

1949

Nick Chongas v. Paul C. Porcker : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
 OF THE
State of Utah

IN THE MATTER OF THE ESTATE OF
 NICK CHONGAS, DECEASED,

Respondent,

—vs.—

PAUL C. PORCKER,

Appellant.

Case
 No. 7206

BRIEF OF RESPONDENT

ON A. HENDRICKS, Judge

STUART P. DOBBS
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Attorneys for Respondent

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SUPREME COURT, UTAH

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STATEMENT OF CASE:

It probably will enable the Court to follow the argument made herein with more ease if a time table of matters which are recited in the Statement of Facts in the Brief of Appellant is available for the perusal of this Court. It follows:

March 1st, 1946: Nick Chongas executes will in favor Paul C. Porcker.

March 11th, 1946: Nick Chongas was committed to State Mental Hospital by the District Court of Salt Lake County.

November -st, 1946: Mr. Chongas was adjudged sane after a hearing in open Court, opposed by Paul Porcker.

February 3rd, 1947: Will executed by Nick Chongas, cutting Porcker off with a \$1.00 legacy.

February 13th, 1947: Order of recommittal signed by Judge John A. Hendricks of the Weber County District Court.

February 24th, 1947: William Lepas petitions for letters of Guardianship. Letters being issued March 20th, 1947.

June 30th, 1947: Chongas petitions for restoration to capacity, alleging release from State Mental Hospital.

September 26th, 1947: Chongas restored to capacity by Second District Court.

March 26th, 1948: Nick Chongas dies.

April 14th, 1948: State Mental Hospital gets around to filing notice of release, showing release made that day; "Condition unchanged".

Time has quite a bit to do with this case, and the succession of events has vital importance in considering the weight of the testimony. Since the question involved principally is whether there was evidence to go to the jury on the issue of mental incapacity, the exact character of that evidence must be scrutinized closely. The evidence will be considered under several sub-heads:

FIRST: THE ORIGINAL COMMITMENT:

There is in evidence a certified copy of the record from the Third District Court (Salt Lake County) of which the affidavit of Paul C. Porcker setting out Nick Chongas as being insane, the

warrant of commitment signed by the Judge of that Court, and the return on the commitment were admitted in evidence. The portion entitled "Physician's Certificate" was not admitted, (Tr. 80). Refusal of the Court to admit this "Physician's Certificate" in evidence is one of the two Assignments of Error in this appeal. (Br. 10).

The evidence discloses that about March 1st, 1946 Paul C. Porcker, (Appellant here, and a half-brother of decedent), brought Mr. Chongas to the office of H. A. Soderberg, of counsel for the proponent here, and told Mr. Soderberg that Nick wanted a will drawn, (Tr. 52-3). Nick just acquiesced, Mr. Porcker doing the talking, although Chongas read it once (Tr. 52-3; 54-5; 57). Ten days later Appellant swore to an affidavit that Mr. Chongas was insane. Mr. Chongas' version of what happened is:

"I made a will to my brother and then I got sick. He came up here and asked me to go to Salt Lake and live with him. I went over to the bank and got sufficient money to take care of my illness, I stayed one day at my brother's and then they took me to the County Hospital in Salt Lake City. I was there a few days. One morning someone came in and picked me up in my night clothes, and the next thing I knew I was down in Provo. (He was there two or three months and no one knew where he was said the witness who detailed this conversation). And finally Mr. Lepas came to see me and says 'We found Nick' ". (Tr. 20).

This and expense to which the decedent was put, particularly expense in the proceeding for restoration to sanity, the guardian's fee which Mr. Porcker sought to obtain (20-1-2) and the loss of the \$1,000 he claimed he had drawn from the bank and given to Mr. Porcker (Tr. 20; 22; 32) and his belief that his half-brother was trying to get his money (Tr. 23) were of importance in explanation of the action of the testator in cutting off Mr. Porcker with the proverbial dollar.

This dislike by the testator of Mr. Porcker runs all through

the testimony. Mr. Fowles and Mr. Lepas arranged for the release on probation of decedent some time prior to June 30th, 1946, without consulting Paul Porcker, as Chongas' guardian (Tr. 19), because testator was very bitter against his half-brother. Chongas started conversations with Mr. Soderberg about changing the will favoring the half-brother while proceedings for restoration to sanity were in progress (Tr. 33), and reiterated his desires to Mr. Soderberg several subsequent times before he finally came to see him about drawing the will.

SECOND: RESTORATION TO CAPACITY:

The petition was filed about August 1, 1946. It was not disposed of until November 1st following. Testator had been out of the State Mental Hospital (Tr. 15) some time, before petition for restoration was filed, on probation to Mr. Lepas. The petition was contested (Tr. 14-5), and resulted in an adjudication (Prop. Ex. "A") that Chongas was of sound mind, capable of taking care of himself and his property, and restoring him to capacity.

