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Judgment 13, 1965
No 37 of 1964

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN

-3 FEB 1966
80948

KELVIN LUCKY (Defendant) Appellant

- and -

PANDIT DINANATH TEWARI and JOSEPH CHANKARAJ SINGH (Plaintiffs) Respondents

10 CASE FOR THE APPELLANT — Record

1. This is an appeal from a Judgment and Order of the Court of Appeal of Trinidad and Tobago, dated the 23rd March 1964, allowing an appeal from a Judgment and Order of the High Court of Trinidad and Tobago dated the 4th May 1963. The High Court pronounced in favour of a Will of Peter Chandroo, deceased (hereinafter called "the testator"), dated the 11th February, 1957, and against the validity of a later Will dated the 7th September, 1960, on the ground that the latter was not duly executed according to law and that the testator did not know and approve of its contents. The Court of Appeal reversed the decision of the High Court and pronounced in favour of the later Will and ordered that it be admitted to Probate. (pp.67-105; pp.56-63; p. 105) (line 20)

2. The principal questions which arise for consideration on this appeal are (i) whether the Court of Appeal were justified in disturbing the findings of fact of the learned trial judge in the High Court, and (ii) whether the Court of Appeal erred in the way in which they (line 30)

| Record | | |
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| | applied the relevant law to the facts proved. | |
| | 3. The testator, who lived at La Romain village, had a wife, four daughters and five sons. The Appellant (hereinafter called "the Defendant") was a son-in-law of the testator. The first and second-named Respondents (hereinafter called "the Plaintiffs") were respectively the brother-in-law and a personal friend of the testator. | |
| p. 112<br><br><br><br><br><br><br><br><br><br>p. 115 | 4. On the 11th February, 1957, the testator made a Will in favour of his wife and all his children. In that Will three persons were named executors, viz. the second-named Plaintiff, the Defendant and another son-in-law named Joseph Motilal. The testator died on the 5th October, 1960, and thereafter the said three executors named in the said Will took steps with a view to obtaining a grant of Probate. Some time later, it emerged that there was in existence another document purporting to be a Will of the testator dated the 7th September, 1960. By this Will, although provision was made for the wife, and there were bequests in favour of the daughters, the whole of the residue was left to the five sons of the testator in equal shares absolutely. The executors named in this later Will were the Plaintiffs. | 10<br><br><br><br><br><br><br><br><br><br>20 |
| <br><br><br>p.2,1.21<br>p.1<br>p.2,1.16<br><br><br>p.5<br>p.6, 1.5 | 5. Application for a grant of Probate in respect of the Will dated the 7th September, 1960, having been made by the Plaintiffs, the Defendant on the 20th September, 1961, entered a Caveat, and on the 8th November, 1961, the Plaintiffs commenced this action against him claiming to be the executors named in the last Will and testament of the testator. By their Statement of Claim dated 27th January, 1962, the Plaintiffs prayed that the Court should decree Probate of the said Will dated the 7th September, 1960, in solemn form of law. | <br>30<br><br><br><br><br><br><br><br><br>40 |
| p. 6 | 6. The Defendant delivered a Defence and Counterclaim dated the 23rd March, 1962. By way of Defence he stated as follows :- | |
| p. 7, 1.5 | (1) That the Will propounded by the Plaintiffs was not made or executed by the testator | |

either on the 7th day of September, 1960 or at all, and that the same was and is a forgery. — Record

(2) That if the testator did make and execute the said alleged Will, - — p.7,1.18

(a) the same was not duly executed in accordance with the provisions of the Wills and Probate Ordinance, Chap. 8, No.2. Under this heading the Defendant put the Plaintiffs to proof that the provisions of the Ordinance duly complied with. — p.7, 1.9; p.7 1.20

(b) the testator at the time when the same purported to have been executed did not know and approve of the contents thereof. Under this head the Defendant alleged that the testator gave no instructions for the alleged Will and the same was not read over or explained to him properly or fully or at all, nor did he read it himself and he was unaware of the nature and effect thereof. — p.7 1.12; p.7 1.23

By his Counterclaim the Defendant said that the Will dated the 11th February 1957 was duly executed and never revoked and he prayed that the Court should pronounce in favour of that Will and against the Will dated the 7th September, 1960. — p. 7, 1.31; p. 7, 1.38; p. 8

