benjamin's notebook had been paid as he wished, either by the deceased or by her brother Samuel. p. 122. p. 122.

24. The residuary charitable bequests were often mentioned by the deceased to the Appellant Laredo. She called him her " trustee." The Appellant was in fact a trustee of Hebrew charities and one of the Vice-Presidents of the Community. The Appellant Laredo knew nothing of the terms of the Will and codicils during the lifetime of the deceased though she said she was happy to have completed the desire of her brother Benjamin. She said that her desire was the same as her brother's. She constantly spoke of her money being for the poor and in this connection mentioned the Talmud Torah. Constantly after 1946 she said her capital belonged to the Talmud Torah. In March, 1953, she spoke to the like effect to a teacher of the Talmud Torah that her money was for the poor and for the Talmud Torah. She often asked the Appellant Laredo how the Hebrew School was getting on and said she had a lamp—a memento of the brother Benjamin—she wanted to give to the School. On 30th May, 1953, the day after the execution of her last Will the deceased according to the evidence of two witnesses spoke of her money going to the poor and of her former Will as if it were valid and subsisting. p. 30. p. 33. pp. 35, 40, 41. pp. 42, 43. pp. 44, 46. p. 38. p. 45. p. 32. pp. 39, 41, 42, 43.

25. In about February, 1953, the deceased was confined to bed and stayed there until removed to hospital on 22nd May, 1953. She was p. 33.

p. 90. often sick and weak and suffered from cancer of the stomach ; she had broken a leg previously and had had a nurse who had stayed up to a few
p. 33. months before May, 1953. She was deaf, or at least very hard of hearing.
pp. 23, 25, 33, 34, pp. 32, 39, 42, 43.

p. 33. 26. About 15th May, 1953, the Appellant Laredo for the first time heard her sing opera ; she said " unusual things." In May, 1953, she was unable to appreciate the fact that it was Pentecost and was in an abnormal state ; shortly before the 22nd May she could not appreciate the ceremony
p. 33. of the Blessing of the Wine and the Appellant Laredo gave up the ceremony.

MEDICAL HISTORY OF THE DECEASED WHILST IN HOSPITAL

p. 33. 27. On the 21st May, 1953, a Dr. Giraldi, who had known the deceased
p. 20. as a patient since 1946, advised her removal to the Colonial Hospital, Gibraltar. She entered hospital on the 22nd May 1953, and had a private
p. 39. room. She had a bad fall as she was entering a car to go to hospital, where she remained until she died, on the 2nd June 1953.

28. The condition of the deceased during the time she was in hospital was recorded in day and night reports and these show the following facts :—

p. 91. On 22nd May 1953 she had difficulty in taking her special diet.

p. 91. On 23rd May she could only take 6 oz. water and orangeade ; she slept fairly well. At 5 a.m. she had pethedine for her pain.
p. 92. She appeared bright and talkative during the day and took fluids.

p. 94. On 24th May 1953 she had a miserable day, with very little fluid, but had slept well during the night of 23rd. During the
p. 95. night, she only took sips of fluid. She complained of pain in her shoulder and of headache and was given pethedine.

p. 96. On 25th May 1953 the deceased was not so well in the afternoon
p. 97. and was incontinent. At 10 p.m. the deceased had pain in her shoulder and headache and was given pethedine. She took 4 oz. fluid during the night.

p. 98. On 26th May 1953 she was incontinent, she took fluids and jellies only and was not so well in the afternoon. During the
p. 100. night she was unable to sleep. She was incontinent. At 7.30 p.m. she had an injection of mersalyl. At 10 p.m. she had pethedine, which had no effect. Further pethedine at 2.15 a.m. had very little effect.

p. 99. On what appears to be the day report for the 27th May (though dated 26.5.53), her condition was poor at 10 a.m. Coramine was administered and Dr. Giraldi informed. At 7.30 p.m. she was seen by Dr. Giraldi and luminal was prescribed. It was noted " ring 511 if patient becomes worse."

29. On the morning of the 28th May, the deceased's condition was unchanged. She had had pethedine at 10 p.m. and had slept better for short periods. She had taken very little fluid. Dr. Giraldi saw her that morning and recorded her condition as " losing ground—mentally clear . . . tho' wandering at times." During the night of 28th/29th May the deceased slept for longer periods. Her pulse was weak and irregular; she took only 4½ oz. fluid during the night. Her condition remained the same. p. 102. p. 102. p. 21. p. 103. p. 90. p. 104.

