

Supreme Court of the Hawaiian Islands.

IN RE THE PROBATE OF THE WILL OF JOHN N. ROBINSON, DECEASED.

BEFORE MR. JUSTICE McCULLY AND A JURY.

CHARGE OF THE COURT.

THE COURT, Gentlemen, the will in question has been proved according to the law of this country, namely, a signing by the Testator and a witnessing by two or more witnesses, in this case three witnesses, in his presence. I do not give much value to the attestation of Mr. Roy because she could not write and presumably could not read writing, and I do not value the testimony of such a witness very highly in proving the signature of the Testator and the identity of the instrument.

Mr. Thurston having the matter in charge receiving that, then called in Miss Roy after the name of John N. Robinson had been signed, and John N. Robinson putting the instrument in sight of Miss Roy, and as I remember his hand on his name, said, that is my signature and my name; that is equal to my seeing him sign his name; for our law does not require, and very frequent practice has established it, that the two witnesses shall sign at the same time, they must each sign at the request and in the presence of the testator, but not at the same time nor in the presence of each other. Now, if that is the case, he writes his name but once, one witness sees him write it, as to the other he places his hand on it and says, this is my signature so attesting it. The third witness was Mr. Kinney, though not third in order.

"In order that you should find a verdict in favor of the will," as it is called, in favor of those who propose the will, the executors, "the jury must be satisfied that at the time of the will, John N. Robinson, was of full age—that is not doubted—and that he was of sound mind." As to saying that is a sound mind, I will come to that hereafter. I am at present going through the instructions asked for by counsel, and those are the words of our law. And I will say further that, subject to such qualifications as I make, that "a test of testamentary capacity, or capacity to make a will, is whether at the execution of the will the testator could remember the property he is about to dispose of." I will qualify that; it would not be necessary that a man should be capable at the time of executing his will of making an inventory of his estate, and that instruction is of less importance in this case because they did not undertake to make an inventory of the estate, it was a will in whole estate terms for the most part. He mentioned his homestead in Honolulu and everything thereon, and all my property elsewhere in Honolulu and in Ewa, and all my real estate, without describing it, money, stocks, bonds, mortgages and other property, real, personal or mixed of whatever description and wherever situated of which I may be seized or possessed, it was in general terms. It is a safe way to make a will, and one that is often practiced. Where there is an enumeration of every piece of property, real or personal, and a designation where it shall go to, then the property that is not mentioned, that is not devised, is considered as not included in the will, and goes as if the man had made no will. It is necessary to describe property where there are many enumerated; of course it has got to be enumerated and mentioned, but a safe and careful drafter of a will in such a case would make a clause providing for a residuary legatee, devising all that has not been mentioned to some purpose or other or to some person.

Another point of law requested to be given is, that "the testator must not only have had the power to answer simple questions, but a sound and disposing memory." I give you that, but it is as I have said before, it is not required that he should have been able to make an inventory of his property at that time, he need not have such a memory as that. "He should be able to remember the persons, the members of his family and the objects outside of his family whom he wished to provide for in some way." Again: "A sound mind is one wholly free from delusion." There are two kinds of delusions, an insane delusion and a morbid delusion, because all delusions are morbid actions of the mind or insane actions of the mind. It would be a delusion if a person persistently supposes facts which have no existence at all and acts as though they were facts. If a man, for instance, believes that an affectionate wife or affectionate child were pursuing his life, were plotting, were trying to kill him, there being no foundation at all, we should say that he was laboring under a delusion. And sometimes he might in, as if in self defence, kill the person under such delusion. But as no delusion has been proved in this case, I have only spoken of it because it is in the instructions that I am asked to give or refuse. "All of the intellectual faculties are to exist in a certain degree of vigor and harmony." Yes, that is a general description of soundness of mind—the propensities affections and passions being under the subordination of the judgment; "that is a general description of proper soundness of mind;—judgment and the will, the former being the controlling power."