7. By a Reply and Defence to Counterclaim, dated the 30th April, 1962 the Plaintiffs joined issue with the Defendant on his Defence, and alleged that the Will dated the 11th February, 1957 was revoked by that dated the 7th September, 1960. — p. 9; p. 9,1.9

8. The action was heard on four days from the 8th to the 11th January, 1963, before Corbin J. and Judgment was delivered on the 4th May, 1963. Evidence was adduced on both sides. — pp.12-55; p. 56

9. The first witness called on behalf of the Plaintiffs was Frank Duff, a transport overseer. The substance of his evidence in chief was as follows :-

That he met the testator on the 7th September, — pp. 12-13

Record

1960, at his house at La Romain, that he did not know him previously and never met him again after that day; that the first-named Plaintiff told the witness that the testator wanted the witness to write a Will for the testator and the latter said "Yes" and handed to the witness a Will of the first-named Plaintiff and told the witness that he would like it written like that Will; that the witness read the said Will (which was produced and identified by him); that the witness returned the said Will to the testator, took up a piece of paper, sat at a table, took out his pen, and as the testator called out to him he wrote on the paper; that when the testator was finished, the witness read the writing over to the testator and the latter said that was what he wanted; that the testator and the first-named Plaintiff and the witness all signed the paper, in the presence of each-other (the Will dated the 7th September, 1960 was produced, and identified by the witness as the paper which he said he had written); that the first-named Plaintiff had told the witness on the 6th September, 1960, that he was the testator's brother-in-law; that the witness had been friendly with the first-named Plaintiff for about 30 years.

p. 114 (10)

p. 13, 1.10 (20)

pp.13-18

10. The witness Duff was cross-examined at length, and in the course of his cross-examination said <u>inter alia</u> as follows:- (30)

p.14, 1.6

p.14, 1.13

That he was and had on the 6th/7th September 1960 been living rent-free in premises belonging to the first-named Plaintiff; that on the 6th September, 1960, the first named Plaintiff told the witness that he was ill, and asked the witness if he would drive him to the residence of the testator at La Romain on the next day, and the witness agreed to do so; that on the way to La Romain on the 7th September, the first-named Plaintiff did not say why he was going to see the testator, and that the witness was merely going as a friend to drive; that on arrival at the testator's residence, the witness remained in the car, but after the first-named Plaintiff had been inside for 5 or 10 minutes, he called from the

p.14, 1.35 (40)

p.14, 1.35

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gallery and asked the witness to come in; that the first-named Plaintiff introduced the witness to the testator; that when the first-named Plaintiff told the witness that the testator wanted him to make his Will he was surprised; that he had never written a Will before, and never witnessed a Will, nor been named executor, and never had any connections with a Will and had not made one for himself; that the first-named Plaintiff can write, the testator did not appear to be an illiterate man, and as far as the witness knew it was physically possible for either of them to have written the Will; that the testator dictated to the witness, and he merely acted as a scribe; that the testator did not expect the witness there that day.

p.15,1.1
p.15,1.17
p.15,1.17
p.15,1.35
p.15,1.47

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11. The first-named Plaintiff, a Hindu Priest, also gave evidence. Referring to the visit to the testator on the 7th September, 1960, he said in examination-in-chief inter alia as follows :-

pp. 18-29

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That on arrival he went inside and the witness Duff waited in the car; that he told the testator that he had brought his Will for the testator to see, and the latter said that was how he would like to have his Will made; that the testator asked the first-named Plaintiff to write it out for him; that he told the testator that he was not feeling well but had a very good friend in his car and could call him in to write it out, and the deceased said yes; that he went to the car and called the witness Duff inside, and introduced him to the testator.

p.18,1.22

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The first named Plaintiff then gave an account of what occurred similar to that given by the witness Duff and concluded his evidence-in-chief as follows :-

p.19, 11.1-31

"When (the testator) signed the Will on 7th September he was quite normal but not too well. He said he was not feeling well. He was sick sometimes and well sometimes. His physical and mental condition were alright."

