

1, 1959

ON APPEAL
FROM THE COURT OF ORDINARY OF BARBADOS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
12 MAR 1960
25 RUSSELL SQUARE
LONDON, W.C.1

THE MATTER of THE ESTATE OF
ERNEST CLARENCE HILL DECEASED

BETWEEN

ERNEST CLARENCE HILL (Petitioner) Appellant
and
ERNEST CARLTON HILL (Respondent) Respondent

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal pursuant to the special leave granted on the 23rd day of July 1957 by the Judicial Committee of the Privy Council from the Judgment delivered on the 19th day of October 1956 by the Chief Judge sitting in the Court of Ordinary of Barbados whereby he dismissed a Petition by the Appellant Ernest Clarence Hill (hereinafter called "the Appellant") asking the Court to declare invalid a pretended marriage between one Ernest Clarence Hill (hereinafter called "the Deceased") and one Marion Allanzena Green celebrated on the 27th day of October 1954 and to grant Probate in solemn form of a Will dated the 19th day of September 1952 (hereinafter called "the said Will") made by the Deceased and to provide for the costs of such Petition out of the estate of the Deceased.

p.89
p.80
p.1

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2. The deceased died on the 30th day of April 1955 resident and domiciled in Barbados possessed of substantial estate estimated to be of a value of about \$98,602.57. He was then over 80 years old. He had made and properly executed the said Will on the 19th day of September 1952. By it he appointed the Appellant and the said Marion Allanzena Green Executors of the said Will.

p.30, p.80
p.2
p.30,1.10;
p.21,1.40
p.80,1.15,
p.1 et seq

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3. The Deceased left him surviving three children by his lawful marriage to his late "first" wife, namely the Respondent herein Ernest Carlton Hill born in 1893, Daisy Rosamund Hill born in 1898 who was in 1955 and still is resident in the United States of America, and Erroll Leslie Hill born in 1911.

p.57
p.58
p.57, 1.34
p.29, 1.33
p.2

4. Since about 1925 the Deceased had lived and cohabited with the said Marion Allanzena Green then 16 years old and he continued so to do until his death. During this time she bore him eight children of whom seven survive. The Appellant is one of such children. The said Will made substantial provision for the said Marion Allanzena Green and several of the said children.

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5. The Appellant on the 6th day of April 1956 filed the said Will for Probate pursuant to the Rules of the Court of Ordinary of Barbados. On the 21st day of June 1956 a caveat was entered thereto on behalf of the Respondent as heir at law of the Deceased. On the 25th day of July 1956 the Respondent petitioned the Court of Ordinary for Letters of Administration and for a declaration that the said Will was null and void on the grounds that it had become revoked by the Deceased's subsequent marriage to the said Marion Allanzena Green on the 27th day of October 1954. The said Erroll Leslie Hill consented to such grant of Letters of Administration.

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6. A citation was issued on the 25th day of July 1956 to Marion Allanzena Hill (who is the same person as Marion Allanzena Green aforesaid) to enter an appearance to the said Petition. Such appearance was filed on her behalf on the 27th day of July 1956.

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p.1

7. The Appellant petitioned as set out in Paragraph 1 hereof on the 26th day of July 1956, (a) to declare the said marriage invalid, (b) to grant Probate of the said Will in solemn form and (c) to provide for the costs out of the Deceased's estate. This Petition alleged that the said "marriage" was invalid both as to its formal validity and the capacity of the Deceased at the time of the ceremony. By particulars delivered on the 15th day of September 1956 three grounds of invalidity were alleged, namely:-

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(i) That each of the parties to the alleged marriage did not freely consent to intermarry with a proper understanding of the contract;

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(ii) That the said Marriage ceremony was not performed in due form as required by the Marriage Act 1904-9 of the Laws of Barbados; and

(iii) That the Deceased was at the time of the marriage so affected by age and physical weakness that he was totally incapable of marrying.

