

1953

In the Matter of the Estate of Emma G. Buttars : Proponent and 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	}	Case No. 7945
EMMA G. BUTTARS,		Proponent and
Deceased.		Respondent's Brief

Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, District Judge

L. E. NELSON

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and Respondent.

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of
EMMA G. BUTTARS,
Deceased. }

Case No. 1945
Proponent and
Respondent's Brief

STATEMENT OF CASE

This is an appeal from the Judgment of the Trial Court entered on November 15, 1952, admitting the Will of Emma G. Buttars, to probate, notwithstanding the verdict of the Jury. The jury returned its special verdict on November 5, 1952, in which it found that the said will was not procured by undue influence or fraud, but found that on the date said will was executed on March 22, 1945, she was not of a sound and disposing mind.

The trial court no doubt based its judgment upon the undisputed evidence, as testified by both the attending witnesses, that Emma G. Buttars, unassisted, directed how she wanted her will made and the lack of any evidence of insanity. Both attesting witnesses testified that in their opinion Emma G. Buttars, on the date she made her will was mentally competent and had testamentary capacity.

STATEMENT OF FACTS

Whenever reference is made herein to the pleadings, judgment or the testimony, it will be the record number made at bottom of each page by the court clerk. The

facts as detailed on pages 2 and 3 of appellants brief are in the main correctly stated, except we submit that there is no evidence that Wallace Buttars, who is named as executor in the will, took advantage of his mother. Counsel states (Br. 3) that decedent kept her holdings intact until conveyance and transfers commencing six days after will was made. These deeds did not necessarily affect her holdings since she retained a life estate, and therefore, enjoyed the income from the property until her demise. (Con. Ex. 21, 23, 24.) And this income is reflected in her bank accounts. (R. 137.) And moreover, she retained title to most of her real property and also the bank accounts as appears from petition to probate will. (R. 1-4.) Counsel states (Br. 3) that prior to date of will, Mrs. Buttars wanted to treat all of the children equally. This no doubt explains why she gave his children, each one dollar, because as she stated in the will, Dan had failed to repay his loan, evidenced by (Exs. 2 and 3.)

We cannot agree with statement of facts as related on pages 4 and 5 of appellant's brief. These statements are at variance with the testimony of disinterested witnesses. From an examination of the will it is interesting to note that testatrix could and did remember the death of her son, Dan, and could and did remember the names of his children because she accurately detailed them to Attorney Daines. (R. 5, 42) and she had no one to assist her memory, (R. 38, 39) nor did she have a written memorandum to assist her. (R. 41.) She recited in her will that her son "Daniel D. Buttars" was deceased (R. 5) and noted the difference in his name (middle initial) with that of her deceased husband, Daniel Buttars.

Her mind was not confused, nor was her mind or body deteriorated to the extent, that she was incompetent to make a will. The testimony of both attesting witnesses is that Mrs. Buttars, unassisted, supplied the information from which the will was prepared. (R. 37-39.) She also had the note and mortgage (Con. Exs. 2 and 3) with her at the time and, left said documents and the will with Mr. Daines for safe keeping, and he retained them continuously until after her demise. (R. 46, 335.)

There is an apparent error in the Reporter's transcript (R. 204, line 8) in the use of the word "incompetent," or in the use of the same word by the cross examiner — and this is cleared up (R. 205) where the witness, Melvin Buttars, admitted that he had signed a petition to probate the will (Pro. Ex. B) on the grounds that his mother, Emma G. Buttars, was mentally competent to make the will, Pro. Ex. "A") (R. 205.)

The apparent confusion on question of the ownership of turkeys (Br. 5) is in the mind of the witness Melvin H. Buttars, and not in the mind of the testatrix (R. 201) for here the witness expresses only his own opinion as to the nature of the ownership. After all, Wallace was a tenant on her land. Counsel cites the testimony of Maybell Griffiths, as authority for the fact that testatrix did not know what property she possessed (Br. 5.) This witness testified that the time she was referring to was when Mrs. Buttars was sick in 1944 (R. 237) and in 1952, but nothing is said about 1945, when the will was made. And moreover, this was another of the witnesses who signed and authorized a petition to admit the same will to probate, but asked the court to appoint her brother Melvin as ad-

ministrator with will annexed, and she testified, (referring to said petition (Proponent's Exhibit No. B) — "Q. And on the day you signed this, about the 23rd day of July, 1952, you asked the court to probate this will as the last will and testament of your mother? A. Yes. Q. In which it states she's of sound and disposing mind and memory. That's the petition you signed, was it not? A. It looks like it. (R. 253)." And notwithstanding, the contestants attempted to discredit their mother and grandmother for as long as twelve years before her death, all of the testimony of the disinterested witnesses produced by proponents, is to the effect that to and including March, 1951, she was physically able to care for herself, and her mind was alert for a woman of her age. (266-330.) Dr. Randall, her attending physician testified that her mind was sound until March of 1952. (R. 294-296.)

Wallace Buttars, testified that he had no knowledge of provisions of the will and that he took no part in the making of the same. On page 393 of the record Wallace testified — "Q. I'll ask you whether or not you had anything to do with the making of the will, or suggesting, or anything at all to do with it. A. I never did." And he also testified — Q. Did you have anything to do or did you accompany your mother at any time when she went into the First Security Bank and bought those bonds and put them in her box? A. No., not unless she came to Logan with me and done it when I wasn't around. I may have brought her to Logan, but I was never with her when she made any of those bonds at all." R. 394.)