THIRD: THE SECOND WILL:

It appears that after the conversations about the old will (Tr. 33) commencing about November 1st, 1946, Mr. Chongas came to Mr. Soderberg's office alone some ten days or more prior to February 3rd, 1947, (Tr. 31-2) —**he was not brought there by William Lepas** as Appellant erroneously states—Br. 9 and 16) told Mr. Soderberg he wanted to make a new will, to leave Paul out of it; he wanted to leave his friend William Lepas something, he told (Tr. 46) of his relatives, that they were getting old, and he was not sure all were living; he wanted his property to go to his brothers and sisters and Lepas, or their survivors (Tr. 47. Mr. Soderberg shortly thereafter drew a will (Tr. 31) which was in his office, unsigned, on February 3rd, 1947, when he was told by William Lepas (Tr. 48) that the testator was in St. Benedict's Hospital and "wanted the will"

Lepas and Soderberg were driven to the Hospital by Theodore Stamos (Tr. 49), entered the sick room together, and found Mr. Chongas in bed. They had a conversation as to his state of health (Tr. 34; 61) in which testator told them he had sugar diabetes, and Chongas asked about the will. Mr. Soderberg read it to him (Tr. 35; 61) and the testator told Mr. Soderberg that he had "left out Christ" (Tr. 35-61-2). Soderberg then wrote in the name of Christ Chongas among the legatees. The date was changed from January to February. Mr. Stamos then, at testator's request, read it to him in Greek (Tr. 36; 61); the testator asked Lepas to be a witness, and when told Lepas could not be a proper witness, requested Stamos and Soderberg to witness his signature (Tr. 36; 64) whereupon the will was signed by the testator and the witnesses.

Mr. Soderberg testified to the testamentary capacity of Nick Chongas from his knowledge of the testator gained in connection with the proceeding for restoration to capacity, his talks with him from the time of trial to time the will was signed, including the consultation respecting the will in January, (Tr. 38) Mr. Stamos from the conversation had preceding the discussion of the will, that discussion, and his observation of the testator at that time (Tr. 66) also testified that Mr. Chongas then was of sound mind and knew what he was doing. He had known Nick Chongas some time. Mr. Fowles from observation of testator from the time he was released from the hospital to the time the witness became engaged in attendance at the State Legislature in January of 1947, also testified that Nick Chongas was of sound mind at the time the will was signed. (Tr. 7; 15).

FOURTH: THE SECOND COMMITMENT:

The testator went back to State Mental Hospital February 13th, 1947. There is in evidence both Insane File No. 1049 and Probate File No. 7549 of the Second District Court. The first, admitted to be the entire file in the matter (Tr. 51) contains a paper, largely in blank, upon which William Lepas waived notice of time of hearing of application for admission of Mr.

Chongas "an alleged insane person" to the hospital, a minute entry which recites that "upon the affidavit of William Lepas, filed herein" and the sworn testimony of said Lepas, it is ordered that said Nick Chongas be "recommitted to the Utah State Hospital for care and treatment", and a Order of Recommitment which recites that Chongas had theretofore been recommitted to the State Hospital from Salt Lake County, released into the custody of William Lepas, and that "———now surrender the said Nick Chongas and ask that he be recommitted for further treatment at said Utah State Hospital" and orders the recommitment. A receipt shows that he was taken to the hospital the same day. That is all—except the Notice of Release of Patient dated April 14th, 1948.

Mr. Soderberg was present at the time this "recommitment" was taken up, (Tr. 38) as well as testator and Mr. Lepas. They had tried to get the testator admitted to the Weber County Infirmary at Roy, without success, as "they didn't have a place for him" (Tr. 39) so they went before the Judge, to whom Chongas said that (Tr. 40) he wanted to go back to Provo for treatment, whereupon without any further examination, with no physicians present, no testimony as to his mental health, or as to his competency, the order was made by the Judge. "He (Lepas) was the guardian and he requested that he be returned" said Mr. Soderberg (Tr. 49).

At this point an unusual situation arose. Counsel for Contestant asked a question as to presence of the witness at a hearing "wherein he was alleged to be insane", to which proponent objected. The following colloquy then took place (Tr. 50-51):

Mr. Hutchinson: I take it the Court wouldn't sign an order recommitting him unless he was.

The Court: Well sir, you take the wrong position.

Mr. Hutchinson: In what respect, your Honor?

The Court: When a person volunteers and wishes him-

self to go down there we have to have—sign a recommitment, or a commitment.

The Court: We don't sign it thinking he is insane; we sign it thinking he will go down there for observation. He isn't on a recommitment deciding him to be insane. Forms are sometimes used that are not just fitting of the situation."

Further conversation between counsel and the Court followed in which the Court, without objection from counsel, makes it clear that the question of the sanity or insanity of testator was not raised in connection with the recommitment. We suggest the language above quoted reflects quite accurately just what the Court did, a view supported by the wording of the order made.

The second "guardianship" proceeding (Probate File 7549) contains a petition by Mr. Lepas asking for letters upon the ground that Chongas was "sick and unable to take care of his property", reciting his original commitment, his being released on probation, and that he had personally asked recommitment to the State Hospital. No allegation of mental trouble appears. The Court's order appointing a guardian is based upon the finding that Chongas had an estate which needed the care of some fit and proper person. There is also in the file a letter from the testator, protesting appointment of a guardian, and asserting his fitness to care for his property, an account and report, and order discharging the guardian and restoring conduct of his affairs to Chongas about September 26th, 1947. No evidence of importance concerning this appears outside the files.

FIFTH: OTHER TESTIMONY:

The only witnesses called by Appellant were one William Palitsas, Andrew Meintasis, and one of his counsel, William L. Beezley. Palitsas' evidence (Tr. 85-9) had to do with his experiences with Mr. Chongas as a tenant, up to the time that

testator left for Salt Lake to live with his brother, just prior to the insanity proceeding. It is printed quite extensively in Appellant's Brief. (Tr. 6-7-8)). It was somewhat contradictory, was weakened on some points on cross-examination, but in view of the position we take that his condition, prior to his restoration to capacity, is not revelant, we shall not discuss it further.