"Imbecility," and I think imbecility, Mr. Hatch, has not been offered to be proved in this case. Mr. Hatch—Not after imbecility, no. The Court—Imbecility is that feebleness of mind which, not depending on the person entirely of the use of his reason, leaves the person only with the faculty of conceiving ideas of the most common sort, and which relate almost always to physical wants or habits.

"The deceased of the mental capacity of the deceased is a question of fact for the jury." That is the question that you have been on for these eight days. Your eighth instruction I cannot fail to come to hereafter, Mr. Hatch; it will make too much repetition to speak of it now; that is, in regard to the day.

Now these gentlemen have who propose the matter, namely, "That upon the death of the deceased of the mind of the deceased, whether he had the ability to comprehend in a reasonable manner the nature of the affair in which he participated," that I understand to be what you must bear, Gentlemen, with what appears to be some tediousness and some repetition, these instructions, and two sides which are in part concurrent, and when I come to speak on my own account I shall say some of the same things myself.

and to understand the business in which he was engaged at the time."

The third I shall cover completely after this. It is, "if you shall find that at the time he executed the will he knew what he was doing, and to whom he was giving his property, it is sufficient." I don't know of anything that I shall say hereafter which will qualify that; it is a brief statement of what the law requires.

"If you find that the deceased was able to transact the ordinary affairs of life, having a soundness of mind, you may find that he was competent to execute a valid will." That is the fourth.

The fifth does not seem necessary: "Because a person is a spendthrift or is under guardianship as a spendthrift," which was not this case—I will give it if you think it is necessary, gentlemen—"he is not therefore incapacitated to make a will."

"A man may have perfect capacity to dispose of his property by will and yet be very inadequate to the management of other business, as for instance to make contracts for the purchase or sale of property." There is authority for that. "A man may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract and yet be competent to direct the distribution of his property by will;" that is law as I understand it. Now there is another one as to the date of the will which I shall comment upon fully hereafter; if I do not, please remind me of it.

The law, Gentlemen, as you may have gathered from many of the instructions given to you as law, is very tender in regard to the power of men and women to dispose of their property by will, to give it the direction that it shall take after their death. There is no instrument which is so simple or may be so simple as a will. In deeding a piece of real estate it may require more particularity of description and of the price, and a variety of other matters, than it would to convey in a sentence many parcels of real estate, and besides real estate personal property and all that a man has. It can be done, perhaps, in fewer words than he can make a conveyance or a lease. The law gives this power to the man down to the last years of old age and the last stage of feebleness, provided he still retains what is considered a sufficient intelligence. The writer of a will often takes the words whispered in feebleness with his ear at the mouth of the almost dying man, takes his instructions and indies his will, and he may sign it in the last stages of feebleness. I have seen, and it is pathetic to see the signatures upon some wills here made by business men of the community who in their lives were the equals of any in intelligence and the habit of writing, the poor signed their names when at last they signed their names to their last will and testament.

Beyond that, if he cannot sign his name, it is our statute law, his name can be signed by some other person in his presence and by his express direction. That would apply also to a person who could not write; Mrs. Roy is not incapacitated from making a will if she can get some person to write her name. I have said in the course of this trial as to the question whether a man is competent to make a will, that it should be considered the kind of a will he might make or might not make; and I said a man might make a simple will who could not give the instructions, and therefore intelligently devise a very complicated will, a will burdened with trusts and conditions and forfeitures; you understand he very well might do the one and not the other. The will of the father of John Robinson is vastly more complicated than this will—you have heard part of it; and this case might have another aspect if the will of John Robinson had been drawn by Mr. Thurston as voluminously and with as much variety as that of the old gentleman, James Robinson. Now, as I have said before, what is the will in this case? It was a will simply providing for his wife, the partner of his life; it could have been written in fewer words; it is not written in much fewer words and with absolute simplicity, and yet it would have conveyed the estate. It could have been written in three lines; nevertheless, it was better that a person understanding the drafting of wills should put in some provisions which perhaps John Robinson would not have put in if he had written it, as for instance, here is the introduction: This is the last will and testament of me John N. Robinson, of Honolulu, Oahu, and then, first, I appoint my wife Caroline Robinson, of said Honolulu, to be my executor, an unskilful person might not have put that in; but yet if he had written that he gives and devises all his real and personal estate which he possessed to his wife, that would have carried the core of it and would have been good in our respect that his debts were to be first paid; they would have been paid if he had not provided for them, but it was regular for the attorney to make it as he did.