p.19,1.32

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12. The first-named Plaintiff was also cross-examined at length, and stated, inter alia, as follows :-

pp.19-28

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p.22, 1.26 — That on the 7th September, 1960, at the testator's residence, after the Will was signed, the testator said to the first-named Plaintiff "Pandit, do not let my children know anything about this Will until after my death or they will trouble

p.22,1.36 — me"; that the first-named Plaintiff had never been a witness to a Will before nor prepared one, he did not know how to prepare one or what were the requirements 10 for a Will, he did not discuss it with the testator, and as far as he knew none of the others knew what was required; that

p.23, 1.32 — on the 5th October,1960, when the testator died, the first-named Plaintiff was very sick, and could not attend the funeral;

p.24, 1.5 — that after that date he told the testator's widow to tell "the boys" (i.e. the testator's sons) he would like to see them but he said nothing about the Will 20 to anyone because he had promised the testator not to say anything until after his death; but he also said that he intended "Sonny Chandroo" (i.e. George, one of the testator's sons) to tell the others

p.24, 1.11
p.25, 1.16 — about the Will, and on the 15th November, 1960, he informed Sonny about it; that he informed the second-named Plaintiff (i.e. his co-executor named in the said Will)

p.24, 1.38
p.28, 1.11 — about it on the 16th November, 1960; that 30 on the last-mentioned date the first-named Plaintiff instructed a Solicitor, a Mr. Roberts, not the regular Solicitor of any of the parties, to apply for Probate of the said Will; that he did not know that the executors under the earlier Will were proceeding to obtain a grant of Probate; that in January 1961 for the first time the first-named Plaintiff

p.25 — summoned a meeting of the members of 40 the testator's family, in order to put the said Will before them; that the meeting was held on the 8th January, 1961; that some of the members of the family

p.27 — challenged the genuineness of the Will dated the 7th September, 1960, and "the

p.26 — meeting ended very stormy".

pp.30-36 — 13. The second-named Plaintiff then gave evidence. In examination-in-chief he referred

to the making of the Will dated 11th February, 1957, which was prepared by one Dalton Chadee (a solicitor's clerk who for many years acted for the testator) (hereinafter called "Chadee") and signed by both the second-named Plaintiff and Chadee as witnesses. He further stated *inter alia* that on the 30th September, 1960, the testator told him that he (the testator) had given all his property to his five sons, and when the second-named Plaintiff asked what about the girls, the testator replied "the girls have." On the 16th November, 1960, he was shown the Will dated the 7th September, 1960, by the first-named Plaintiff.

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p.30,l.12
p.30,l.41
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p.31,l.24

In cross-examination this witness stated, *inter alia*, that he presumed (as a result of what the testator said to him in a conversation on the 4th September, 1960) that the testator had made a new Will, but also that after the death of the testator he and the other executors under the 1957 Will had given instructions to Chadee to apply for Probate, and that he had done so because he thought it was the last Will of the testator, and that he did not tell Chadee that he thought that the testator had made a new Will. He said that on the 16th November, 1960, he heard of the Will of the 7th September, 1960, and a few days later he told Chadee that there was another Will and he did not sign any papers under the old Will.

p.33,l.43
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p.34,l.16
p.34,l.37

14. A daughter of the testator, Stella Mootilal (whose husband was the third of the three executors named in the 1957 Will) gave evidence on behalf of the Plaintiffs. She said, *inter alia*, that the testator told his son George to go to Chadee and get the Will of 1957 and destroy it, and that on 4th September, 1960, the testator asked Ethel (another of his daughters) to get a certain Mr. Cameron, a solicitor, to come to him on the 7th September, and that on the 4th September it was clear that the testator wanted to make a new Will. She also said that on the 30th September 1960 she heard the testator tell the second-named Plaintiff that he had given the boys (i.e. his sons) everything. She admitted that she knew that her husband was an executor under the Will of 1957 and realised that he had a responsibility to put that Will forward but said that she never told him that she thought he ought

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pp.37-41
p.39,l.23
p.38,l.9
p.39,l.33
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p.40,l.10

Record

not to do so as there was a later Will.