30. On 29th May, 1953 (the date of the Will propounded by the Respondent) her condition was deteriorating. The day nurse recorded " still rational and very talkative. All treatment given—condition poor at 3.20 p.m. Coramine 1 cc. given. Relatives informed. Coramine repeated at 5 p.m. Oxygen given. Seen by Dr. Giraldi at 5.50 p.m.; to be called again if condition becomes worse." Dr. Giraldi saw the deceased about 11.30 a.m. to 12 noon. He noted " Reported (or reputed) to be irritable and restless, lucid with doctor, but reported (or reputed) to be mentally disorientated." It is right to say that his evidence in cross-examination was " It's an unusual note, not very relevant at the time. It meant I thought her lucid but someone was trying to impress me with the contrary. I'm almost sure it was one of the Hebrew watchers. I think it was." But the only Hebrew watcher who was present on 29th May when Dr. Giraldi was there, namely Elias Belilo, was not cross-examined to suggest this. p. 105. p. 105. p. 21. p. 23. p. 90. p. 23.

At 8.45 p.m. on the 29th May Dr. Toomey saw the deceased. At 10 p.m. she had luminal with little effect. Her pulse was weak and irregular; she was very noisy and complained of pain in the stomach. At 12.45 p.m. she had pethedine and slept for long periods. Her general condition appeared worse at the time of the report. p. 105.

On 30th May she was slightly worse and sipped water only. Dr. Giraldi saw her in the morning; that night her condition deteriorated. She had pethedine and luminal. p. 106. p. 107.

31. On 31st May Dr. Giraldi recorded that she was in a stupor and difficult to rouse. She was weaker and fed by rectal drip. She was noisy and restless. She had pethedine, and died on the 2nd June, 1953, at 12.10 a.m. p. 90. p. 107. p. 108. pp. 109–110.

EVIDENCE OF THE CIRCUMSTANCES OF THE MAKING OF THE WILL.

32. The Respondent's case was opened to the Special Jury when it was stated " T(estatrix) in hospital asked the Plaintiff to bring her a lawyer. He brought a completely independent one: " There was no evidence called to the effect that the Testatrix had given such instructions to the Respondent, and the only evidence adduced on this aspect of the matter was that J. E. Triay a barrister-at-law of six month's call who said in evidence in chief " On May 29th 1953 at about 10 a.m. Plaintiff came to p. 16. p. 17. p. 16.

my Chambers and said he had a cousin at Col. Hospital who wanted to make a Will. He asked me to do it all in one visit. I took my portable typewriter. He said he did not know what the contents of the Will were
p. 17. to be. The Respondent said that it was best to avoid the inconvenience of two visits as the deceased was ill. The firm of Triay and Triay had in
p. 20. fact acted for the Respondent and for his father, in April, 1953, and more recently, and had been consulted by the Respondent on one or two occasions
p. 18. in relation to motoring offences : but it was said he was not looked upon as a client."

p. 17. 33. The Respondent and the said J. E. Triay saw the deceased in
p. 16. her private room at about 10.30 a.m. they being alone with her. The deceased recognised Triay by name and said she had made a previous Will by Serfaty and that Alcantara had taken over his practice. She did not
p. 17. refer to having made any codicils. Triay in examination in chief said, " She said she wanted her old Will completely revoked and a new one made in the Plaintiff's favour. I asked whom she wanted as executor. She said Plaintiff had been extremely kind to her, spoke very highly of him and his family ; he was the only relative she could rely on. She said Plaintiff was to be her executor. Plaintiff took no part in that conversation. I sat on chair and started typing formal parts. As I came to the operative parts (revocation, appointment of executor and bequest of estate) I put each point to her and asked her open questions. She told me again. I typed it all out."

p. 18. 34. In cross-examination he said that, whilst he typed, the Plaintiff and the deceased talked by the bed and that he included " codicils " in the revocation clause as a measure of precaution not knowing of any. No question was asked of the deceased of her then existing testamentary dispositions or whether she wished to benefit any person or institution other than the Plaintiff or as to the nature and value of her estate, the said Triay being completely satisfied that the deceased had a clear view and wish.

