

1942

In The Matter of the Estate of John H. Gordon : Brief of Appellants

Utah Supreme Court

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Brockbank & Pope; Attorneys for Appellants;

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In the Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE
OF
JOHN H. GORDON,
Deceased.

No. 6374

Appellants' Brief

APPEAL FROM THE FOURTH JUDICIAL
DISTRICT COURT, UTAH COUNTY, UTAH
HON. DALLAS H. YOUNG, *Judge*

BROCKBANK & POPE
Attorneys for Appellants

FILED

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In The Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE

OF

JOHN H. GORDON,

Deceased.

No. 6374

STATEMENT OF FACTS

On the 14th day of September, 1938, John H. Gordon executed his last Will and Testament. Copy of said will is as follows:

“LAST WILL AND TESTAMENT

OF

JOHN H. GORDON

KNOW ALL MEN BY THESE PRESENTS:

That I, John H. Gordon, of 253 West Sixth South Street, Provo City, Utah, of the age of nearly eighty-three years, and being of sound and disposing mind and memory, and not acting under duress, menace, fraud, or any undue influence whatsoever, do hereby make, publish and declare this my Last Will and Testament, as follows, to-wit:

FIRST: I direct that my body be properly buried.

SECOND: I direct that my executor hereinafter named, as soon as he has sufficient funds in his hands, pay the expenses of my last illness, death and burial, and also all my lawful and just debts and obligations.

THIRD: I give and devise to my daughter, Mrs. Maud Olson, of Orem, Utah County, Utah, her grandmother's picture, and also the sum of One Dollar.

FOURTH: I give and devise to each of my children, namely, Lewis W. Gordon, John H. Gordon, Jr., Robert Gordon and Vera Williams the sum of One Dollar.

FIFTH: I give and devise to each of my grandchildren, who are children of my deceased daughter, Alfretta Wilkins, namely: Don Wilkins, Delbert Wilkins, Arnold Wilkins, Norma Wilkins and Leora Wilkins, the sum of One Dollar.

SIXTH: All the rest, residue and remainder of all my property of any and every kind whatsoever, I give, devise and bequeath to my wife, Julia Ann Gordon, for and during her natural life, together with the use and income therefrom to be used for her support and maintenance for and during her natural life.

The bequest to my said wife as in this paragraph mentioned shall be in lieu and instead of her one-third interest in my real estate to which she is otherwise entitled; and shall not be in addition to said one-third interest in my property.

SEVENTH: I direct that my executor, before final distribution of my property, and at any time

when he shall have sufficient funds on hand, pay the amount to Provo City necessary to provide for the perpetual maintenance and upkeep of my lot in Provo City Cemetery.

EIGHTH: All the rest, residue and remainder of my property, after the death of my said wife, Julia Ann Gordon, I direct shall be sold and the proceeds turned into cash, and such proceeds of the sale of said property I give, devise and bequeath in equal shares, share and share alike to my children namely: Curtis Gordon, Leon Gordon, Hannah Baum, and Minnie Nowell, each the one-fourth thereof.

NINTH: I hereby nominate and appoint my said son, Curtis Gordon, to be the executor of this my Last Will and Testament, and I direct that he may act without giving bonds.

TENTH: I hereby revoke and cancel any and all former wills or testaments by me heretofore made or executed.

IN WITNESS WHEREOF, I have hereunto set my hand at Provo City, Utah County, State of Utah, this Fourteenth Day of September, A. D., 1938.

JOHN H. GORDON (SEAL)

The foregoing instrument, consisting of one page besides this page was by the testator, John H. Gordon, signed, published, and declared to be his last Will and Testament, and was by him signed in the presence of us and each of us, who then and there, at his request and in his presence and in the

presence of each other signed our names as witnesses thereto.

ARNOLD MECHAM

Residing at 555 N 4 East St., Provo, Utah.

A. L. BOOTH

Residing at 131 W 5 North, Provo, Utah.

John H. Gordon died at Provo, Utah, on the 13th day of October, 1938. Thereafter, Curtis Gordon, the Executor filed said Will for probate. Notice was given to all the heirs and devisees, and after hearing by the Court, said Will was admitted to probate, and Letters Testamentary were issued to Curtis Gordon on the 3rd day of December, 1938, and he began the administration of said estate. Thereafter, on the 23rd day of December, 1938, Julia Gordon, widow of said deceased filed the following, "Acceptance by Widow of Provisions of Will".