Now, the testimony is, that John Robinson had a purpose which he followed persistently in the making of his will. It was not a will that was begun and ended on that 13th day of February, that day sick room. He went two or three times to the house of Mr. Thurston to have a business interview with him, and he obtained it by Mr. Thurston's going to his house when he was at once said to Mr. Thurston that it was on business that he wanted to see him, and not to talk about various matters, and took him aside into that bedroom which we visited, and which seemed to be also an office, and he then gave the instructions to Mr. Thurston upon which this will has been drawn; that he wished to devise all his property to his wife, Mr. Thurston very properly interrogated him—do you not wish to remember any other persons in your will, any members of your family? He said, no, and he gave the reason that they were all well off, but that his wife would depend for her support upon the provision which he might make for her. He gave a reason why he did not wish Mr. Thurston to go to Mr. Jaeger and get particulars of what property he had. I will submit to you if it was not a reasonable reason, that he did not wish him to know that he was making a will which excluded them from inheritance; he had reason to think and feel, and this litigation is a proof, that his purpose would be obstructed, opposed at least, and it is wise to make his will as he wanted it in peace and quietness. It would have been a most oppressive thing for the sick man to have made that with the knowledge and in the presence of his family, and to have had to bear for the remainder of his days, perhaps, an opposition from this large family to that will. Judge

whether he has shown sense thus far in the business of making his will; I will say, judge you if he had had the sense of twelve jurors and the Court and Bar, thus far he could have done any better. I do not like to use such a strong expression, and I will say judge you whether more sense and a larger mind would have enabled him to do any better than he did do so far in getting a will made according to his desire, and by which Mr. Thurston was able to provide for the conveyance as I may say of the whole estate without seeing Mr. Jaeger, although he could not have drawn a deed for Mr. Robinson without seeing what was in Mr. Jaeger's hands, or in the Registrar's office.

To speak now of his general capacity, for that has been attacked; that is, not only his condition and capacity at the time of the execution of the will, but during the existence of his life. I shall not undertake, of course, to review the testimony but I call your attention to certain acts. In some respects I may be following Mr. Thurston's line of argument, but it was my own thought before I heard him speak. Take the lease made by the testator and Mr. Mark Robinson to Allen & Robinson; Mr. Allen persistently declined to say whether he judged him to be capable, and said that it amounted to this, that he did not consider him capable, did not consider it worth while to consult him and spoke only to Mark Robinson. But John Robinson was as much a party to that lease, as a lessor, as Mr. Mark Robinson, and his signature and the acknowledgment of it are appended to that lease, and without it it would not have been a lease of John Robinson's interest, and the fact cannot be avoided that it was a lease made with John Robinson, and Mr. Allen is in this position: Either that he dealt with John Robinson as a person capable of making a lease, or that he took a lease from a person who was incapable of making it, a lease which must have been cancelled had it been brought before the Court, as an instrument from a person incompetent to make one. From time to time, as you know, instruments are brought before the Court and are cancelled, for instance, deeds procured from old people who have become incompetent to make them and have been imposed upon by the most honorable suggestion for Mr. Allen is that he did not make what you may call a fraudulent lease with his brother-in-law but that he took him as a person competent to be dealt with, there are only those two suppositions. The same argument applies also to Mr. Mark Robinson, but he was not questioned, and did not refuse to answer the questions which Mr. Allen did. Gentlemen, if John Robinson was a proper party to make that lease, he was a proper person to make a will. Let me go briefly through the acts with regard to the power of attorney given to Mr. Jaeger, with regard to which I say the same things; that as he gave that power of attorney; it was nothing given by order of the Court, no power conferred by order of the Court— he gave it as a person competent to have a transaction with his property, and a very important one, the transfer and delivery of the management and custody of it to another person, and he himself and Mr. Jaeger and all the family acquiesced in that and acted under that until he died. I say if he was competent to make that, he was competent to make a will giving his property to his wife.