p. 24. 35. Nurse Olivero was called into the room and asked if she could sign something but was not informed of the nature of the document.
p. 19. She left the room to see Sister Dines to ask her to sign. On this aspect of the matter Sister Dines in cross-examination said, " I met N. Oliviero in the corridor and she asked whether she could attest a Will. She had a pen ready. I told her ' No '. I was in the corridor. Plaintiff and J. E. Triay both came out of T.'s room—one of them asked me to witness. I refused. One of them then asked if a doctor was available. The doctors were very busy. I suggested they should contact Giraldi. One of them then asked me to contact him. I phoned him at K.G.V. and explained situation to him. He said he was far too busy to come. I told the Plaintiff and J. E. T. and suggested they go to Dr. Miller."

p. 22. 36. In cross-examination Dr. Giraldi said that Sister Dines had asked him to come and witness the Will but he said he wasn't going to be ordered about like that. He said he was annoyed because he should have

been asked for permission that the patient be disturbed. He said it was clear to him from the fact that he made no report about Sister Dines that he had not told her that the deceased was mentally unfit to sign any legal document. Nevertheless he agreed that the statement of one Elias Belilo a Hebrew watcher was substantially correct and the statement made a few days after 29th May, 1953, recorded that Dr. Giraldi on that day had said to the Respondent " even if this lady had to give evidence for a crime to the police the police could not take her evidence without my permission because she is not in a state to be disturbed." p. 22. pp. 22, 112.

Belilo gave evidence on this matter and said " I gave you (Hassan) a statement a few days later. Later I met Giraldi and told him I made a statement. He said he had read it already. He said ' It's very well and correct. Don't worry. Forward with the matter '." p. 47.

37. The Respondent and the said J. E. Triay (on the suggestion of Sister Dines) visited the hospital secretary, one Dotto, and were taken to see the Chief Medical Officer. Shortly afterwards Dotto was informed by them that he had been authorised to go with them and attest the Will. The Will was not read over to the deceased, nor did she read it herself, but it was explained to her in the following circumstances :— p. 19. pp. 17, 25, p. 25.

(1) Triay said " I then laid the Will before T. and asked her if she preferred to read the Will or have it explained to her. T. said she preferred explanation. I then made these points, in Spanish, as before :—Revocation, exors. appointment, bequest of all to Plaintiff. I was in some doubt as to whether T. had acknowledged the Will then, so asked Plaintiff to repeat it all to her. Plaintiff explained it all correctly. T. said ' Si ' and nodded." p. 17.

In cross-examination he said " When Plaintiff explained Will to T. he said ' By this you revoke the previous Will, that of Laredo.' I was satisfied Plaintiff explained her present Will properly." p. 18.

(2) Dotto said " T. was sitting in bed against pillows. Triay produced a document and laid it on the bed for T. to read and sign. The T. intimated that she would rather have it explained to her. So Triay started to explain it. At this stage Plaintiff intervened to tell Triay that T. was rather deaf, and to lift his voice. Triay then said ' Will you explain it yourself—three things ; first that she is making her last Will and revoking all former Wills ; secondly that she is appointing you sole Exor. ; thirdly that she is leaving all she possesses to you.' Triay said all that in Spanish. The Plaintiff repeated more or less what Triay had told him in Spanish. T. assented. In my opinion there could not be any doubt that she understood what was said." p. 25. p. 25. p. 25.

In cross-examination he said, " He explained the Will into her ear in Spanish. ' You revoke your former Will the Laredo one. You make me sole executor, and leave me all you possess. Don't fear. You'll live 100 years '." p. 25.

pp. 25, 17. p. 17. 38. The Will was then signed (though the deceased expressed some doubt as to her strength to sign) and attested and remained in the possession of J. E. Triay. There was no evidence that the deceased thereafter ever referred to the Will or to the events of that morning to anybody.

p. 21. p. 21. 39. Dr. Giraldi (if he did as he always did) had seen the deceased at 8.30 a.m. His evidence was that he found her mental condition quite clear. At about 11.30 a.m. to 12 noon he saw the deceased when her condition was " practically the same as in the morning—no change in her mental condition." 10