10 8. The hearing of the Appellant's Petition took place before Sir Allan Collymore, Chief Judge, who delivered Judgment on the 19th day of October 1956. He dismissed the Petition, refused Probate of the said Will and ordered the costs of the Petition to be paid out of the Deceased's estate.

p.80

9. The Marriage Act 1904 (1904-9) of the Laws of Barbados inter alia provides as follows:-

20 "Section 2. ... it shall be lawful for such Minister where the banns were published, on receiving such certificate from such other Minister where the banns were published, or for such Minister as aforesaid to whom the certificates of such Ministers of both places where the banns were published are produced, on receipt of such certificate or certificates (as the case may be), to solemnize matrimony between the said parties according to such form and ceremony as shall be in use or be adopted by the persuasion to which the Minister solemnizing such marriage shall belong; provided that whenever the form and ceremony used shall be other than that of the Anglican Church in this Island each of the parties shall in some part of the ceremony make the following declaration:-

30 'I do solemnly declare that I know not of any lawful impediment why I, A.B., may not be joined in matrimony to C.D. here present'.

40 And each of the parties shall say to the other:-

'I call upon these persons here present to witness that I, A.B. do take thee C.D., to be my lawful wedded wife (or husband)'.

And provided also that there is no lawful impediment to the marriage of such parties".

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"Section 9. All marriages shall be solemnized with open doors between the hours of eight in the forenoon and nine at night, in the presence of two or more credible witnesses besides the Minister who shall solemnize the same: and immediately after the solemnization of every marriage an entry thereof shall be made in the marriage register book by law required, and in every such entry in every such register it shall be expressed that the marriage was had by banns or licence, and if both or either of the parties married by licence be under age, and not a widow or widower, that it was had with consent of the parents or guardians or other person or persons having lawful authority to withhold consent to the marriage, or after such order of the Chief Justice as aforesaid, and shall be signed by the Minister with his proper addition, and by the parties married, and shall be attested by such two witnesses; provided always that nothing in this section contained shall impose on any Minister of religion any obligation to solemnize any marriage after four o'clock in the afternoon".

10. Section 13 of the Wills Act, 1891 (1891-1) of the Laws of Barbados provides as follows:-

"Every Will made by a man or woman shall be revoked by his or her marriage (except a Will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)".

11. The questions involved in the present appeal are the following:-

- (i) Whether in the case of a marriage not in the form or ceremony of the Anglican Church in Barbados, failure to make the declaration or use the words stipulated by Section 2 of the Marriage Act 1904 of the Laws of Barbados of itself invalidates the marriage;
- (ii) Whether non-compliance with any of the requirements of Section 9 of the Marriage Act 1904 of the Laws of Barbados invalidates the marriage;

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(iii) Whether when there is clear and uncontradicted evidence of non-compliance with the statutory requirements relating to the form or ceremony of marriage the same can nevertheless be presumed to be valid;

10 (iv) Whether the validity of a marriage can ever be presumed upon evidence of a form of marriage where the parties are shown to have cohabited prior to such form of marriage;

(v) Whether the Deceased was or was not capable of understanding the nature of the contract into which he was entering.

12. The facts material to the determination of the questions involved in this appeal were as follows:-

20 (a) In October 1954 the Deceased suffered an attack of dysentery and that thereafter he had a strangulated hernia which was reduced but subsequently recurred, so that, as a means of saving his life it was decided to perform an emergency operation. For this purpose the Deceased was admitted to a clinic in Barbados at about 2 p.m. on the 25th day of October 1954 and the operation took place at about 3 p.m. His physical condition was very poor at the time of admission and he continued to be weak until his discharge on the 1st day of November 1954 when he had to be carried to a car. The ceremony of the alleged marriage took place on the 27th day of October 1954 at the said clinic apparently without the knowledge of any of the medical practitioners or nurses who attended the Deceased;

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40 (b) The surgeon who performed the operation saw the Deceased every day after the operation. He stated in evidence that his general condition improved rapidly and that the deceased talked to him every day and answered his professional questions normally. He was not able to form any opinion as to the mental state of the

p.58, 1.34
p.20, 1.34 et seq
p.21
p.59, 1.15
p.59, 1.20
p.21,1.10 et seq.
p.22, 1.28;
p.32,1.5,p.33
p.42,1.8
p.31,p.38
p.44,1.12
p.33,1.11;
p.38,1.12,
p.65,1.23
p.23,1.21,
p.15,1.4
p.18,1.3,
p.7,1.29
p.28,1.17;
p.43,1.13,
p.65,1.6
p.22
p.22,1.32
p.22,1.10