In regard to the signature to the bond of the tax collector for \$23,000, the application cannot be so strong, because he was not dealing with his own family who knew him so well; at the same time if he were competent to sign that bond, he was, of course, competent to deal with his property by giving it to his wife.

I need not say anything in particular about the land which Mr. Roy sold him, it is not as strong a case, because we all see that Mr. Roy's acquaintance with him was not so intimate as that of his brother and family; but it is in the same line. If he was competent to buy a piece of land, he was competent to dispose of it, to sell it.

Mr. Smith—You have not mentioned the deed from Jaeger, Your Honor.

The Court—I was coming to that. Mr. Jaeger sold him two lots for a price which seemed to be a full and fair one, neither too much and I should say not too little, Mr. Jaeger well knowing his condition and capacity and moreover being in the very delicate position of his attorney, dealt with him as a competent man. Now, if all these transactions had been with an imbecile, a person "non compos mentis," which is a common expression and must be familiar to you all, although it is not in the English language, they would have been invalid; a person who is known by his family to be incompetent to buy and sell real estate and make leases or a lease, is competent to convey his property, and it is not in conflict with that fact that it was best,—I have no doubt it was best,—that he should give a power of attorney to Mr. Jaeger and pass over to him the management of his affairs. Undoubtedly John Robinson was not a bright man and not a business man, but many a man of fortune and of leisure who does not want to pursue the acquisition of fortune leaves his business in the hands of agents under different powers; and it is something admirable to see a man who had money enough not devoting himself to getting more. In all health, having an ample income, being surrounded by an affectionate family,—it appears that they took good care of him,—it was much better that he should entrust the management of his business to an agent and give him authority for it. Let me say as to that power of attorney, Mr. Jaeger said that he thought John Robinson knew the general effect of it, but that he would not be able to understand perhaps every word and every phrase of it. Doubtless many a man who could properly sign a power of attorney, could not write one, and when Mr. Jaeger was asked if he himself understood what powers were given to him by that, whether he could make transactions with his real estate, make leases or not, he said he supposed he could; but there is no specific authority to do that, such as is usual to put in powers of attorney for that purpose, there is none there, yet Mr. Jaeger signed the extension of the lease of real estate. So John Robinson, being able to do so, devoted himself to matters which would divert his mind and occupy his time. As I may say, he enjoyed elegant leisure, painting, photographing and travelling and the creation and care of the finest conservatory in Honolulu, and perhaps he showed as much sense in taking that course as if he had set up a business office down town and devoted himself to making more money. And just upon that, it is well known to us all that very learned and competent people may be very poor business men, many learned professors might better let busi-

ness men do their business. But we can take an instance from the case now before us, taking the testimony of Dr. McWayne, which cannot be supposed to be other than true, no imputation is to be made upon it. I know of no instance of the incapacity and inattention to business of John Robinson displayed in the testimony here greater than that displayed by Dr. McWayne. You cannot forget, even if Mr. Thurston had not repeated his testimony to you, his utter inability to remember when he paid his two notes to John Robinson, his utter inability to remember the rate of interest, or even if he had paid them before or since the death of John Robinson, a marked line, if he had paid them sometime during the several years mentioned, '87 to 1890. He said, as the nearest he could approach to the question of time, that he had paid them by installments, the two notes of twenty-three hundred and twenty-five hundred dollars. By Mr. Jaeger's book, which is in evidence here, he had never paid an installment on either of those notes, what payments he had made must have been payments towards the interest, because in the account in this book of the items of property which Mr. Jaeger was passing over to Mr. L. A. Thurston as executor, he enumerates, Thurston's note of A. McWayne, twenty-three hundred, promissory note of A. McWayne, twenty-five hundred, and then he crosses these off, he does not obliterate them at all, the figures and the writing are, under date of the margin it says, paid, under date of April 25th, 1890, and below is the entry, interest on McWayne's notes for a certain time, eighteen months to date, one hundred and eighty-seven dollars and fifty cents, and the principal, forty-eight hundred dollars. If a failure of memory in respect to business transactions proves incompetency to make a will, this might be used in contesting a will of Doctor McWayne; yet he is undoubtedly a competent testator. Of course, his memory in this instance is to be considered in regard to his memory of the transactions on the 13th of February, it is inevitable that it should be. In the observations which I have made to you concerning persons with whom I am upon good terms and towards whom I have a friendly feeling, I have from duty and necessity followed up what I consider to be the logic of the case and of the evidence, and that, on this Bench, I shall always do, however even blistering it may seem to be.