IN THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF
UTAH, SITTING AT UTAH COUNTY

6891

In the Matter of the Estate
of John H. Gordon, deceased.

ACCEPTANCE BY
WIDOW OF
PROVISIONS OF
WILL

Comes now Julia Ann Gordon, the widow of John H. Gordon, deceased, and hereby submits her acceptance of the provisions of the Last Will and Testament of John H. Gordon, deceased, and by such acceptance hereby

relinquishes her right to take anything further out of the property of said estate except a life interest in said property, with the rents, issues and profits therefrom for and during her natural life, as in said will specified.

Dated at Provo City, Utah County, Utah, this 23rd day of December, A. D. 1938.

Her
Julia X Ann Gordon
Mark
Widow of John H. Gordon, *deceased*.

WITNESS:

MINNIE GORDON

State of Utah
County of Utah } ss.

On this 23rd day of September, A. D., 1938, personally appeared before me, Julia Ann Gordon, the signer of the above instrument, who duly acknowledged to me that she has heard read the said instrument, and that she signed the same freely and voluntarily and for the uses and purposes therein mentioned.

ALFRED L. BOOTH
Notary Public
Residing at Provo City, Utah.

(SEAL)

My commission expires April 20, 1939

That on the 15th day of August, 1939, Maud Olsen, John Gordon Jr., and Julia Gordon, three of the legatees and devisees of said Will filed a petition praying that Letters Testamentary heretofore issued to the said Curtis Gordon be revoked, on the ground that the said

John H. Gordon at the time of the execution of said Will was not mentally competent to make said Will. The allegations of the said petition were denied by Curtis Gordon and other devisees under the Will, and on this issue the case was tried by a jury before Judge Dallas H. Young on the 13th day of May, 1940. The jury found that John H. Gordon was not of sound and disposing mind and memory and was incompetent to make a Will on the 14th day of September, 1938. Judgment was entered on the verdict on the 16th day of May, 1940, wherein it was ordered, adjudged, and decreed that the said John H. Gordon was not competent to make a Will at the time he executed the same; that said Will was not his valid act, and the Letters Testamentary heretofore issued to Curtis Gordon be revoked.

At the conclusion of plaintiffs' testimony, defendants moved the Court to grant a non-suit on the ground that there was not sufficient evidence or no evidence to submit to the jury and from which the jury could find that the testator at the time he made said Will was not competent to make the same. This motion was denied.

After the verdict of the jury, motion was made by the defendants that the Court disregard the verdict of the jury on the following grounds: (Record Page 67.)

1. That said verdict is contrary to the evidence, and the preponderance of the evidence did not support said verdict. That the preponderance of the evidence established the fact that the said John H. Gordon was of sound mind when he made said Will.

2. That the jury entirely disregarded the instruc-

tions of the Court in arriving at its verdict in said cause, and said verdict was rendered under a misapprehension of such instructions, and under the influence of passion, prejudice or sympathy.

Notice of intention to move for a new trial was duly filed wherein it was moved that the Court vacate and set aside the verdict rendered in said cause, and that a new trial be granted. Statutory grounds for a new trial were set forth therein. This motion was argued primarily on the insufficiency of the evidence to justify the verdict and that said verdict was against law. (Record 64-65). The Court refused to disregard the verdict of the jury and denied the motion for a new trial, (Record 77-78) and an Order denying motion for a new trial was served and filed October 21, 1940. (Record 79.)

From the ruling of the Court and the denying of said motions, an appeal has been made to this Court upon the following Assignment of Errors:

1. That the Court erred in denying defendants and appellants' motion for a non-suit made after plaintiffs had rested, as shown on Page 131 of the Transcript and Page 240 of the Bill of Exceptions or Record on Appeal.

2. That the Court erred in denying defendants and appellants' motion to disregard and set aside the verdict of the jury, as shown on Page 67 of the Bill of Exceptions or Record on Appeal.

3. That the Court erred in overruling the motion of appellants to vacate and set aside the verdict, and to grant a new trial, as shown on Pages 64 and 65 of the Bill of Exceptions or Record on Appeal.