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- p.23, 1.34 Deceased but said that he was not capable of managing his affairs, his personal business either on the 25th or 26th day of October 1954. He did not know if he could have done so on the 27th day of October 1954;
- p.24, 1.6
- p.32, 1.3 (c) The Appellant stated in evidence that at the date of the said ceremony the Deceased was not capable of carrying on a conversation but could only speak a few words and that he had often previously told him that he would never marry again and that although he regularly saw the Deceased after the date of the said ceremony until his death the Deceased never mentioned the said ceremony to him and that the Appellant had not been aware of it until after the death of the Deceased, when the Respondent told him of it; 10
- p.32, 1.18
- p.32, 1.27
- p.33, 1.7
- p.40, 1.12
- p.41 (d) A nurse, Esther Hill, who was employed at the said clinic gave evidence that the Deceased while there was very weak and although she was frequently in and out he never carried on any conversation with her, but that he would frequently curse and appeared at times to be under delusions saying that he intended to put on his boots and go to his store. He was helpless and one had to do everything for him. He was not even able to sit up when leaving the clinic. On the third day after the operation she expected him to die. 20
- p.47, 1.35,
- p.42, 1.10
- p.42, 1.21
- p.42, 1.30,
- p.44
- p.48, 1.22
- p.42, 1.24
- p.44, 1.8
- p.47, 1.22
- p.47, 1.22 30
- p.48 (e) A witness, one George Griffith, a former magistrate, who had known the Deceased for years and who had a relative in the same clinic, saw the Deceased there on two occasions over an interval of about two days. He found the Deceased unable to carry on any coherent conversation;
- p.63, 1.11
- p.49, 1.12
- (f) The ceremony of the alleged marriage was performed by the late Rev. J. Winter at about 7 p.m. on the 27th day of October 1954. He was a Minister of the New Testament Church of God in the Island of Barbados. He was 76 years old and died before the hearing of the Petition. There was evidence that he had repeatedly before his illness urged the Deceased to marry and to cease to live in sin. He apparently 40
- p.6, 1.15
- p.16, 1.33
- p.32, 1.10;
- p.13, 1.7
- et seq

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knew the Deceased quite well. His widow also attended the ceremony and she gave evidence on the hearing of the Petition. She herself was a missionary and she in turn had repeatedly urged the said Marion Allanzena Green to get married to the Deceased. She at first stated that the Deceased in the course of the ceremony answered as questions were asked of him, but she could not remember anything in the ceremony which he answered except that he said "I will". She would have been near enough to hear if he had said anything. She also saw him and the said Marion Allanzena Green hold hands in the course of the ceremony. She had known the Deceased for about a year and thought him sick but could not say how ill he was. She took a message from the said Marion Allanzena Green to her husband as the result of which the ceremony of marriage took place. When her husband arrived at the clinic he did not tell the nurses or doctor what he was about to do and he asked the Deceased if he knew who he was. She, Mrs. Winter, was very anxious that these two people should marry to help get their souls saved. The Deceased could not sign the marriage register or record himself but she did not know who signed his name on this. In cross-examination she said that she had seen her husband perform several marriage ceremonies and that there was nothing special about this one;

(g) One Gill, a witness to the said ceremony, gave evidence. He explained that the other witness was now in England. He stated that Miss Green had signed both her own name and the name of the Deceased on the certificate, because the Deceased had asked her to do so saying that he was "a bit nervy". He heard the Deceased say "Sign for me" and the Deceased touched the pen, but he could not remember his exact words. He was a friend of the Rev. Winter and had been asked by him to come as a witness to a marriage. He heard the Rev. Winter ask the Deceased if he knew who he was and the Deceased said Yes. The Rev. Winter also asked if the Deceased knew what he had come there about and the Deceased said "Yes, to marry Miss Green". Thereafter he did not remember the Deceased saying anything. He was only 6 to 8 feet away and he did not hear him say anything. The

p.9
p.11, 1.24

p.13, 1.7
p.10, 1.23

p.11, 1.1,
p.11, 1.17
p.11, 1.2

p.11, 1.20
p.12, 1.4
p.11, 1.33

p.14, 1.10

p.15, 1.4
p.14, 1.7

p.15, 1.17

p.16, 1.9

p.16, 1.3
p.17

p.6
p.7, 1.1
p.7, 1.6

p.7, 1.34
p.8, 1.4

p.8, 1.16
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p.9, 1.1
p.9, 1.12