40. At 3.50 p.m. the Respondent reported to the Secretary of the Synagogue, the said Elias Belilo, that the deceased had got worse and that watchers were necessary. Belilo and the Respondent went to the hospital, p. 46. the Respondent saying : " How one feels when a relative is dying ! It is like having one's heart torn out." At about 4.30 p.m. Dr. Giraldi arrived p. 21. at the hospital and there met the Respondent. He was very annoyed p. 22. that his patient had been disturbed. He agreed in cross-examination that possibly he said : " I'm going to revoke it." and had an interview with the Respondent in the nurses' office. He said : " When we came p. 22. out I was less angry. My anger was based on the belief that some other 20 medical authority had permitted my patient to be disturbed. In fact p. 25. none had, as it turned out." Dotto, however, gave evidence that he had been told by the Respondent and by the said J. E. Triay that the Chief Medical Officer had authorised him to go with them to attest the Will.

41. Belilo's evidence on the meeting between the Respondent and Dr. Giraldi at 4.30 p.m. was as follows, Giraldi said to Plaintiff :—

> " Listen, Marrache, who gave permission to bring a lawyer here and disturb my patient without my authority." Plaintiff said " I acted on instructions." Giraldi said " Instructions *de quien ?* I am he who is in charge here. She is my patient. I'm 30
> p. 47. going to revoke this." Plaintiff said " Triay came and Dr. Miller was inside " (*adentro*). Giraldi said " Neither Dr. Miller nor anyone ! Even if police wanted a statement they couldn't have it, because this lady wasn't in a fit state for anything today." Plaintiff stood mute (*se quedo helado*). Giraldi turned his back and entered T's room. Plaintiff said to me " But man ! we phoned Giraldi."
>
> Plaintiff's wife came out of T.'s room very excited, and said " Samuel, I don't want Dr. Giraldi to come to the house any more, even if we have someone ill—He came in and cut me dead." 40 Plaintiff said " Don't worry ! The Dr. is excited. It must be that Laredo has got him worked up ! "
>
> Dr. Giraldi stayed in room a few minutes, came out and said : " Sam, come with me, I want to speak with you." They went into a nearby room for 10 or 15 minutes. They came out. Giraldi then said to me, taking my arm : " I was very excited because I don't want to be ignored in relation to my patients."

I asked if I need stay as a watcher. He said " Definitely. The lady is very weak and at her age her heart could stop like that (clicking fingers)." Plaintiff was there when he said it.

Giraldi left. Plaintiff said nothing for 2 or 3 minutes. Then said " Belilo, for your children's sake say nothing to anyone of this, because if Laredo hears of it he is capable of coming up here to the hospital and kicking up a row with the old lady and killing her." I promised him to say nothing. I stayed another 2 hours. Oxygen twice more. In cross-examination Belilo identified his statement and said " I agree I said in it that Giraldi has said ' she's not in a fit state to be disturbed,' not ' she's not fit for anything.' I also agree that I did not say in exhibit 4 that Plaintiff said ' for your children's sake '." p. 47. Ex. 4, p. 112.

42. On this aspect of the case Dr. Giraldi said " I could have been present when the Will was made but it is not desirable for a medical practitioner to be either a witness or present at a Will. To be definite as to her state of mind at a given moment I should have had to examine her immediately before and after." In re-examination he said " I did examine her early that day and later. In my view she was of a disposing mind that day." And to the Court " I can't be sure as to the exact time I went for the second time . . . it may not have been until 5.50 p.m." And further re-examined " I visited T. certainly on one occasion possibly two after the Will on 29th. I examined her in presence of Sister alone after the Will. She made no complaint to me about anything that had happened that day." p. 23. p. 22. p. 24. p. 24.

SUMMING UP ON THE BURDEN OF PROOF.