Another principle on which the Court must instruct you (and I have only touched upon the evidence so far as it bears upon the principle of considering, weighing evidence) is in regard to the apparent contradictions. These contradictions are the strongest, perhaps, as to the doings of the 13th day of February, and I wish, and you would wish, to make the most charitable construction, a construction upon any parties who have come before you, and there is only one that I see that would help the matter very much, because the contradiction is there, and that is, the supposition that the parties on both sides are in fact speaking of different dates. It is not at all denied or contested that this name to the will, J. N. Robinson, was written by him; the other theory would be that it was a fabrication. If a fabrication, it would be a gigantic perjury on the part of Mr. Thurston, not to say Mr. Kinney and others, a perjury which would disturb Mr. Thurston and if a prosecuting attorney did his duty and a Court and a Jury did their duty, would send him to prison for the prime of his life, so you may take it as an absolute fact here as proved, that J. N. Robinson wrote that name. That is a living witness. He being dead yet speaketh. However you discuss it, on one side and the other, you must come back to this, that a clear, even signature was made by J. N. Robinson. Whatever supposition might be made that he could not have written it, he has written it, whether on the 13th or some other day, he has written that. Both parties are strongly sure that they speak of the 13th. On the part of those who support the will, they have the written word, the "thirteenth" day, not in figures, not put in afterwards, and written when the will was written; and the testimony of Mr. Thurston, which is uncontradicted, is that he wrote this will from the instructions, or at all events, finished writing it just before he went down there; and you are to consider the probability of a business and professional man, such as Mr. Thurston is, making the will and putting the date in it, whether he was liable to put the actual date in or not, and if he would not be liable to find it out, he will know that there was some importance to it. I only mention that one circumstance. There is other evidence in support of the proof that this transaction was done on the 13th. The other evidence you will consider, consider what I do not speak of as well as what I do. On the part of the contestants, and mostly on the part of Dr. McWayne, the medical man, the testimony is that he could not have been in condition to make such a signature or to do such business. If poor John Robinson had just previously been for an hour or two struggling for his life during a paroxysm of coughing, and his pain was only subdued when he was struck by massive doses of morphia; it is the testimony of Doctor McWayne and of Doctor Trossen, I do not know whether Doctor Wood was examined on that point or not, certainly of those two men, that he could not have transacted such business as this, that he would have been lying in a helpless stupor. By John Robinson says, by this autograph, that he did do it. Observe that the witnesses directly supporting this will were present and saw that he did it and that the testimony of these others is that he could not have been in a condition to do it; they were not there at the time it was done.

Mr. Hatch—If Your Honor please, the contention was merely that he was not in a condition to understand it; that has been my argument from the beginning, not that he could not have done it; I say he may have made the signature and not understood the act.

The Court—I have presented it to the jury for consideration, that this will written name could not have been executed by a man lying under the stupor of these massive, and if Doctor Trossen's opinion is to be taken, highly dangerous doses of morphia. It is incredible to believe that a man could be aroused from such almost deathly stupor and write that name. This testimony must stand together and fall together, or as the word derived from the Latin is, it must be a consistent, stand together. It must be a rule for the consideration of evidence, that if you believe that he wrote this name as Mr. Thurston and Mr. Kinney described his writing, that it was also true, as they testified, that he was clear in mind, that he was intelli-