pp.41-47 — 15. The last witness called on behalf of the Plaintiffs was the said George Chadroo, a son of the testator. He stated, inter alia, that about

p.42,l.7 — 2 weeks before his death the testator asked him to go to Chadee and ask him for the Will of 1957

p.44,l.46 — and tear it up. He said that Stella Mootilal told him of the conversation on the 30th September 1960 with the second-named Plaintiff and the testator, and yet said that he did not think from what Stella told him that the testator had made a fresh Will, and he did not think there was anything in what she had said to indicate that. He stated that after the testator's death he thought that the Will of 1957 was the last one,

p.43,l.12 — until the 15th November, 1960 when he was told by the first-named Plaintiff about another Will. He stated that on the said 15th November he told Chadee about the later Will.

pp. 47-55 — 16. Evidence in support of the Defendant's case was given by Chadee. He stated, inter alia, as follows :-

p.48, l.4 — That he was intimately connected with the testator for over 40 years, and assisted him in his legal work and affairs from time to time, and was his close confidant;

p.48, l.9 — that in November, 1956, when the testator was in hospital he gave the witness

pp.108-109 — instructions to prepare his Will, and the witness did so; that he later prepared a

p.49,l.11 — Codicil to that Will; that he subsequently prepared the Will dated 11th February, 1957 (he challenged the evidence of the second-named Plaintiff both as to the place and the manner

p.49,l.30 — of the drawing of the said Will); that in 1960 he went to the testator and said that the testator's son George said that the testator wanted to see him (Chadee) in connection with his Will, and the testator said he never told George anything of the

p.49,l.42 — kind; that on the 26th September, 1960, he told the testator that George had told him (Chadee) that the testator wanted him to bring the Will and make a change, and the

p.50, l.3 — testator said "I never told George that. Take back the papers. They only want to get

p.51,l.11 — my property and not give me nourishment";

that it was not true that the second-named Plaintiff told him a few days after the 16th November, 1960, about the later Will, and it was not true that George told him about it on about the 17th November, 1960.

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p.51,1.13

17. No evidence was led in support of the allegation of forgery, and so this was treated as abandoned.

p.57,1.17

18. In his Judgment, the learned trial Judge, after mentioning the facts not in dispute (including, in particular, the making of the Will dated the 11th February, 1957) stated the matter in dispute in terms as follows :-

p. 56
p. 57,1.3

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"What is disputed ..... is whether (the Will dated the 7th September, 1960) was duly executed and whether the testator knew and approved of its contents."

p.57,1.14

As appears from the passages set out in the following paragraphs, the learned trial Judge decided that issue in favour of the Defendant principally because he did not believe the evidence of the two attesting witnesses, Frank Duff and the first-named Plaintiff.

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19. Referring to the evidence led on behalf of the Plaintiffs, the learned Judge stated :-

"... In the instant case the Plaintiffs led evidence which, on the face of it, establishes that on the 7th September, 1960 (the testator) having dictated his Will and approved of its contents duly signed it in the presence of (the first-named Plaintiff) and Frank Duff who both signed as attesting witnesses in his presence and in the presence of each other, in other words, that it was duly executed, so that, the onus then shifted to the Defendant to cast doubt on the evidence of these witnesses and on the circumstances in which the Will was executed. If he can do so then the Plaintiffs must show affirmatively that the testator knew and approved of the contents of the Will. Cleare v. Cleare (1869) 1 P.& O. 655).

p.57,1.36

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The question now is, "Has the Defendant

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destroyed the evidence of the Plaintiffs' witnesses?" In my view he has.

p.58,1.11

The learned Judge then mentioned several differences appearing in the evidence of Frank Duff and the first-named Plaintiff regarding the events on the day on which the Will was signed. He said that these taken individually might appear to be minor but that they take on greater importance when the evidence is considered as a whole, and in the light of some of the behaviour of the first-named Plaintiff which he described as "somewhat difficult to understand"; the learned Judge gave two illustrations of such behaviour, viz. the long delay in informing his co-executor of the existence of the Will, and the way in which the first-named Plaintiff went about making the application for Probate. He then went on as follows :-

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p.58, 1.32

"It was urged on behalf of the Plaintiffs that no positive evidence had been led and no direct suggestions made, to contradict their evidence, but this seems hardly to be necessary in dealing with witnesses who are so patently unreliable and who have contradicted themselves and each other.