43. As to the burden of proof : the Chief Justice said—

" . . . now a word as to the specific issues which are left to you in this case. There are three though really as we shall see in a moment only two are in dispute. In each instance the burden rests upon the Plaintiff for there is a rule of law for trials of this kind ; he who propounds a Will that is to say who brings it to Court for affirmation of its validity bears the burden of proving first its due execution and secondly the soundness of the testator's mind and thirdly the knowledge and approval of the testator as to the contents of the Will when he signed it. If those questions are raised in the pleadings of those who oppose the Will the burden is on the Plaintiff. Of course in the present case these issues are raised in the Pleadings. So your task is to look to see whether the Plaintiff has proved each of those matters to you by a satisfactory preponderance of evidence, that is to say by evidence—whether that of the Plaintiff's own witnesses or that which was elicited by the Defendant's own witnesses or by the documents exhibited—evidence which effectively outweighed the opposing evidence. That is what it comes to." p. 55.

And—

" . . . now gentlemen, you have once more listened with very great patience and I can only tell you that it not only of course your p. 74.

duty to carry out your oath but as I mentioned before you have a very solemn duty to find in all truth on the evidence before you and on that alone and by applying the principles of law to which I have referred what value should be given to the deceased lady's signature on her Will on 29th May, 1953. It is a question of the full value or no value; that is the choice, and the answer depends upon your replies to these three questions put to you in writing . . ."

p. 145.

SUMMING UP ON THE ISSUE OF KNOWLEDGE AND APPROVAL.

44. The Chief Justice summed up on the issue of want of knowledge and approval as follows :—

"In a case like the present it is for the jury to decide first whether the deceased was fit—that is to say, mentally fit to make the disputed Will, fully capable of understanding what her property was, the various people or institutions she might or might not favour and the decision she was making, whether she was thus mentally fit during the time when she gave instructions for her Will and executed it: and secondly whether it was duly executed according to legal requirements; and thirdly whether at that time the time of its execution she knew and approved the contents of the Will. If the answers to those three questions are 'Yes' in such a case as this, it is a good and valid Will, whatever favour it bestowed on whatever person or persons."

p. 54.

And

"Now, I have dealt as best I can with the law on the second issue and now pass on to the third issue. First of all, let us see how it is pleaded in the defence. I will tell you in a minute why it is very important for you to know and to remember how these matters are set out in the defence, in these written documents which form the defence. This is the way it is pleaded on this third issue. 'The deceased at the time of the execution of the said alleged Will neither knew nor approved of the contents thereof. The deceased never gave any instructions for the alleged Will and the said alleged Will was neither read over nor explained to her nor did she read it herself before it was executed, and she was not aware of its nature and effect.' That is plain English: the deceased neither knew nor approved the contents of the Will. That is the way the Defendants put their case and that is the pleading on which they stand. Now, I must pause a moment to observe to you a point of practice in the Courts. When a person pleads his case he does so under the Rules in order that his case shall be clear and concise and known to his opponents. We have the rule in all civil proceedings that we must have a clear, concise statement of the parties' cases put upon paper so that not only the Court but also the opposing party or parties know the case they have to meet. The whole virtue of what are called the pleadings—these written documents—and the reason

pp. 58–59.

for them is that each party to any civil proceedings must state the framework of his case so that the opposing party knows what he has to meet. Apparently, however, in the course of this case—and you will recall the trend which the case has taken—apparently there has been an attempt to set up a very different case on this issue. However, you must deal with the matter as it has been put before you. Now, you will notice that the first matter that was raised in the 'substance of the case' was, I remind you, that the deceased never gave any instructions for the alleged Will, and then it went on to say that the alleged Will was neither read nor explained to her nor did she read it herself before it was executed, and that she was not aware of its nature and effect. You must, however, as I say, take the evidence on this issue as it has been presented to you and you must consider your answer to that third question on the form in which the question is framed."

CONTENTIONS OF THE APPELLANTS.

45. The Appellants submit that the onus of proof of the issues was upon the party propounding the Will. They submit that he had to satisfy the conscience of the Court that the Will propounded was the last Will of a free and capable testatrix and that he had to satisfy the tribunal judicially upon the balance of the evidence.

The Appellants contend that the burden which the Respondent had assumed was to satisfy the Court beyond reasonable doubt, and that whether or not it could be said that the evidence of the Plaintiff effectively outweighed the opposing evidence was not decisive of the question, unless it so effectively outweighed the evidence against the Will that the jury had no reasonable doubt on the matter. The Appellants respectfully submit that the absence of direction on this matter to the jury constitutes a misdirection.