ARGUMENT ON MOTION FOR NON-SUIT

It is the contention of the appellants that when the respondents rested their case there was not sufficient evidence to warrant the submission of said case to the jury. There is no evidence whatsoever that Mr. Gordon was not of sound and disposing mind and memory at the time he executed his Will. It is true that Maud Olsen, his daughter, testified that her father did not know her at times (Trans. 15) and that he was laboring at times under certain hallucinations regarding a trip to Salt Lake (Trans. 17-18), and about his automobile (Trans. 19). From the above testimony, Mrs. Olsen was permitted to say that her father at no time during the month of September was of sound mind. In connection with Mrs. Olsen's testimony, we desire to draw the Court's attention to the fact that sometime about the first of September she and her brother, Curtis Gordon, had a conversation with the testator regarding making a Will. On direct testimony she stated: "Well, he asked Daddy how he would like things fixed up." "Well," he says, "I want all of them to have equal shares." And he says, "I am not going to slight any of them." (Trans. 20). On cross-examination, speaking of the Will, she stated as follows: "Well, I thought I would ask him—I asked him how he wanted it made, and he said he wanted all the children to have equal shares. He said he didn't want to have no trouble after he was gone. Curtis came in and asked him how he wanted it fixed." (Trans. 26.).

At this time Mrs. Olsen must have thought that her father was competent to make a Will. If not, why did

she talk to him about it? Certainly, this conversation and what was said by Mr. Gordon definitely shows that he knew what they were talking about, and that he was not incompetent at that time despite the testimony of the contestants that he did not know anybody and that he was incompetent over a long period of time to make a Will. In this connection, may it be stated that no one at any time prior to the filing of the protest had contended that Mr. Gordon was not competent to make a Will. Even at the time the Will was being made, Mrs. Gordon, wife of the testator, was present and a number of the children and other people were about the place and no protest or statement was made that Mr. Gordon was not competent to make a Will. It is the contention of the appellants that the testimony of Mrs. Olsen is clearly insufficient to justify the finding or the conclusion that her father was incompetent to make a Will on the day and at the time it was made. She did not see her father that day, at least not until night, and she says nothing about his condition then.

Now, let us consider the testimony of Eva King. She is the daughter of Julia Gordon, one of the contestants. She testified that Mr. Gordon did not know anybody after the 15th or 16th of August. (Trans. 48). She also testified as to Mr. Gordon having hallucinations. (Trans. 44, 45, 46). She testified on cross-examination that Mr. Gordon would ask them to call Curtis and that she was there when he came on the 14th of September, and that Mr. Gordon talked to him about something. (Trans. 50 and 55). She was the only witness that testified that there was anything wrong with

Mr. Gordon prior to the accident, and it seems from her testimony that Mr. Gordon was sick and probably incompetent two or three years before the automobile accident. (Trans. 58). Again, under Mrs. King's testimony the only evidence from which it could be deducted that Mr. Gordon was not of sound mind when he made his Will was the fact that he had hallucinations and did not know people at times.

Ned Olsen, son of Maud Olsen, one of the contestants, testified that sometime in August until the death of Mr. Gordon, Mr. Gordon did not know him at any time (Trans. 62,) and that in his judgment Mr. Gordon was not himself after the accident which happened in the summer or fall of 1937 (Trans. 70; 134) and that he was not of sound mind from sometime in August until his death. These conclusions of the witness are not supported by any substantial evidence.

Thelma Carter was called as a witness. She is a daughter of Julia Gordon, one of the contestants, and testified to certain hallucinations and made the conclusion that Mr. Gordon was not of sound mind (Trans. 73-74). On cross-examination she admitted that about the 1st of September or at least when she was picking grapes, Mr. Gordon, the testator, came out where the grapes were and they transacted certain business about the grapes, and that Mr. Gordon gave one of them fifty cents to buy sugar. Testimony is as follows: "No. This other lady asked Mrs. Gordon about the fifty cents. And she told Mr. Gordon about it." "Well," he said, "If she wants the fifty cents, give her what she wants." "Now that is what he said." (Trans. 78). This conversation

and transaction of business, according to this witness, took place on the 5th of September, (Trans. 79). Curtis Gordon testified that it took place about September 25-27. (Trans. 141-2).