Andrew Meintasis' testimony (Tr. 81-85) is partially given in the Appellant's brief. (Br. 5). He saw Chongas something like a month or two prior to his death, had not seen him for several years prior to that time, and at that time Chongas was "jumpy" and talked incoherently. He had been told that the testator had been in the "Asylum", (Tr. 84) but when asked if he formed his opinion of the testator's mental condition with that fact in mind, he ducked the question completely, and after being pressed several times, gave his position as to how he formed it as follows (Tr. 85):

"I made it just like a doctor would. A psychiatrist, I read it to thought he wasn't all there, and that is my true statement.—That was my opinion, of course. I might have been mistaken about it."

(C) William L. Beezley. This witness was called to impeach on one point the testimony of the Proponent. Mr. Fowles. He recalled Mr. Fowles telling him that Chongas was "crazy as a bedbug", and Mr. Fowles recalled a quite different version of the conversation. (See Appl. Br. 9 for detailed statements of the two witnesses).

(D) Other evidence.

It appeared that the testator was "thrifty" to the point of stinginess, so that he was unwilling to be hospitalized at the Dee Hospital, but sought admission to the Weber County Infirmary and that failing, recommitment to the Utah Mental Hospital. (Fowles at Tr. 10); although Mr. Soderberg didn't think him "ultra stingy, just saving" (Tr. 53). He later was a resident at Weber County Infirmary and died there.

SIXTH: OFFERED AND REJECTED TESTIMONY:

Contestant produced one Dr. Earl Wight, a physician and surgeon of Salt Lake City, who, without being sworn, was asked a hypothetical question which embraced the statement that Chongas was suffering from dementia praecox at the time of his first commitment. The testimony was offered to illustrate the use to which Appellant's counsel desired to put the "Physician's Certificate" contained in the original commitment papers. The offer was denied, upon the ground that the "Physician's Certificate" was not competent to establish that Chongas suffered from dementia praecox. The testimony of the doctor was not offered in the presence of the jury, and the rulings of the Court made thereon are not assigned as errors here.

A R G U M E N T

Appellant's Assignment No. 1

Respondent contends that the evidence adduced was not sufficient to carry to the jury the question of testamentary incapacity, and, of course, if that be true, that the motion for new trial was rightly denied.

Moser v. Zion's Co-op Merc. Inst. (Utah Unrep.) 197
Pac. 2d 136.

We have no quarrel with the points of law which Appellant cites, particularly when the cases from which quotations are made are examined. Several of these cases we will discuss subsequently in our brief. At this time we call attention to the fact that the Van Hooten and Cissel (not Sissel) will cases involved advanced and incurable insanity, and wills which were not consonant with lucid reasoning, while in the Etchen case, the incompetent was claimed to have been "weak minded, normally incompetent, without any natural powers to protect himself" which feeble minded condition so claimed naturally involved proof of a lifetime condition. See

In re Van Hooten's Will, 124 N. W. 886 (Ia.).

In Re Cissel's Estate, 66 Pac. 2d, 779 (Mont.).

Etchen v. Texas Company, 199 Pac. 212 (Okla.).

The question involved here is not admissability of proof as to prior and subsequent insanity, guardianships, and similar testimony, but is the effect of such testimony upon this will herein admitted to probate. It is our position that none of the testimony offered supports the theory of mental incapacity at the time the will was made. Appellant says (Appl. Br. 17) that he relies upon (1) the commitment, (2) recommitment, (3) guardianship matters involving person and property of the decedent, (4) releases of Utah State Mental Hospital, Deceased's confinement in St. Benedict's Hospital and the Weber County Infirmary, and (5) oral evidence. Analysis of the probative effect of these matters follows:

FIRST: THE SALT LAKE PROCEEDINGS. There is in evidence here the greater part of an insanity proceeding in the Salt Lake District Court, and some oral evidence which indicates that, upon the commitment, Appellant obtained letters of Guardianship of his half-brother's estate. There is also testimony of one William Palitsas, at whose hotel the testator lived for some four or five months prior to removing to the home of his brother in Salt Lake for one day, and of which nothing need be said except that it indicated that Nick Chongas was ill much of the time, thought he was going to die, eccentric, a patient in the S. P. Hospital at San Francisco, Palitsas said he had no mind at all at the time he went to his brother's.

This testimony is entirely without probative value because, something like eight months later, Nick Chongas was adjudged to be sane and restored to capacity upon a proceeding, had before the same District Court, contested by the Appellant.

"An adjudication of insanity is prima facie evidence of testamentary incapacity where it precedes the execution of the will. In such a case, continuance of insanity will be

presumed and the onus cast upon the propounders of the will to show that the disqualification has been removed.

"Having been found a lunatic, the law presumes the state of his mind to continue unchanged until the contrary is made manifest."

Clark v. Trail, 1 Met. 35 (Ky.).

"We think the true rule to be that an adjudication of insanity is not conclusive, but prima facie evidence only, and that a person who deals with the supposed insane person may show at the time the contract was made he had sufficient mental capacity to make it."

Eagle v. Peterson, 206 S. W. 55; (Ark.) 7 A. L. R. 553.

"The adjudication in 1902 by the Supreme Court of New York, declaring that he was competent to manage himself and his affairs was not a conclusive adjudication that he was then sane. Prior to that judgment, the legal presumption would be that the insanity, previously adjudged to exist, would continue. Thereafter the legal presumption would be that he was sane.—After the adjudication in 1902, that he was competent, the disputable presumption that he was sane arising therefrom, was subject to contradiction by competent evidence."

In Re Baker's Estate, 168 Pac. 88 (Cal.).