The Appellants further respectfully submit that the final observation of the Chief Justice to the Special Jury in relation to the onus of proof, that the value to be attached to the signature of the deceased on her Will on 29th May, 1953, was a question of the full value or no value and that was the choice, depending upon their replies to the three questions put to them, was in the circumstances misleading. It contained no direction for the guidance of any juror who, reflecting on the value that he was to give to the signature in connection with the questions asked found himself in doubt, and unable to answer plainly "Yes" or "No." p. 74.

Further, in relation to the plea of lack of knowledge and approval, the Appellants respectfully submit that in the circumstances, having regard to the evidence, the jury ought to have been directed that it was possible for them to find a knowledge and approval of part of the contents of the last Will alone, and that it was possible for them in particular to find that the deceased, according to the explanation given to her by the Plaintiff, did not know and approve of the revocation of the codicils, nor did she know and approve of the inclusion in her Will of the words pp. 17–25.

p. 88. " for his absolute use and benefit." The Appellants respectfully submit that the Jury should have been so directed, and that it was a mis-direction to direct them that it was a question of " full value or no value."

46. In regard to the plea of lack of knowledge and approval the Appellants respectfully submit that the onus of proof on the party propounding is an increased burden where there is advanced age, or serious illness or the question of capacity is doubtful at the time of execution.

The Appellants submit that the fact that the deceased was weakened by age and illness was a factor referable not only to the plea of incapacity but also to the question of lack of knowledge and approval; and that the jury should have been directed that it was against the background of the totality of the evidence as to her condition that the Respondent still had to satisfy them that the Will contained the real intentions of the deceased, notwithstanding that they might find that she had testamentary capacity.

47. The Appellants contend that where there is a great change of testamentary disposition and a total departure from former testamentary intentions long adhered to and the change is made shortly before death, it is material for the Court to examine the probability of the change and especially so if the testatrix is of weakened or of doubtful capacity or if the person in whose favour the change is made is the person originating or conducting or making arrangements for or procuring the execution of the new Will. Such a transaction requires explanation.

The Appellants submit that the jury were not directed on this matter and that the omission constitutes a misdirection. It is right to say that the Chief Justice in reviewing the history of the testamentary dispositions said " It is perfectly clear that her second Will was a very substantial
p. 63. departure from anything she had done before—a very substantial departure . . ." but he did not direct the jury that the onus of a satisfactory explanation of the change was on the Plaintiff as the Appellants contend it was.

48. The Appellants further contend that a person propounding a new Will constituting a complete departure and made shortly before death must show the testator to have had a real disposing mind and an intention to abandon the dispositions of any then existing Will and codicils, and an appreciation of the effect of the new Will.

The Appellants submit that the jury were not directed on this matter and that the omission constitutes a misdirection.

49. The Appellants contend that whenever a Will is prepared in unusual circumstances or in circumstances which raise a well-grounded suspicion that it does not express the testamentary wishes of the testator, the Court ought not to pronounce in favour of the Will unless the unusual

circumstances are explained to the satisfaction of the Court or the suspicion is removed. The rule enunciated in *Barry* v. *Butlin* 2 Moo. P.C. 480 extends to all cases where the circumstances are unusual or in which circumstances attending the preparation or execution of a Will exist which excite the suspicion of the Court, and whenever such circumstances exist and whatever their nature may be, it is for those who propound the Will to explain such circumstances or to remove such suspicions and to prove affirmatively that the testator knew and approved of the contents of the document.

THE APPELLANTS SUBMIT that by reason of evidence before the Court of circumstances which were relevant to the preparation and execution of the Will it was material for the Jury to be told that such circumstances were a matter for their consideration as to whether they thought they were unusual, or there was a suspicion that the Will did not in fact express the mind of the testatrix : and further, that if they thought the circumstances were unusual or suspicious then they ought not to find that the testatrix knew and approved of the Will unless the unusual circumstances were explained to their satisfaction or that suspicion were removed, the onus being on the Respondent to prove that the deceased had exercised thought judgment and reflection as to the claims upon her bounty as to which she ought to give effect.

The jury were not so directed and the Appellants submit that the omission so to direct them was a misdirection.

The facts which the Appellants submit that the jury ought to have been told were material to their consideration in this respect were :—

(1) That the Will of 29th May, 1953, was made in circumstances of despatch. p. 16.