Ilas Carter, son of Julia Gordon, contestant, was called and testified about certain things that happened in March, 1938, and to other things that happened in the fall of the year 1938. Again we have the reference made to certain hallucinations, but none of which are in any wise connected with the condition of Mr. Gordon at the time he made his Will, or to show that said hallucinations in any wise affected him in making his Will. Did not think that Mr. Gordon was alright any time after the automobile accident, yet he admitted that he drove his own car, did his own business and visited with his children. (Trans. 94.)

Nettie Carter was called as a witness. (Trans. 97-98). No relation to John H. Gordon, testator, or Julia Gordon, his wife, but a friend of Mrs. Gordon. The evidence given by Mrs. Carter certainly could not be the basis of finding that Mr. Gordon was not competent to make a Will on the 14th day of September, 1938, and has no probative value of any kind to establish his incompetency on said date.

Jack Gordon, son of the testator, one of the protestants, was called as a witness. He also spoke of some hallucinations (Trans. 109), but in no wise are these hallucinations connected up with or claim to have any influence upon Mr. Gordon in making the Will in question. Testified on cross-examination that he knew the will was being prepared and admitted that he made no

statement or remark of any kind to anybody that his father was not competent to make a Will (Trans. 112 and 113.) He further testified that he went into the house immediately after Mr. Booth left and that his father did not know him. (Trans. 111).

Robert R. Shoemaker, a neighbor and unrelated to any of the parties was called as a witness. Stated that about two weeks prior to his death, testator, did not know him, (Trans. 129), and without relating any incident or conversation with the testator he concludes that the testator was not of sound mind. (Trans. 130). Testimony of Mr. Shoemaker has very little value as to the condition of the testator's mind on the 14th day of September, 1938, when the Will was made.

There seems to be only two reasons or grounds from which, under the testimony of the above contestants' witnesses, it could be assumed or inferred that Mr. Gordon was incompetent at the time he made his Will. (1) That at intervals he did not know people when they came to his home, and (2) he had hallucinations or delusions at times. Assuming for the sake of argument that he did have these hallucinations or delusions, and did not recognize people at times, there is not one scintilla of evidence to show that when he made his Will, the testator was influenced by such hallucinations or delusions, or that any hallucination or delusion had any effect of any kind or nature whatsoever upon the testator in making his Will.

We think it is the law that unless a hallucination or delusion operates as a cause influencing the Will or causes its execution, that such evidence will not establish

the incompetency of the testator, and the will will not be voided by such evidence.

The law regarding this matter is well established in the following cases and texts:

Kendrick's Estate, (Cal.) 62 P. 605.

Redfield's Estate (Cal.) 48 P. 794.

Purcell's Estate, 128 P. 932

Cole's Estate, 226 P. 143

Gunther's Estate, 248 P. 514

It is true in this case that the testator was eighty-three years of age and had been ill to some extent prior to the making of the Will. The particular nature of his ailment is not disclosed, but it seems that he suffered a lot with his legs and that he took some pills to relieve him of his pain. It does not matter how old a testator may be or how he may be afflicted physically if he had sufficient mental capacity to be able to understand in a general way the nature and situation of his property and his relation to the persons around him and those who naturally have some claim on his bounty, he will be considered to be of sound and disposing mind and memory and his Will will be held valid. 68 C. J. 455 Sec. 58.

When a will is contested on the ground that the testator was incompetent to make the will, the case will not be submitted to the jury unless there is substantial evidence to establish the fact that the testator at the time said will was made or executed was of unsound mind.

True, evidence may be given as to his mental condition prior to and after the execution of the will, but

such evidence can only be used to corroborate the proof that the testator was incompetent at the time he signed or extended the will.

In this case petition to probate the will had been filed. Hearing had and testimony of Mr. A. L. Booth given that at the time the will was made Mr. Gordon was of sound and disposing mind and memory and such testimony was in writing and signed by the witness. (Record Page 5) The Judge filed his certificate of facts found and letters testamentary were issued. This record was a part of the files in this case and was before the court at time motion of non-suit was made. The law presumes that if a will is in proper form and properly executed and attested, that the testator had testamentary capacity to make the will. In *Re-Nolan's Estate* (Cal.) 78 Pac. (2-d) 456; also *Dean vs. Jordan*, (Wash.) 79 Pac. (2-d) 331. 68 C. J. 444 Sec. 43.