"As to point 4, that the judgment of the county court adjudging the allottee to be a competent person raised a presumption of law which should be overcome by clear and convincing evidence, **while perhaps true as a general proposition of law**, it is not applicable here, or at least not controlling, for the reason that there had been several adjudications in reference to this boy's mind and his competency to manage his estate, one of which being subsequent to the adjudication relieved upon by the plaintiff in error."

Etchen v. Texas Company (Supra—see page 216).

And where subsequent to an insanity commitment, the father of the incompetent procured her discharge from the asylum by giving bond, under substantially the proceeding authorized by Utah Statutes, and as William Lepas and J. Francis Fowles procured the release of Nick Chongas, about three months, (substantially the same time) after her commitment, the question of her sanity being at issue upon a deed, the lower court, the commitment being admitted, testimony given by some eleven inexperienced witnesses as to her want of sanity at various times, other than the time of execution, ordered the deed cancelled. In that case the appellate court set aside that judgment, holding that it was without substantial evidence to support it, thus refusing to give any effect to the presumption of insanity arising from the commitment under the given circumstances.

Wade v. Sayre, 123 S. E. 59 (W. Va.).

Thus the law is that, when the Court adjudged Nick Chongas to be sane, the whole effect, as testimony, of the previous commitment, guardianship, and evidence as to his prior condition, ceased to have weight. It was admitted solely because it cast forward a presumption of continuance of the condition then shown; it had no weight when that presumption ended upon legal proof of sanity. And while as to third persons, the law may be that such an adjudication of sanity creates also only a new presumption and is not conclusive, where, as here, the person who now offers that former adjudication to prove insanity nearly a year later is he who contested the adjudication of sanity while the testator was alive, and could be heard to speak for himself, he might well be concluded by the judgment of November 1st, 1946. We think it unnecessary to press this further however:

“But such evidence as to the mental condition of the testator before or after execution of the instrument in question is important only in so far as it tends to show

mental condition at the time of execution thereof; it has no probative value unless it raises an inference of mental incapacity at the time of execution of the instrument."

168 A. L. R. 972, (note and cases cited).

SECOND: EFFECT OF RECOMMITMENT, AND SUBSEQUENT GUARDIANSHIP.

As to the "recommitment" on February 13th, 1947, and the so-called guardianship proceedings which followed, neither were of the character which would raise an inference of subsequent insanity, and neither would create a presumption of such insanity because of the want of validity of the proceedings.

(a) Neither could raise a presumption of insanity.

When Nick Chongas went before the Judge of the Weber County Court on February 13th, a record was made consisting of an order, a waiver of notice signed by William Lepas, and a minute entry. That record, and the testimony of Mr. Soderberg, together with some comment by the Court appearing in the transcript, are all that there is bearing on what took place on that day. Mr. Lepas, to whose custody Chongas had been released after his first commitment, appeared before Judge Hendricks, the testator told the Judge that he was sick and needed treatment, and the judge signed an order of recommitment. Lepas and Soderberg prior that day had sought to get the testator admitted to the Weber County Infirmary at Roy, but it was full. (Tr. 39) "So Nick says: 'I want to go back to Provo, so I can get some medical treatment.—I need some insulin and other care.'—That is what he said in court." No physicians were there, no examination was made, nothing was said about his mental condition.

The record bears out this testimony. The order of recommitment is of the character which would be used by a person to whose custody, under our statute, a person is released from the State Hospital, and who is surrendered by that person for recommitment. "He (Lepas) was the guardian and he asked

that he be returned." (Tr. 49). The minute entry recites that Lepas filed an affidavit, but the fact that no such affidavit is in the file, and the testimony, uncontradicted, that none was filed, dispute that fact, and of course speculation as to what the affidavit said, if there was an affidavit, would not aid Appellant's case.

It then is the fact that the recommitment affords no evidence that on February 13th, 1947, Nick Chongas had suffered a relapse into his former condition of insanity.

Subsequent to that, Lepas filed a petition to be named as guardian of Nick Chongas' estate. (Probate File No. 7549). This petition recited that the testator having "entered" the Utah State Hospital about March 13th, 1946, and about August, 1946, having been released therefrom, having returned to Ogden and lived with the petitioner until February 13th, 1947, had at his own request been "recommitted to said institution, and he is now in said Hospital.—That said Nick Chongas is sick and unable to take care of himself and his property." The statute applicable to such appointments, Section 102-13-20, Utah Code Ann. 1943, defines those who may require guardianship as:

"Any person, who though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself and his property, and by reason thereof would be likely to be deceived or imposed upon by artful and designing persons."

Upon the effect of such a recommitment, no cases have been found. We should not expect much success in that search, since the proceedings were not of a character likely to occur often, nor likely to be reviewed by appellate tribunals. But on the effect of such a guardianship proceeding, there is ample authority, and we think that its ratio decendi is equally applicable to the question of the probative value of commitment and guardianship. That rational rule of decision is simply that

such proceedings, unless founded on insanity, create no presumptive evidence of insanity. The proceedings here not only are not based upon any charges of insanity, but the facts appearing as to them, uncontradicted, indicate that insanity did not enter into either. We cite:

Where the facts surrounding appointment of a guardian negative any presumption that want of capacity was involved, no inference of want of testamentary incapacity arises from such appointment:

In *Re Bottger's Estate*, 129 Pac. 2d 518 (Wash.).