Deceased and Miss Green did hold hands. He heard the Rev. Winter say something about knowing any just cause but did not remember the Deceased saying it. He had no conversation with the Deceased. The Deceased, The Rev. Winter and the lady alone were talking, but he did not hear the Deceased talk except when the Rev. Winter first went in;

p.50
p.52, 1.5
p.50, 1.29

(h) Betty Hill, a daughter of the Deceased by the said Marion Allanzena Green, gave evidence. She was 11 years old at the time of the ceremony and attended it with her sister Joan now in England. They were present because their mother required them to be with the Deceased while she was absent during the day. She was about 10 feet from her father's bed and saw his face. She saw him make no movement as if speaking during the ceremony neither did she hear him say anything. If he had spoken she would have seen it. She and her sister had been in the room for three hours before the others came in. When they started reading from the book she had no idea what was taking place and at the end she still had no idea, but she could hear what Mr. Winter was saying, though she could not remember all the words he said. They all left together and she took a keen interest in what was going on. During the previous three hours she and her sister had sat in the room and talked but their father had not said anything at all. For one hour he had his eyes closed;

p.51, 1.5
et seq.
p.55, 1.1
p.51, 1.20

p.53, 1.29

p.54, 1.2
p.54, 1.15
p.54, 1.31
p.55, 1.4
p.56, 1.20

p.56, 1.28

p.57
p.57, 1.4
et seq.

(i) Marion Allanzena Green also gave evidence in support of the Petition. She first knew the Deceased when she was 16 years old in 1925. They became friendly in 1927 and she continued to work for him in the business ever since 1925 except when she gave birth to his children. She had no salary but the Deceased had always kept her and the children and they lived together since 1947. The deceased did not control his business regularly since 1954. When the Deceased was in the clinic she slept there every night and went home during the day. On Monday night, the evening after the operation, the Deceased told her to go and bring the Reverend and he would marry her. Mrs. Winter came to see her at home on the Tuesday. As a result Mrs. Winter fetched

p.58, 1.1
p.67, 1.22

p.59, 1.30

p.60, 1.1
p.60, 1.15
p.60, 1.32

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her from the clinic on Wednesday morning and then took her to get a licence. The Deceased had not again mentioned the matter. He signed no document for the licence. On Wednesday evening Mrs. Winter came at about quarter to seven with her husband and two witnesses. They brought books and Mrs. Winter had the licence. They went to the Deceased where her two daughters were keeping vigil.

10 Mr. Winter then went to the Deceased and asked if the deceased knew what he had come about. The Deceased did not answer, neither did Mr. Winter tell him. After that Mr. Winter took a book and started reading the ceremony. The Deceased was lying down and made no answer during this and said nothing. He was then in a bad condition, his memory was bad and he was very sick.

20 The reading lasted about three minutes and she took no part in it, but just stood with her hands folded. She said nothing but Mrs. Winter answered. It was Mrs. Winter who said "I will". No holding of hands took place. When the reading was over she told the Deceased that he had told her to bring the Reverend, but the Deceased said nothing, whereupon Mr. Winter told her never mind, that it was nothing and that he did this all the time, and that when people were in a dying condition he would "marry them with the gloss on their eyes". She signed the Deceased's name in the Register. Alterations were made in this later by someone else.