Here is such a Will—It names all of testator's heirs and disposes of all his property. In addition there was before the court the written testimony of Mr. Booth, one of the subscribing witnesses, that Mr. Gordon was of sound and disposing mind and memory at the time he made the will.

Appellants contend that in the light of this presumption and the above record that the contestants did not prove by substantial evidence that Mr. Gordon was not of sound mind at the time he executed the will in question. They did not discharge the burden imposed upon them and therefore the motion should have been granted.

VERDICT SHOULD HAVE BEEN SET ASIDE AND NEW TRIAL GRANTED

Appellants maintain that the verdict of the jury is not supported by substantial evidence and that the preponderance of the evidence is against the verdict. In the face of the positive and uncontradicted evidence as to Mr. Gordon's mental condition and of his knowledge and understanding of his property and the natural objects of his bounty at the time he made his Will, the jury must have arrived at its verdict under a misapprehension or misinterpretation of the instructions of the Court and for grounds or reasons other than those contained in the instructions, or must have arrived at its verdict because of sympathy or because they thought injustice had been done to some of the heirs or that someone influenced Gordon to make the Will as he did.

Jurors are often inclined to disregard the evidence and to set aside the Will upon some excuse found outside of the evidence because the dispositions made by the testator do not conform with their personal notions of what is just and proper.

It is incumbent upon the Court not to permit a Will to be set aside except upon substantial evidence tending to show that it is not in fact the Will of the testator.

28 R. C. L. 406 Sec. 418.

Hansen's Will (Utah) 167 P. 256 at Page 260.

It is the law in Will contest cases, and the jury was repeatedly so instructed, that in order for the Will to be set aside the preponderance of the evidence must establish the fact that the testator at the time said Will was executed was of unsound mind. It was the burden

of the contestants to prove by a preponderance of the evidence the incompetency of the testator at the time said Will was made.

Appellants contend that the preponderance of the evidence in this case established the fact that John H. Gordon, when he made his will, on the 14th day of September 1838, was of sound and disposing mind and memory, and that his will was valid and should govern the disposition of his property. In fact we think the evidence is almost conclusive on this point.

Let us examine briefly the evidence to support appellants' position or contention.

Curtis Gordon, son of testator testified that on the 21st day of August 1938, his father came out to Curtis' farm, spent the day and inspected a pear orchard. The condition and conversation of the testator showed at that time he was perfectly normal. (Trans. 134-5). Had conversation with the testator the fore part of September, 1938 and was told that he, the testator, had been out to visit his son, Rob. and no doubt had caught cold. (Trans. 136). Had visited his father off and on for months prior to the making of the Will and always found him of sound mind. This testimony undisputed.

That on the 14th day of September, 1938, the testator asked someone to send word to Curtis that he, the testator, wanted to see him. Telephone message was sent and Curtis came to testators home on that day. (Trans. 49-50). Testator told Curtis that he wanted to fix out some papers and for Curtis to go get Judge Ellertson. Curtis reported back that Mr. Ellertson was in Salt Lake, whereupon his father asked him to bring

A. L. Booth, which Curtis did. (Trans. 137-38). Later took Mr. Booth to his office and brought Mr. Booth and Mr. Mecham back to his father's home. Stated that his father on the 14th day of September, 1938, was in as sound a mind as he had ever been in his life. (Trans. 139). That on the 25th day of September or near that time Curtis relates conversation he had with his father regarding father's grapes. (Trans. 140-41-42). Part of this conversation is corroborated by Thelma Carter (Trans. 78.) Curtis at the request of his father paid water and light bills, bought him medicine (Trans. 143). A short time before his death testator turned over to Curtis some money and papers and asked him to put them in a safety deposit box. (Trans. 145).

Orvil Baum (Trans. 187-92) Mrs. Orvil Baum (Trans. 260-1) Lily Harding, (Trans. 262-4) Ernest Harding, (Trans. 265-67) and Hannah Baum (Trans. 196-203) all testified that on the 13th day of September, 1938, the evening before said Will was made that they visited the testator and that he conversed with them, and knew all of them, and their evidence shows without doubt that Mr. Gordon on that occasion was mentally normal in every way. The Court will no doubt read the testimony of these people and we think that the above conclusion is justified from their evidence.