Where will was made at about same date petition for guardianship was filed by children; the petition was contested, at eve of trial, testatrix told lawyer she could not bear to take stand against children, it would kill her, required him to attempt settlement. Result, letters issued some time latter, upon finding testator was 92 years old, unable to read or write English, without business experience, and that she consented to appointment of guardian. Court says:

"We are of the opinion that the fact that a guardian has been appointed to conserve the estate of one adjudged to be incompetent to manage it herself does not necessarily tend to establish lack of capacity on the ward's part to execute a will, (whether the adjudication of incompetency precedes or follows the execution of the will), unless the order appointing the guardian is based upon an express finding of some mental defect inconsistent with the possession of the capacity required for the execution of a will. The appointment of a guardian is not an adjudication that the ward is insane nor does it in all cases imply that the ward is not fully capable of making a valid testamentary disposition of her property."

In *Re Cowdrey*, 77 Vt. 359; 3 Ann. Cas. 70.

Testatrix was old, public charge for many years, unexpectedly inherited \$6,000.00—a large sum at that time. She

asked for appointment of guardian under a statute which the Court interprets as affording guardianship in just such cases as does our Section 102-13-20. (supra). Held.

"Adjudication of mental incapacity to take care of herself or her property and the appointment of a guardian thereunder did not render her prima facie mentally incapable of making a will."

Keenan v. Scott, 225 Pac. 906 (Okla.). (Cited by Appellant).

Ross made deeds on August 4, 7, 11th—killed a negro on August 12th, was adjudicated insane and admitted to mental hospital August 13th, and his guardian thereupon appointed sued to set aside the deeds. Evidence of a brother was given, of statements by Ross indicating delusions, and evidence by Notary who witnessed deeds and others indicating capacity. The Court held the evidence insufficient to cancel the deeds, saying:

"No question at all had ever been raised as to Ross' incapacity to transact business until the escapade occurred at Muskogee, evidently on the 12th day of August, wherein he killed a negro, and the plea of insanity was evidently interposed at a very opportune time."

In re Ames, 67 Pac. 737 (Ore.). (Cited by Appellant).

Ames, accused of sodomy by a stepson and another, blackmail involved, sought counsel from attorneys who advised both the making of a will and a request for appointment of a guardian for his estate. Will executed, guardian applied for and named the same day. Guardianship applied for on ground of poor memory, feebleness, and that persons were trying to impose on him and defraud him of his property. On proof of the guardianship, the lower court held the will invalid for want of testamentary capacity. Circuit Court, saying that the evidence did not show testator was not of sound and disposing mind and

memory when he made will, directed that will be admitted to probate and the Supreme Court affirmed.

Kelley v. Stanton, 118 A. 863 (Md.).

Lower court rejected will upon proof of guardianship some 16 months subsequent to execution, and weak testimony of witness as to incompetency. Appellate Court while holding evidence of the guardianship proceeding admissible, ruled directed verdict in favor of will should have been granted saying:

"It was not, however, conclusive, but its force and effect depended upon the other evidence in the case, and in the absence of evidence connecting the mental condition of the testator as described by the inquisition with a want of testamentary capacity at the date of the will, the inquisition alone would be insufficient to show such incapacity."

In Re Dolbear, 86 Pac. 695 (Cal.).

Where proof that testatrix committed suicide less than three months after executing will, that her mother also was a suicide, and that her father's family had had insane members, with some weak evidence from witness as to mental condition was held insufficient, as against strong evidence of those who saw her at and about time of making will and shortly thereafter that she was sane and capable. The court said:

"The presumption always is that a person is sane. Proof of insanity carries back no presumption of its past existence."

Keillein v. Krauss, 209 SW 933 (Mo.).

"Such testimony as to mental condition at other times has no probative value as to the mental condition at the time of execution of an instrument in question in the face testimony, nowhere directly questioned, that the testator

was of sound mind and disposing memory at the time the will and codicil were made."

See also note 168 A. L. R. 972, previously cited.

Tested by the rules laid down in these cases, there is evidently nothing in the records of what took place after the will was executed which warrants any inference that the testator was insane at a later date. It is not enough that he was returned to the Provo Hospital, it is not enough that he again had his property placed under guardianship. To create a presumption of insanity at a later date, the proceedings must have want of sanity as a basis, and without such want appearing, they create no presumption that he was insane when the will was made. They are explainable on another basis.

Chongas may have been guilty of miserliness in seeking to obtain further treatment from the State Hospital, or may have simply felt that the treatment for his diabetes there given had been more beneficial than that had elsewhere. But what he did to obtain further treatment bespeaks intelligence, not lunacy.

(b) Both proceedings were void and invalid, and invalid insanity and guardianship proceedings create no presumptions of insanity, prior or subsequent.

"The adjudication is generally held inadmissible if the proceeding in which it was made was void. regardless of the nature of the defect which rendered the proceeding void."

7. A. L. R. 578 and 68 A. L. R. 1312—note (e).

As to invalidity of the order of recommitment, it should be sufficient to direct attention to the Utah Code provisions as to recommitment.

First: If he has been released to some relative or friend under bond, (Section 85-7-28 and 85-7-29) and it is brought to the knowledge of the judge that the person thus removed is

not cared for properly, or is dangerous to persons or property, he may order such person to be returned to the hospital.

Second: If he has been discharged after commitment, and "has a recurrence of his nervousness", he may be recommitted (Section 85-7-52) by a Judge upon application of a guardian, etc., stating that he "has a recurrence of his nervousness or is not cared for properly, or is dangerous to persons or property and is in need of further care and treatment", the committing officer "after hearing the evidence and being convinced that said person is in need of further treatment for his nervous condition" to make an order of recommitment, the form of which is prescribed by the section, and which differs materially from that here used.