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It was submitted by Counsel for the Plaintiffs that the whole of the cross-examination was directed towards challenging the credibility of the witnesses to the Will and that this is not evidence of suspicious circumstances. With this general proposition, I agree but, that situation does not arise in this case. Here there is not only direct evidence of suspicious circumstances, as I shall endeavour to show, but there is abundant justification for saying that the witnesses (the first-named Plaintiff) and Duff are shown by cross-examination to be completely unreliable. If I do not believe their evidence, how can I be sure of the circumstances in which the Will was executed, especially as I think it is extremely unlikely that a layman could write a Will in the terms of this one merely on listening to a testator express

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his wishes. It should be noted that, there are no alterations in the Will, and that, according to Duff (the testator) was holding the Will that was being used as a guide."

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20. The learned Judge then turned to the evidence led on behalf of the Defendant and said:-

p.59, l.18

"Moreover the Defendant has led positive evidence which casts suspicion on the execution of this Will."

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He referred to the relationship which had long subsisted between the testator and Chadee, and said that he accepted entirely the evidence of Chadee regarding the conversation between him and the testator on the 26th September, 1960, and said :-

p.59, l.37

"I ..... find that in all these circumstances it is very difficult to believe that (the testator) should wish to have someone other than Chadee prepare a Will for him in September 1960. Why should he suddenly wish to abandon Chadee who had prepared the earlier Will and had it keeping. To explain this, (the first-named Plaintiff) attempted to give evidence to the effect that (the testator) had referred to Chadee as a rogue, but he retracted it at once, and Stella Mootilal quoted him as saying that he had lost confidence in Chadee. I do not believe either of these statements and can see no reason to conclude that if (the testator) wished to alter his Will in September, 1960, he would have turned to anyone but Chadee".

p.59, l.38

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21. The conclusion of the learned Judge on the evidence was stated in the following terms :-

"It is well established that certain circumstances of suspicion may cause a Court to refuse probate ..... (he referred to relevant authorities and continued - )

p.60, l.5

pp. 60-61

"In all the circumstances of this case, I have grave doubts that the testator knew and approved of the contents of this Will. The situation is not saved by the application of the principle that a Will which is shown to have been executed and attested in manner prescribed by law is presumed to be that of a person of competent

p.61, l.23

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understanding, for as I have stated, I do not accept that the Will was duly executed, since I do not believe the attesting witnesses and since I find that the circumstances attending its preparation and execution are suspicious.

I find, therefore, that the Plaintiffs have failed to discharge the onus, which has been shifted back to them, of establishing that the Will of 7th September, 1960, was duly executed, or that the testator knew and approved of its contents, and I pronounce against this Will." 10

pp. 64-65 22. The grounds of appeal were directed to alleged errors of the learned trial Judge in relation to the evidence and the facts found by him.

pp. 67-105 23. In the Court of Appeal (McShine, Hyatali and Phillips J.J.A.) the first Judgment was delivered by McShine, J.A. The learned Justice of Appeal reviewed the evidence and expressed a 20 different view on the facts from that arrived at
p. 74, 1.4 by the learned trial Judge. He indicated that
p. 84, 1.33 he considered that the Court of Appeal was free to disturb the findings of the learned trial Judge, and arrive at its own conclusion on the facts because the "manner and demeanour" of the witnesses who had given evidence before the learned trial Judge, had not played any part in the conclusion which he reached. The Defendant respectfully submits that the learned 30 Justice of Appeal erred in law and on the facts in assuming that "manner and demeanour" played no part, and that there is no justification for disturbing the findings of the learned trial Judge.

24. As regards the facts, the said Judgment of McShine J.A. contains the following passages:-

p. 74, 1.28 "The real burden of the argument of counsel for the (Plaintiffs) in this matter is that the whole finding of the learned Judge is 40 based on inferences and reasoning which in themselves must be fallacious because they are based upon a speculative and false premise, and the false premise on which apparently he relies, is the premise that the judge appears

to have had in his mind that the testator must have consulted Chadee if he proposed entering into any transaction of a legal nature. This argument appears to me to be sound ....."

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. . . . . . . . . . . . . . . . .