Orvil Baum testified that he visited his grandfather, the testator, on the 10th day of September, 1938, and that he had a conversation with the testator on that day and he asked him, Orvil Baum to bring his wife and visit him the day of his marriage. (Trans. 188). Also testified that he had several conversations with the testator

and had taken him Western Stories to read, and that he always knew him and talked to him. (Trans. 189).

Hannah Baum testified that she was visiting her father on the day that the Will was made. That she was called in the house and her father asked her regarding Alfie's children. (Trans. 198). Had reference to Alfretta Wilkins, his deceased daughter. She also testified to the conversation that the testator had with her daughter, Irma. She also testified about visiting her father on the 10th of September and asked him if he would be able to come to the wedding. (Trans. 200). Testified that her father gave Rob a watch. This took place after the Will was made out. (Trans. 201). Relates other visits and conversations with her father and the condition her father was in. (Trans. 202).

Mrs. Minnie Gordon, wife of Curtis Gordon testified of the visit of the testator to her home on the 21st of August, 1938. (Trans. 212.) Testified of going to the home of Mr. Gordon the day the Will was made. (Trans. 215). Testified of conversation with Mr. Gordon on the 18th of September, 1938. (Trans. 221), and Mr. Gordon gave her a lot of information about his family and other facts. She made a note of this information. Defendants' Exhibit 2. (Trans. 217). She was present when Curtis Gordon had a conversation with the testator about the grapes. (Trans. 218-19). Always knew her even up to two or three days before his death. (Trans. 221).

Leon Gordon testified that he visited his father several times during his sickness beginning with the fore part of September, and that his father knew him every time he visited him and carried on conversation

with him. (Trans. 254). Visited with his father on the 14th of September, the day the Will was made. His mental condition was good. (Trans. 254-55). Testified as to the conversation after the Will was made concerning genealogy work. (Trans. 256). Testified of conversation with his father Monday before father's death. (Trans. 257). Testified of visiting with his father about the 10th of October. Curtis and Jack were present. Gave Curtis some money and also talked about the money which Mrs. Gordon had. (Trans. 258-59).

Eliza C. Gibby, a neighbor, testified of visiting Mr. Gordon every day since he was sick. That he took sick about a month before he died, but was only seriously ill about two weeks before he died. Told Mrs. Gibby that he had made a Will and that everything was satisfactory. (Trans. 272 and 275). Knew her up to the very last. (Trans. 273). Was light-headed at times, but it was due to the pills he took. Was very seriously ill a few days before he died. (Trans. 275).

Dr. David Westwood testified that he had known Mr. Gordon for thirty years or more. Called on him on September 9th. Had a long conversation with him and his mind was clear and he understood everything that was talked about. (Trans. 234). Called again on the 13th of September and found Mr. Gordon asleep so did not disturb him. (Trans. 234). Denied that he had ever told the family that Mrs. Gordon should not remain alone with Mr. Gordon. Probably advised her that she should have some help and a nurse at night. (Trans. 238). Denied that he had ever stated to John Gordon or to Mrs. Olsen that it would be dangerous to have Julia

Gordon remain alone with Mr. Gordon because of the condition of Mr. Gordon's mind. (Trans. 239-40). Under severe cross-examination Dr. Westwood still maintained that there was nothing mentally wrong with Mr. Gordon.

We now come to the testimony of the attorney who prepared the Will and who in connection with Arnold Mecham was an attesting witness. Our Court has held that it is the function and duty of subscribing witnesses not only to witness the signature of the testator, but they should pass upon the question of his sanity and testamentary capacity.

Re: Swan's Estate, 170 P. at Page 456.

In that case the Court said:

"Indeed, they would have no right to subscribe their names as witnesses to the Will, unless they first satisfy themselves of his mental capacity to make it, and thereby dispose of his property."