gent, that he was fully intelligent, and that he knew what he was doing, that following the direction very properly given by his attorney—everyone does not know how to make a will—that he called for his two witnesses, or had three, and that he made, declared and published this for his last will and testament; that if the one part is not true the other is not: if the one is, why they hang together? It is an ancient maxim—"false in falsus in, false in all, and the converse. It is a matter of reason that what is true in one respect is true in all things that are consistent with it, and so it would appear that those who testified that he could not have been in a condition to make such a signature, and could not have been doing at the time, as in fact he did make the signature, so he was in a condition to understand what he was doing. But as I have said, the case does not vitally hang upon the fact that it was done on the 13th, if it was done in his lifetime. It is not the law that the will is valid if it was made on the day it is dated, and not valid if it is in fact made on another day, or if the witnesses are mistaken as to the fact, we recognize that every day and all the time. One of you may have done any particular thing—you may have driven to the top of Punchbowl and undertaken to assign the day, your wife disagrees with you and proves that you have the wrong day, but you went there, that is a fact.

This Court has said it is not necessary to prove the date with accuracy or exactness, as dates are uncertain in the human memory, and that a mistake of a few months or longer in the date would not be fatal to the will if it was substantially proved, that is the case of a will where they could not come nearer to it at all; that is law in this country and elsewhere too. 5 Haw. Reports, p. 10.

There is one other principle to be stated that you should carry with you in all your consideration of this evidence and this testimony, and that is, that there is a presumption of law in favor of the sanity and competency of men; we deal in that way every day. You are doing some business with a man, but you do not first consider whether he is competent; you hear of a transaction, but you do not enquire, well, was the man sane or insane; unless it was shown that he was not. As that beyond proving in the ordinary way, as these proponents of the will did, and as is always the case in the probate of a will necessary to prove, that the man is of sound, competent mind and memory, the contesting party is bound to prove that he was not so, so that the burden of proof to show that he was not a competent person to do the ordinary business of life lies with those who set up that proposition.

Have you gentlemen anything to say about the form in which the jury shall render their verdict?

Mr. Hatch—I should say that they should find for the proponents or contestants.

The Court—Your verdict will be if you find in favor of the will, we find a verdict for the proponents, those who have put the will in; if you should find that it is not a good will upon the ground contended, your verdict will be for the contestants.

Mr. Hatch—I intend to ask the ruling of Your Honor upon these requests since hearing the charge.

The Court—Upon the matter of the right and interest, the devisable interest of John N. Robinson in the property which he had enjoyed during his lifetime, it is true as was stated by counsel for the will, that he devised what he had, and that the will would carry that. If it should appear that under the conditions, especially of his father's will, and the will of Mr. Lawrence has not been shown here, I do not know what it is, if under the conditions of that will he did not have a right to devise property which he had called his in his life time, then the will does not take it. Your duty is to find whether this is his will as he made it to devise all his property, that is, all that he was his.

The two first new instructions I do not think proper to give, the third point, number eleven, that the jury are at liberty to find all the transactions of John N. Robinson and Mr. Jaeger and others who dealt with him were dealing with a person who was non compos, out of legal status to do any business. If you go back to that, it is true that these persons dealing with him did not make him competent if he were not so, and would not establish as a matter of law that he was competent to make his will. Those transactions, however, stand as important evidences of how he was considered and treated by them.

The jury may retire.

The jury returned in twelve minutes with an unanimous verdict in favor of sustaining the will.

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HYDRAULIC RIVETING, Boiler Work and Water Pipes made by this establishment, riveted by hydraulic riveting machinery, that quality of work being far superior to hand work.

SHIP WORK, Ship and Steam Capstans, Steam Winches, Air and Circulating Pumps, made after the most approved plans.

SOLE Agents and manufacturers for the Pacific Coast of the Haines Safety Boiler.

FOLLY—Direct Acting Pumps for Irrigation or city works purposes, built with the celebrated Davy Valve Motion, superior to any other pump.

RUPTURE

It is admitted that Dr. Pierce's Remedy for Rupture is the only one that has been shown to be successful in curing this disease. It is a purely vegetable preparation, and is safe in all cases. It is sold by Dr. Pierce's Remedy for Rupture, 255 Broadway, New York.

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