We direct the attention of the court to the want of any application, to the complete absence of any showing of the presence of any of the facts upon which, under either statute, the Court had power to order recommitment. The whole proceeding rests without any foundation of right or authority in law. If the order was under the first section, it was made wrongfully because Chongas had been restored to capacity, and had been discharged. An entirely new insanity proceeding was requisite in that case. If made under the second section, there was no application showing that he had a "recurrence of his nervousness", nor any application at all except Chongras' own statement that he needed "some insulin and other care." Whatever may have been the opinion of the judge who made the order, we submit that the statute does not refer to a need of care for ordinary ailments, such as diabetes, and that a recurrence which warrants recommitment is recurrence of just such a mental condition as warranted original commitment. No evidence was heard showing any such condition. The recommitment was plainly invalid.

As to the appointment of Lepas as guardian thereafter, there was a total want both of pleading and of finding by the court of either insanity, or of his being not only "sick and unable to take care of himself and his property", but also, as the

statute provides, "and by reason thereof would be likely to be deceived or imposed upon by artful and designing persons." The one statutory requirement is not sufficient, the statute requires both to concur.

We submit that neither proceeding, upon the record here made, had validity, and that in the absence of validity, neither was entitled to be in the record, nor to be considered by the jury.

Third: Other hospitalization, etc.

Appellant says that in addition to the matters heretofore discussed he relies upon:

Releases from Utah State Hospital.

Confinement in St. Benedict's Hospital.

Confinement in County Hospital, Weber County, for the Indigent.

The release found in Proponent's Exhibit No. 2, and filed in the Salt Lake Insanity proceedings, was not admitted in evidence (Tr. 80), and its exclusion is not herein assigned as error. It was properly not admitted since it is without evidentiary value, hearsay, wanting in relevancy because made long subsequent to the restoration to capacity, evidently a formal act done to close the record. That from Weber Co. File No. 1049, which recites that "the above patient was discharged, condition unchanged, from the Hospital April 14th, 1948" is equally irrelevant. Prior to April 14th, 1948, Nick Chongas had left the hospital, which he had entered voluntarily, freely and without any probation, he had been found sane and able to handle his own affairs by the Weber County courts, and had managed those affairs for months; he had become ill, had died, had been buried. So he was "discharged April 14th, 1948."

What is claimed for the confinement in St. Benedict's Hospital and what is claimed for the residence at the County Infirmary counsel does not say. The hospitalization at the time

the will was made, at St. Benedict's was for diabetes. Has Appellant authority that a diabetic condition creates an inference of mental unsoundness? That Chongas was able to obtain admission to the County Infirmary where he might find companionship, care, board, room, all at much less expense than he would have paid for private hospitalization, bespeaks not insanity, but an acute and informed sanity. He cherished his hard earned money, and he sought to save himself all expense he could, and miserliness is not insanity.

To argue about these matters is like hitting at a pillow; there is no substance at which to strike a blow. We submit none of these matters have probative value upon the question of the testamentary capacity of Nick Chongas.

Fourth: "Oral Testimony" relied upon.

We have shown that what William Palitsas thought of the the testator's condition prior to his commitment became immaterial when, and for the same reason, that the evidence of a higher form that he was insane, the commitment, became immaterial. After his return, Palitsas testified only to seeing Chongas on one occasion, when he was trying to sell or rent a house which the witness thought he had already sold (Tr. 91). This was just after Nick left the hospital (Tr. 93). The record shows (Tr. 26) that Chongas did have a house, and that he did sell it after he had been restored to sanity, so that the basis for Palitsas' attempt to show subsequent insanity, from sale of what had been sold, falls down.

Andrew Meintasis saw the testator for the first time in two or three years about six weeks before he died, thought him incoherent, "jumpy", "not all there" but "might have been mistaken about it." At that time, this diabetic was not far from his final illness. There was no showing that his condition was not due to the advanced state of his illness, or that what the witness observed had any connection with a mental condition had by Chongas at the time he executed his will.

Mr. Beezley, in impeachment of the testimony of the proponent as to the sanity of the testator, testified that sometime in the period when Mr. Fowles was in the legislature he had talked with Fowles who had told him that Chongas "was crazy as a bedbug" and that he sat on a stool in a restaurant, all alone, gazing out of the window. Without commenting upon whether Mr. Fowles did or did not say that, or upon its weight as impeaching testimony, we submit that the conduct recited certainly did not warrant imputation of want of sanity. He sat on a stool, all alone, gazing out of the window of the restaurant. What else had this lonely man, sick, feeling himself betrayed by the only relative whom he knew how to find—what else did he have to do!

What was the other testimony: None certainly supports want of testamentary capacity. The record as to possession of full capacity by Nick Chongas is full of both direct and intrinsic matters in support of the will. The following points are not disputed:

(a) Chongas had ability to understand what he was doing when he executed the will.

He began to discuss a change in the will which left his estate to Appellant at the time of the proceedings for restoration to capacity three month before date of execution. He reiterated that at several subsequent times.

He visited Mr. Soderberg—alone let us insist—some ten days or more before the will was signed, and gave instructions as to his intentions.

He caught, on first reading of the will to him on February 3rd, the error made by Mr. Soderberg in omitting the name of a brother from the will.

He showed caution and an acute desire to be sure the will carried out his wishes by requesting Mr. Stamos to read it to him in his native language.