(2) That the Plaintiff, the sole beneficiary, of no proved blood relationship to the testatrix was present at all material times when the Will was being made and conveyed her instructions to the draughtsman. No friend or person other than the Plaintiff and the solicitor he brought was present, nor did the testatrix have independent advice nor was she ever alone with the draughtsman.

(3) The Will was made when the deceased was dying in hospital, aged 86, in pain, suffering from headaches and had been receiving drugs. She was deaf, or at any rate, very hard of hearing.

(4) The Will was never read over by the deceased, but was explained to her by the sole beneficiary as revoking her previous Will " that of Laredo." Laredo was by no means the chief beneficiary and the explanation was misleading and made no reference whatsoever to her then two existing codicils of which the draftsman was ignorant.

(5) The provisions of the Will of 29th May, 1953, were a complete departure from her former dispositions and omitted the charitable bequests to which she had long adhered. There was no evidence that the deceased had ever spoken against the

charities ; there was evidence that she had often spoken in favour of them. The Will was a departure from the wishes of her brothers to which in all major aspects she paid attention.

p. 48. (6) The Plaintiff was anxious to let it be known contrary to the truth that the news that he was sole executor and beneficiary was only known to him after the death of the deceased and was a surprise.

(7) The deceased had made up her mind to benefit the Plaintiff alone before the arrival of the draftsman, who did not think it necessary to ask her as to others who might be the object of her bounty or as to her then existing testamentary dispositions, or as to the nature and value of her estate. There was no suggestion in the evidence that the draftsman was aware of these matters from any other source.

pp. 39, 41, 42. (8) On 30th May, 1953, the day after the Will the testatrix said " I want all the money for the poor ; they need it more than I do." She spoke as if her Will of 1946 was effective.

(9) On the day of the Will (29th May, 1953) Dr. Giraldi was dissatisfied with the regularity or propriety of the events leading to the preparation and execution of the Will and, moreover had expressed the view that his patient was not fit to be disturbed.

(10) There was no evidence that the testatrix asked the Respondent (the Plaintiff) to bring her a lawyer ; in any event the successor to the late A. B. M. Serfaty was not summoned, but the Respondent brought a stranger to her, a member of the firm he had previously employed, and the Respondent himself did not elect to give evidence or explain his part and conduct in the making of the Will.

50. The Appellants submit that whenever there are unusual circumstances or circumstances of a suspicious character in the making and execution of a Will the person setting up the new Will must discharge the onus of showing the righteousness of the transaction. The Appellants submit that it was incumbent on the Plaintiff to discharge this onus and that the jury should have been so directed.

51. The Appellants humbly submit that this Appeal should be allowed and the Judgment and Order of the Court below set aside and that the said action should be ordered to be reheard for the following among other

REASONS

(1) BECAUSE the jury were not directed that the Plaintiff had to satisfy them beyond any reasonable doubt.

(2) BECAUSE the jury were not directed that it was possible for them to find knowledge and approval of parts of the Will propounded ; and because they were directed that they must give full value or no value to the Will.

(3) BECAUSE the jury were not directed that they must consider the question of knowledge and approval against the background of the totality of the evidence even though they might find that the deceased had testamentary capacity.

(4) BECAUSE the jury were not directed that there were special circumstances which the Plaintiff had to explain to their satisfaction.

(5) BECAUSE the jury were not directed to consider whether they thought there were circumstances which were suspicious or unusual which, if they found them so to be, it was for the Plaintiff to remove or explain before they could be satisfied that the deceased knew and approved of the contents of the Will.

(6) BECAUSE the jury were not directed that the onus of proving the righteousness of the transaction was on the Plaintiff.

R. J. A. TEMPLE.

JOSEPH JACKSON.

No. 6 of 1955.

In the Privy Council.

ON APPEAL

from the Supreme Court of Gibraltar

BETWEEN

JUDAH I. LAREDO and DAVID M. BENAIM, Executors and Trustees of the Will of Simy Marache, deceased . . . *Appellants*

AND

SAMUEL ABRAHAM MARRACHE, Executor and Sole Beneficiary of the Will of Simy Marache, deceased . . . *Respondent.*

Case for the Appellants.

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