A. L. Booth testified that he was an attorney and had been practicing law for many years, and that he had known the testator for forty years. (Trans. 278). That Curtis Gordon came to him and took him to his father's home in September 1938. Mr. Gordon told him he wanted his Will made. Mr. Booth then goes into detail as to his conversation with Mr. Gordon—the information Mr. Gordon gave him about his property and how Mr. Gordon wanted it to go. (Trans. 179-80-81). After he got the information he went to his office, prepared the Will and returned to Mr. Gordon's home with Mr. Arnold Mecham. (Trans. 281). Will was read to Mr. Gordon paragraph by paragraph and after each

paragraph Mr. Gordon said "that is right, that is the way I want it." Declared that it was his Last Will and Testament and asked Mr. Booth and Mr. Mecham to sign it. (Trans. 282). Testified that Mr. Gordon's mental condition on the day the Will was executed was not any different than at previous times when he had met him during the period of forty years. Had done work for him. Had been consulted in various matters during that time. (Trans. 283). Testified that when the Will was read before the members of the family that none of them made any claim that Mr. Gordon was incompetent to make a Will. (Trans. 283). Explained to the widow her rights, prepared the acceptance by widow of provisions of Will and the same was signed in his presence. (Trans. 284). On cross-examination Mr. Booth explained that he told Mrs. Gordon her rights as surviving widow and that she understod the paper she signed. (Trans. 295). Testified that he had seen Mr. Gordon intermittently for some thirty years or more, and that Mr. Gordon was just as bright on the 14th of September as he ever was. (Trans. 290).

Arnold Mecham the other subscribing witness testified that he was in the abstract business, that he had known Mr. Gordon about seventeen years, and that he had done business with Mr. Gordon during this time. (Trans. 297). That he went to Mr. Gordon's home on the 14th of September. Mr. Gordon shook hands with him and said, "Hello, how are you son?" That he usually called him son. The Will was read paragraph by paragraph and at the end of each paragraph, Mr. Gordon was asked if that was the way he wanted it and

he said it was right. Stated to me, "this is my Will and I want you to witness the signature. (Trans. 298). Testified that he could not see any difference in Mr. Gordon's mind on the 14th than it was the first time he met him and that he was just as active as he ever was. (Trans. 299-300).

Before commenting on the above testimony, we desire to call the Court's attention to the Will itself. It is true the Will was worded and prepared by A. L. Booth, an attorney, but as stated by him all the information contained in the Will was obtained from Mr. Gordon. Mr. Gordon gave Mr. Booth the names of all of his living children and the names of the children of his deceased daughter. They are all mentioned in the Will and bequests are made to each of them. Mr. Booth explained to Mr. Gordon the rights which Mrs. Gordon had in his property but Mr. Gordon insisted that he wanted her to have the use of his property only as provided in paragraph Sixth of the Will. The Will itself certainly indicates that he was of sound and disposing mind and memory. He knew the objects of his bounty. He knew what property he had and the way he desired it distributed.

The law is well established that a testator is of sound and disposing mind and memory if at the time of making the Will he has sufficient mental capacity to be able to understand the nature of the act, to understand and recollect the nature and situation of his property and his relations to the persons who have claims on his bounty and whose interests are affected by the provisions of this instrument.

DeGraaf's Estate, (Cal.) 93 P. (2d) 199.
Arnold's Estate, (Cal.) 99 P. (2d) 376.
Mason's Estate, (Okla.) 91 P. (2d) 657.
Johnson's Estate, (Ore.) 91 P. (2d) 330.
Lincoln's Estate, (Okla.) 94 P. (2d) 227.
Sixkiller's Estate, (Okla.) 32 P. (2d) 936.
Fletcher's Estate, (Ore.) 32 P. (2d) 123.
Knutson's Will, 41 P. (2d) 793.
Nolan's Estate, (Cal.) 78 P. (2d) 456.
Anderson v. Anderson (Kans.) 76 P. (2d) 825.
Dean v. Jordan, (Wash.) 79 P. (2d) 331.
George's Estate, (Utah) 112 P. (2d) 498.

As heretofore suggested the testamentary capacity of a testator must be determined as of the time the Will is made or executed. Evidence of the mental condition of the testator before or after the making of the Will is important only as it might throw light upon the testator's mental condition at the time the Will was made. The cases above recited may also be cited to support this proposition of law.

In determining the mental capacity of the testator at the time the Will is made, the testimony of the subscribing witnesses is of vast importance and should be given proper consideration and effect, as our Court has held that it is not only their duty to act as subscribing witnesses, but it is also their duty to determine the mental capacity of the testator.