(b) The will was such as a sane testator might well have made. He recognized, along with his brothers and sisters, the friend with whom he had lived, and who had rescued him from the State Hospital. He omitted provision for the half-brother who had proffered to take care of him, and then, after one day, and after getting his \$1,000, had sent him first to the County Hospital, had then caused his commitment, and had opposed his restoration to capacity. He did not know what had become of the immediate members of his family, whether they were living or dead, so he provided for what should occur as to any legacy which lapsed by death, and saw to it that, if his brothers or sisters could not be found, none of his estate would go to Paul C. Porcker. Given the circumstances which surrounded him, his want of knowledge as to his family, his dislike of his brother, the will is just what might be anticipated of the most intelligent and sane testator.

(c) The evidence of the attesting witnesses is clear as to capacity, and was based upon both acquaintance with Mr. Chongas, and upon observation at the time the will was signed. It establishes his testamentary capacity at that time, and it is not challenged by any of the other evidence.

Testimony of attesting witnesses, clearly and positively showing facts warranting their belief in the sound mental condition of the testator, and their conclusions of testamentary capacity drawn therefrom are ordinarily given great weight by courts in will contests.

Ann. Cas. 1914 D 343 and cases cited.

123 A. L. R. 89, (note).

In *Wade v. Sayre*, heretofore cited, (123 S. E. 59) upon a record showing a prior commitment, no restoration, but a discharge on probation, and the evidence of some eleven non-expert witnesses that the grantor of the deed there in dispute was not sane, opposed by the testimony of the person who took the acknowledgements that he had examined the grantor separate and apart as to her knowledge of the nature of the act she

was doing, that she understood and was sane, as well as that of others as to her sanity at or about the time of the execution of the instrument, the Court set aside the judgment, although under the rules of West Virginia the lower court's findings were to be followed if supported by evidence, saying

"We do not think the bare opinion of non-expert witnesses will overcome the presumption that the plaintiff was incompetent to make the conveyance at the time it was made especially in view of the testimony of the officers and others present at the time of execution of the same, who testified that the plaintiff was sane at the time."

In the Bottger and Ames will cases, heretofore cited, the Appellate Court not only held the evidence insufficient, but held that the record was such as to require the will being established. In Kelly v. Stanton (supra) it was held that the court should have granted a directed verdict. The rules as to when such a verdict should be granted are well settled:

"Judges need not submit a question to a jury unless there is evidence upon which the jury could properly find a verdict.—It has been held that an issue should be submitted to a jury where the evidence has sufficient weight to be pertinent or conduces in any reasonable degree to establish the fact in controversy, or if there is any credible evidence which, to a reasonable mind, can support an inference, in favor of a party to an action.—Under the modern doctrines in this regard, an issue should not be submitted to the jury where there is only a scintilla of evidence, where the evidence barely raises a conjecture in support of the view sought to be established, or where there is no substantial evidence." (53 Am. Jur. 152).

"Evidence which merely makes it possible for the facts in issue to be as alleged, or which raises a mere conjecture, surmise, or suspicion, presents no question of fact for submission to the jury and should not be left to the jury, it being error to do so: the rule being that to justify sub-

mission to the jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged." (64 C. J. 312).

Excluding the evidence of the first commitment, because its effect was negated by the latter finding of sanity, excluding the matters relating to the return of Mr. Chongas to the hospital, and to the subsequent guardianship proceeding, not only because they were void and so of no evidentiary value at all, but also because they were not based upon facts giving rise to an inference of testamentary incapacity, we have left really only the testimony of Andrew Meintasis. It seems difficult to conceive that any jury of reasonable men could find on that testimony that something over a year earlier, Nick Chongas had been wanting in such soundness of mind and memory, as to render his will invalid.

APPELLANT'S ASSIGNMENT No. 2

(a) Exclusion from the record of the so-called Physician's Certificate is justified, both by the want of compliance with requirements of law for such a record, and by the matter therein contained, not properly part of the record, nor responsive to matter to questions therein asked, which were hearsay and not the best evidence of matters there shown.

The Statutes of this State, (Sections 85-7-21 and 85-7-22, Utah Code, Ann. 1943) set out the duties of physicians called in by the Court in insanity proceedings, and the matters which substantially must appear in the Physician's Certificate to be filed in such cases.

The first statute cited requires that "after a careful hearing of the evidence, and a personal examination by the physicians of the person alleged to be insane, they shall certify on oath whether or not the person is insane, whether the case is of temporary or curable character, whether the person has a homicidal, suicidal or incendiary mania, or whether he is dangerous, if at large, to other persons or to the property of

the community in which he shall live" and obtain so far as possible correct answers to the questions set out in the statutory form, which is given in the last section cited. As to these points:

Omitting matter where any substantial or partial compliance with the statutes appears, the following objections lie to this so-called Certificate.

1. It does not contain the statement, required expressly by statute, as to whether the case is of temporary or curable character. No place for such a statement appears in the form.

2. Although the form contains blanks for answers as to whether the alleged insane person has a disposition to injure himself, others, or to destroy or burn property, those blanks are left without answer, although such answers are explicitly required.

3. The oath, which contains place for a statement showing that the physicians personally examined Mr. Chongas, is left blank in that particular. Nor do the physicians certify as to whether Mr. Chongas was or was not psychotic, that his departure from normal was or was not such as to endanger health, person or property.

4. The form used does not contain any place for a statement by the physicians of information upon questions Nos. 15, 18, 19, the sub-questions under 23, the first four questions under 31, No. 33, and No. 34 of the form. Yet the question as to whether Mr. Chongas had rational intervals, (No. 34), whether there had been a prolonged departure from his usual course of conduct, (No. 15) as to what peculiarity or defect the physicians noted in the patient (No. 18) and as to what permanent hallucinations or delusions were noted in the patient (Nos. 18 and 19) are matters very pertinent to the inquiry which was before the Court in the trial of this case.