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(j) In cross-examination she stated that when the Deceased returned from hospital people continued to address her as before, some as Miss Green and some as Mrs. Hill She wore no wedding ring. She never discussed with the Deceased whether she was married to him or not and from the moment they all left the clinic neither she nor the Deceased ever mentioned the "marriage". After the ceremony Mr. Winter told her that he married anybody in the condition of the Deceased. When she pointed out that the Deceased had not said anything Mr. Winter told her it was alright. Whenever she went to see the Deceased at the clinic in the evenings she said to him that she had now come to sleep with him and this she had said on this occasion also. She did not say she had come to marry him. The Deceased said nothing to her, nor to the Rev. Winter, nor to the children. She went by the Rev. Winter in going

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p.61, 1.1
p.61, 1.10
p.61, 1.22

p.61, 1.28
p.62

p.62, 1.12

p.62, 1.18

p.62, 1.34

p.63, 1.27

p.63, 1.29

p.63, 1.33

p.66, 1.23

p.63, 1.20

p.64
Exh. A

p.68

p.68, 1.34

p.69, 1.2
et seq.

p.69, 1.31

p.70, 1.10

p.70, 1.12

p.70, 1.23

p.70, 1.31

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p.71, 1.1 through the ceremony. The Rev. Winter asked her no questions during the ceremony. He only read and she made no replies, but she heard Mrs. Winter say "I will". She did not ask Mrs. Winter why she said this but she thought that it was for the witnesses to hear. She thought there was "something fishy" because the Deceased did not answer, but she did not say anything about it because the Deceased said nothing. She did not know that a marriage revoked a Will, but she was suspicious about the marriage before she knew this. She understood from the beginning that it was not good. When it was put to her that she only began to find fault with the marriage when she was told that a valid marriage revoked a Will her answer was that she never yet said that it was bad. The Deceased had said nothing to her on the morning of the marriage when she left him and she had not told him that she had arranged for the licence which Mrs. Winter got;

p.71, 1.15
p.71, 1.20
p.71, 1.24
p.72, 1.2
p.72, 1.8
p.72, 1.14
p.72, 1.20
p.73, 1.22
p.73
p.74, 1.4
p.74, 1.13
p.74, 1.20
p.75, 1.41
p.81, 1.33
p.82, 1.23

(k) For the Respondent only one witness was called, one Thomas, an employee in the Custom's Department of the Island. He had known the Deceased many years. He visited the Deceased about two days after his return from the clinic and he then appeared quite normal. He told the Deceased that he had heard that the Deceased was married and the Deceased thereupon told him that there was no difference between the first and the second. He had been very friendly with the Respondent and the whole family for years.

13. The learned Chief Judge in arriving at his decision cited and relied upon a passage from Halsbury's Laws of England, 2nd edition, volume 16, page 599:-

"Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence".

He then stated that he found the evidence of the daughter Betty impressive but that there was the

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evidence of Gill and Mrs. Winter which showed that the Deceased asked the said Marion Allanzena Green to sign the certificate for him and that he did say "I will" and that the Reverend Winter read a declaration. He then directed himself that inasmuch as

10 "a deaf-mute can contract a valid marriage provided he understands the nature of the contract into which he is entering it seems that the requirements of the Act of a declaration by the contracting parties is directory in its nature and not mandatory". p.84, 1.27

In the light of this he held that there was no decisive evidence to rebut the above presumption. p.84, 1.40

14. Upon the mental capacity of the Deceased the learned Chief Judge referred to Browning -v- Reane 161 E.R. 1080 and to In the estate of Park (1953) 2 All E.R. 408. He found that the Deceased may have been physically helpless and mentally incapable of managing his business affairs and looking after his person, but that this "is far from saying that he was entirely incapable of understanding the nature of a marriage ceremony and its implication". He also relied on the evidence of Thomas and then held as follows:- p.81, 1.28
p.85, 1.1
20 p.88, 1.7
p.88, 1.10
p.88, 1.20

30 "The evidence to which I have listened cannot in my view rebut the presumption of law (1) 'that where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary' and (2) 'Omnia praesumuntur rite et solemniter esse acta'." p.88, 1.25

15. The Appellant respectfully submits that the Judgment of the learned Chief Judge cannot be sustained and is wrong in law and upon the evidence.

40 16. As to the first four questions involved in this appeal, the Appellant respectfully submits that the evidence establishes beyond doubt the following matters:-

- (i) That the marriage was not and did not purport to be according to the form or ceremony of the Anglican Church in Barbados as is shown by the terms of the entry in the Register;

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Exh. B.