Swan's Estate, (Utah) 170 P. 452.
Sturtevant's Estate, (Ore.) 178 P. 192.
Carr's Will 256 P. 390.
Morley's Estate, (Ore.) 5 P. (2d) 92.

Riley's Estate (Wash.) 300 P. 159.

It is interesting to note the testimony of Mrs. Gordon, the wife of the testator. She was not called by the contestants in their main case. She was his wife and was with him almost constantly during his last illness. She did not testify of any hallucinations. She did not testify that he did not know people when they came, and she did not testify that he did not know his own children. She does not testify to any fact that would indicate that Mr. Gordon was not competent to make a Will. She states that she was present when the Will was signed; that she sat right by the side of him and knew that he was making a Will. She did not make any protest or make any statement to Mr. Booth or anyone else that Mr. Gordon was not competent to make the Will. Yet, without referring to any facts upon which to base her opinion or judgment she merely said that she did not think he was right and did not know what he was doing. (Trans. 310-11).

The absence of any fact in the testimony of Mrs. Gordon to show any incompetency or insanity on the part of Mr. Gordon is certainly strong presumptive evidence that no such facts existed, and that in truth and in fact Mr. Gordon was competent to make his Last Will and Testament.

Non-experts may give opinions as to sanity or incompetency of the testator, but such opinions to have any probative value, must be based upon some facts or experience with the testator and such facts and experience must be given in evidence. This was not done by Mrs. Gordon.

Hansen's Will, (Utah,) 167 P. 256.

Hansen's Estate, (Utah) 52 P. (2d) 1103.

From the record and evidence in this case, appellants maintain that John H. Gordon on the 14th day of September, 1938, when he made and executed his Will was of sound and disposing mind and memory, and that there is no substantial evidence from which the jury could find that he was not competent to make a Will on said date. If there is substantial evidence to support the verdict, we recognize that this Court will not interfere on appeal.

Hansen's Will (Utah) 177 Pac. 982.

Bryan's Estate 82 Utah 390; 25 P. (2d) 602.

McCoy's Estate, 91 Utah 212; 63 P. (2d) 620.

Goldsberg's Estate, 95 Utah 378; 81 P. (2d) 1106.

George's Estate, (Utah) 112 P. (2d) 498.

If the Will of a person in the mental condition that the testimony in this case shows or establishes Mr. Gordon was in when he executed his Will can be set aside and declared invalid, it seems to us that no aged person who is ill could make a valid Will. Testimony could be had in practically every case to show that the aged person's memory was not perfect and that it wandered at times and he had hallucinations.

This Court has held that the making of a Will is a sacred right that should be protected and should not be flittered away and defeated on slimy evidence.

In reading the testimony in this case, we are sure this Court will recognize the weakness of the testimony of contestants concerning Mr. Gordon's condition, par-

ticularly as to his memory and as to the hallucinations which he is claimed to have had. It is a strange thing that these hallucinations and the failure on the part of Mr. Gordon to remember some people took place only at certain times and generally when only one individual was present. It is also strange that most of the members of his family and his own wife never testified to any such things. He always knew and talked with most of his family and other people when they visited with him.

Each Will contest case has its own peculiar facts or circumstances which is relied upon to defeat the Will of the testator, and therefore, the Court must review each case carefully to determine whether or not the particular facts in each respective case brings it under the rules laid down by the text books and by courts in determining whether the Will is valid or not.

The real issue in this case is whether John H. Gordon, when he made his will on the 14th day of September, 1938, was of sound and disposing mind and memory. This Court has had before it many cases in which this issue has been involved and we feel it would be useless on our part to quote or refer further to cases and text books. The record and evidence in this case speaks for itself and we are confident that the same will be fully considered by this Court.

Appellants therefore maintain that from the record and evidence in this case, the finding of the jury and the judgment of the Court entered herein to the effect that John H. Gordon when he made and executed his Will on the 14th day of September, 1938, was not of

sound and disposing mind and memory and that said Will was not his valid act and revoking letters testamentary theretofore issued should be reversed and this Court should find the Will of the said John H. Gordon to be valid and that letters testamentary should not have been revoked.

Respectfully submitted,

BROCKBANK & POPE

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