"I am of the view that the findings of the judge must be wrong because they are based not so much on the assessment of the evidence which was given before him, but on reasoning and inference which must be imperfect reasoning because it was founded on a basis which in itself was a false one."

p.75, 1.16

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And as regards the application of the law to facts proved, the learned Justice of Appeal said <u>inter alia</u> as follows :-

"The learned judge seems to have taken as circumstances arousing suspicion (a) "the long delay in informing the co-executor of the existence of the Will" and (b) "the way in which he (the first-named Plaintiff) went about making the applications for Probate."

p.81, 1.27

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It is enough to say that the learned judge has again misdirected himself in that these factors may have contributed to the proof of fraud which was not pleaded and that neither of these factors came within the principles of law as adumbrated in the authorities noticed above and to which the judge had directed his mind. In effect his appraisal of the evidence substantially negatived the law which he had drawn to his mind."

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"On all consideration I hold that the learned judge for the reasons I have given misdirected himself in the inferences he drew and the reasoning he applied to the uncontroverted facts in this case."

p.83, 1.48

It is respectfully submitted that the said conclusion is wrong, and that the learned trial Judge correctly applied the law to the facts found by him.

25. That the said Judgment of McShine, J.A. contained the following passage :-

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p.77, l.42

"The real challenge seems to have been that the Will had never been made at all, and it would seem that the conclusion arrived at by the learned judge amounts to a finding of forgery and/or fraud."

It is respectfully submitted that the view indicated in the said passage is erroneous. The learned trial Judge's conclusion was to the effect that, circumstances exciting suspicion having been shown to exist, it was for the Plaintiffs to prove affirmatively that the Will was duly executed and the testator approved of its contents, and that they had failed to discharge that onus. In that situation (it is submitted) no question of fraud arose to be decided, and as regards forgery, the learned trial Judge expressly stated that it was abandoned. The Judgment of the High Court is therefore not open to the criticism suggested in the said passage quoted above.

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pp.86, 93

p. 105

26. Each of the other members of the Court of Appeal delivered a Judgment in which he reviewed the evidence and expressed the opinion that the findings and conclusion of the learned trial Judge ought to be reversed. Accordingly, the Appeal was allowed, and the Will dated 7th September, 1960, ordered to be admitted to Probate.

P. 106

27. On the 16th July, 1964, Final Leave to Appeal to Her Majesty in Council was granted.

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28. The Defendant respectfully submits that the said Judgment and Order of the Court of Appeal ought to be reversed and set aside, and the said Judgment and Order of the High Court restored, with Costs (including the Costs in the Court of Appeal) for the following, amongst other,

R E A S O N S

1. BECAUSE the Judgment in the High Court is right for the reasons therein and hereinafter set out.

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2. BECAUSE the findings of fact and the conclusion arrived at by the

learned trial Judge are supported by the evidence.

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3. BECAUSE the said findings of fact depend in part upon the manner and demeanour of the witnesses, and in any event the said findings are correct and the Court of Appeal is not justified in disturbing them.

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4. BECAUSE the learned trial Judge applied to the said findings of fact the correct principles of law.

5. BECAUSE the Judgments in the Court of Appeal are erroneous in a number of respects and, in particular, for the reasons that the learned Justices of Appel or one or other of them :

(a) Disturbed and rejected without justification the findings of fact of the learned trial Judge.

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(b) Assumed that the learned trial Judge ignored the evidence of the supporting witnesses called on behalf of the Plaintiffs.

(c) Assumed that the evidence of the attesting witnesses in particular should be accepted because there was no evidence directly contradictory thereof.

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(d) Gave no sufficient regard to the evidence of the witness Chadee.

(e) Assumed that the learned trial Judge did not base his findings on the manner and demeanour of the witnesses.

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(f) Failed to conclude from the known circumstances surrounding or relevant to the preparation and execution of the disputed Will, from the indications apparent on the face thereof and from the subsequent actions of the attesting witnesses

thereto that there were adequate grounds for suspicion that the Will was not properly executed and/or that the testator did not know or approve of the contents thereof.

(g) Failed to apply the relevant legal principles to the facts of the case

MALCOLM J. BUTT

RALPH MILLNER

IN THE PRIVY COUNCIL No 37 of 1964

ON APPEAL FROM

THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

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BETWEEN:

KELVIN LUCKY
(Defendant) Appellant

- and -

PANDIT DINANATH TEWARI
and
JOSEPH CHANKARAJ SINGH
(Plaintiffs) Respondents

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