(ii) That neither the Deceased nor the said Marion Allanzena Green made the delaration required by Section 2 of the Marriage Act 1904 of the Laws of Barbados, - a point also supported by the fact that the book used by the Rev. Winter for the ceremony did not contain the words of any such declaration;

(iii) That neither the Deceased nor the said Marion Allanzena Green said to the other the words which the said Section 2 required them to say to each other or any like words; 10

(iv) That the Deceased did not sign the marriage register book as required by Section 9 of the said Act;

(v) That the terms of the Licence itself were not complied with.

17. The Appellant respectfully submits that the statutory requirements contained in Sections 2 and 9 or at least in Section 2 of the said Act are absolute and must be strictly complied with and that failure to comply with them or any of them renders a ceremony of marriage performed other than in Anglican form nugatory and invalid. 20

18. The analogy of a deaf-mute upon which the learned Chief Judge founded himself is not applicable. It may be that a deaf-mute in Barbados could be married according to the Anglican rite but he could not otherwise bring himself within the provisions of the Marriage Act 1904 and consequently could not be married according to this Statute. 30

19. Further the presumption upon which the Learned Chief Judge relied and which he cited from Halsbury's Laws of England, 2nd edition, volume 16, page 599, is a rebuttable presumption. It can therefore only be relied upon where there is no evidence before the Court proving the absence of matters necessary for the validity of the marriage. Here there was such evidence and such evidence was clear and overwhelming. Accordingly there was no room for the presumption and it was displaced. 40

20. Again even if the presumption could be relied upon it depends for its validity upon evidence of a ceremony of marriage followed by

cohabitation. In the present case the cohabitation had long preceded the ceremony of marriage. Accordingly again the presumption could not be relied upon.

10 21. As to the fifth question involved in this appeal the Appellant respectfully submits that the weight of the evidence showed that the Deceased at the time of the ceremony of marriage was not capable of understanding the nature of the contract into which he purported to enter and was not mentally capable of appreciating that it involved the duties and responsibilities normally attaching to marriage.

20 22. This, as is shown by the case of In the Estate of Park (1954) P.89, is the correct test and the learned Chief Judge correctly stated it. But the learned Chief Judge erred in two respects upon this question. First he stated that "much of the evidence of mental capacity is of a negative nature" and that "the medical evidence on the whole is not very helpful on the question of mental capacity". But later he referred to it as "positive testimony".

30 23. Second the learned Chief Judge confused two distinct matters namely knowledge on the part of the Deceased that he would go or had gone through a ceremony of marriage from which capacity cannot be deduced with capacity at the time of the ceremony to understand its nature meaning and purport.

24. The Appellant respectfully submits that the evidence as a whole is consistent only with a finding that the Deceased at the time of the said ceremony was not sufficiently capable of understanding its nature meaning and purport.

40 25. Therefore the Appellant humbly submits that the judgment appealed from is wrong and should be set aside and that the pretended marriage between the Deceased and the said Marion Allanzena Green celebrated on the 27th day of October 1954 should be declared invalid and that Probate should be granted to him in solemn form of the said Will of the Deceased dated the 19th day of September 1952 for the following among other

R E A S O N S

1. Because the requirements of Section 2 of the

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Marriage Act 1904 (1904-9) of the Laws of Barbados had not been complied with.

2. Because the requirements of Section 9 of the said Act had not been complied with.
3. Because upon the evidence the said marriage was proved to have been invalid as to form.
4. Because upon the evidence the Deceased was not sufficiently capable of understanding the contract into which he purported to enter and what it involved.
5. Because the said Will was and remained valid and was the true last Will of the Deceased.
6. Because the Judgment of the Learned Chief Judge was wrong

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NEIL LAWSON

JOHN WILMERS

No. 30 of 1957

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF ORDINARY OF
BARBADOS

I N T H E M A T T E R of the
Estate of Ernest Clarence Hill
deceased

B E T W E E N

ERNEST CLARENCE HILL Appellant
(Petitioner)

- and -

ERNEST CARLTON HILL Respondent
(Respondent)

CASE FOR THE ^{APPELLANT}~~RESPONDENT~~

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