To the question as to when departure from the normal took place (12th line of the certificate) no answer is given. And the answers which follow to the other questions in that line

are largely inept. Certainly for a man who had been treated for diabetes, as had the testator, to think he had diabetes would not be a symptom of insanity, particularly when the physicians themselves certify on the next page that he possibly did have it. Nor is his having been in the S. P. Hospital for treatment a symptom of insanity. As to his half brother seeming to be somewhat afraid of him, that is pure hearsay, no symptom of anything, and as to this Appellant a very self-serving statement.

At the bottom of this page the following appears:

“Q. Have any relatives suffered from or been treated for nervous or mental disease?

“Brother says a Dr. Brown of Ogden told him to send him to Provo.”

Admission of this portion of Exhibit 2 in evidence would have placed that damaging statement before the jury, as part of a public record, bearing probably to their minds some official stamp of verity. It most certainly is a self-serving statement from the Appellant—it is not responsive, and the purest hearsay. Appellant certainly knows, if any such statement ever was made him, what Dr. Brown it was that so stated, but he did not call that physician as his witness at this trial. The danger of admitting such testimony needs no further argument.

Turning to the next page we find that the physicians set out, to the question as to what “false ideas” Chongas may have had:

“Believes his brother is the cause of all his troubles. Has some somantic complaints. Wanders about in hospital.”

That Chongas believed his brother the cause of his “trouble” is probably true, and if the trouble meant is his incarceration in the County Hospital in lieu of being given residence at the brother’s home, which seems to be the only trouble Nick then was in, the statement is no false idea. Admitted, it would have had its effect in inducing a jury to believe that

Porcker's treatment of his brother was not what Chongas described it as being. That Chongas had some somatic complaints—i. e. was a hypochondriac—falls under the "false idea" head, but if people who have imaginary illnesses are subjects for incarceration in mental hospitals, many of us would find our way there, and the state would have to enlarge its facilities multifold. And what connection there is between the patient, not bedfast, not voluntarily there, wandering about the hospital, and a "false idea" we are unable to determine.

The whole proceeding, for that matter, hardly conforms to the requirements of due process. True, the Warrant of Commitment recites that the Court caused "Nick Chongas to be brought before me for examination as to his sanity," but that any notice was given him of the hearing, any opportunity to defend against the charges of Paul Porckas, that the District Attorney was present to represent the State and see that justice was done,—none of these facts appear. The physicians show no examination made of the alleged incompetent. Were Chongas present, himself testifying to what he told Mr. Fowles as to his being spirited from County Hospital to Mental Hospital without any knowledge of these proceedings, we would contend that the proceedings were invalid. In a collateral matter such as this, the right to do so is somewhat doubtful, if all statements in the record are given full credence, and we shall not spend further time on this. But it's not a good record to warrant such a commitment.

We submit that this "Certificate" was not admissible because not made in conformity with law, and because it carried with it hearsay evidence, and irrelevant statements not responsive to the questions to which appended.

(b) Had its admission been proper, still exclusion of this "Physician's Certificate" did not constitute reversible error.

This was a part of the record of the original insanity proceedings upon which commitment resulted. From it Appellant claimed a right to show the diagnosis of dementia praecox and

to base thereupon expert testimony that Chongas, suffering with that disease, was never thereafter sane.

Respondent while objecting to the admission of the certificate as proof of fact of the statements therein contained, did not object to its proffer as showing what took place at the hearing. (Tr. 69) But Appellant insisted upon offering it to show factual existence of dementia praecox, (Tr. 69) even claiming that there was an "adjudication" of the facts from that record. Our position is:

That Chongas was committed to the State Hospital as insane was a fact, a fact established by this record. That he the physicians believed he was insane from dementia praecox is likewise a fact, which could be established by this certificate. Based on it, Appellant desired to prove dementia praecox an incurable disease, and that, it being incurable, there never thereafter was a time when Chongas was sane.

The trouble with that argument is that the exhibit does not establish that he did have dementia praecox. It establishes only that such was the diagnosis. It could not be substituted for proof of the fact by direct testimony. The record and its presumptions ceased to evidence mental incapacity, at the time of execution of the will, when Chongas' subsequent sanity and capacity was established by the proceedings for restoration which created a new and strong presumption of sanity. That judgment that he was sane negated the presumption that the physicians correctly diagnosed his trouble; it established that he had no fixed, incurable, continuing insanity. Any prior presumptions from the insanity record then ended any right to base expert testimony on the contradicted presumptions ended.

To hold otherwise would be to create this contradictory situation: The presumption that he was insane established by the proven fact of commitment ends, and has no more effect in the case, but the best guess—Dr. Wight (Tr. 74) said that is what a diagnosis sometimes is—of the physicians would be considered as not rebutted. The diagnosis was not admissible

for that purpose because for that purpose it is not only rebutted, but is hearsay—just as the evidence from Palitsas (Tr. 87-8) as to what Dr. Brown said to him was hearsay, and should have been excluded on our objection,—and certainly is not evidence of testamentary incapacity.

It follows that whether or not the Physician's Certificate was admitted, no reversible error occurred. Admitted it would have had no more probative weight than the commitment. Admitted, it would not have afforded ground for a question, addressed to an expert witness, based upon the assumption that Chongas suffered from dementia praecox at the time he executed his will. This Court has held too often that error, which cannot affect the result, gives no ground for reversal for citation of authority to be needed.

We submit that the trial Court's judgment should be sustained.

Respectfully submitted,

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