Then on page 14 of appellant's brief, counsel states that the witnesses who were brothers and sisters of Wal-

lace, all testified as to their mother's testamentary incapacity. We have pointed out previously that every one of these witnesses also were parties to two cross petitions (Proponent's Exs. "B and C") to the lower court to admit the will to probate, but asking that Melvin, be appointed Administrator with will annexed. Condonation of this conduct would amount to perpetrating a fraud on our Courts, and again we stress the fact that the jury found that there was no fraud, no undue influence in the execution of the will, and in view of these findings we submit that they bar any possible holding to the effect that the testatrix was of unsound mind at the date of execution of the will.

ARGUMENT

Point 1. *The findings and judgment of the court, admitting the last will and testament of Emma G. Buttars, deceased, to probate, notwithstanding the verdict of the jury, are supported by competent and uncontradicted evidence.*

There is direct, positive, and uncontradicted evidence that on March 22, 1945, the decedent, Emma G. Buttars, caused her last will and testament to be prepared by Attorney Newell G. Daines. (R. 35, 37.) On that occasion she went to his office, alone and unassisted, and furnished the information necessary to prepare the will. (R. 39). And upon completion thereof, and after it was read to her, she subscribed her name to the will in the presence of Attorney Daines and his stenographer Lois Schenk, and at her request and in her presence and in the presence of each other, they subscribed the will as attesting witnesses, and she then and there declared to them that it was her

last will and testament. (R. 39, 59.) The will was then left with Attorney Daines, from March 22, 1945, until after her demise which occurred on July 1, 1952. And it was not changed or modified in any respect.

In re Carr's will, 256 Pac. 580, the Supreme Court of Oregon stated:

"In determining the mental capacity of the testator at the time of making the will, great weight is to be given to the testimony of the subscribing witnesses. They have the opportunity to observe the mental condition and all the surrounding circumstances at the time of the execution of the will."

As further proof of the fact that Emma G. Buttars, was normal in all respects to and including the time she had a heart attack in March, 1951, we desire to briefly refer to the testimony of neighbors and friends, who frequently visited with Mrs. Buttars from the years 1940 to 1951.

Vivian Clark, a neighbor, (R. 277) testified that Mrs. Buttars attended his parent's golden wedding. This was in 1943. (R. 277). Mrs. Buttars was at the witness' home three times after 1944. Mrs. Buttars read the newspapers, discussed current events (R. 279), and he knew that Mrs. Buttars had been sick, but he noticed between 1944 and 1947 that she was very alert (R. 280.)

Donna Sparks, a neighbor (R. 281) testified: Q. "Would you say that she was normal for her age? A. Well, certainly. I only hope that I can say that I'm as normal when I'm that age." (R. 286.) This was at the time the will was executed. (R. 287.) Donna knew of a heart spell, but this was in 1951. (R. 289.)

Dr. C. C. Randall (R. 290) felt she was perfectly competent, and that the only time he saw her when she was not alert was in March, 1952. (R. 295.) Prior to March, 1952 her mind was always sound. (R. 296.)

Annie Thompson (R. 302) was her Relief Society Teacher with whom Mrs. Buttars discussed religious lessons—thought she was always alert and enjoyed visiting with her (R. 305.) In 1947 these were monthly visits (306-7.)

J. Byron Ravsten (R. 313) lived in Clarkston all his life (44 years old) and was Bishop of Mrs. Buttars ward, knew her all of the years in question, and noticed nothing unusual, until shortly before her death. (R. 315.)

Horace Bowles, (R. 319) was a Watkins Products dealer, and had been for twenty-seven years, and had called on Mrs. Buttars about every four or five weeks for 17 years (R. 320.) He did not notice any mental incompetency in his business dealings with her (R. 322.) “She never failed to recognize me. She never failed to recognize what I was there for.” (R. 323,) and he had continued to call on her till 1951. (R. 322.)

Sylvia Goodey (R. 326) was another neighbor who had lived in Clarkston all her life, and she noticed nothing peculiar about Mrs. Buttars (R. 327-8) as late as 1951.

Pearl Allen (R. 339) owns and operates a ladies ready-to-wear store in Logan, where Mrs. Buttars traded and had known Mrs. Allen for 15 years as a customer (R. 341) and Mrs. Buttars traded there all the time, right up to the last illness. (R. 343.) A. “Well I find that Mrs. Buttars was

always alert. She knew what she wanted and that was it . . . That was true during all these years . . . As long as she came into the store she was perfect.” (R. 342.)

This resume only includes, friends, neighbors, business acquaintances, the Bishop, the Relief Society Teacher, and the Doctor. May we ask why it is that not one of such people would say Mrs. Buttars was incompetent, and we must assume that if any of the people of Clarkston had thought she was incompetent the appellants would have produced them. There was not one disinterested witness who testified for appellants.

Herein we shall give a brief summary of the testimony of each witness called on behalf of the contestants and appellants, who will be referred to hereafter as appellants. The entire mass of testimony rendered by these people is so replete with evidence of the competency at the time of making the will, that the verdict of the jury in answer to the first interrogatory is impossible to understand.

For instance, note the three answers. (R. 16.) All the answers are in the negative and it is perfectly conceivable that the jury felt the answer to the first one to be in favor of respondent. Otherwise, how can the answers to No. 2 and No. 3 be reconciled with that of No. 1? If, in fact no such fraud or undue influence existed at time will was executed, the mother must have acted on her own initiative in dictating the terms of the will. We will briefly refer to the testimony of each witness produced by appellants to indicate the reasons back of the testimony and to show that the only reason for the contest was a disappointment in the terms of the will.

As a preliminary thereto, however, we will state that Dan Buttars was a deceased son of Emma G. Buttars, the testatrix. In the will (R. 5) the testatrix specially mentioned them, but because she had loaned money to her son Dan, their father, which had not been repaid she felt he had received a just proportion of her estate. It is interesting to note at this point (R. 37) that Mrs. Buttars gave Attorney Newel G. Daines instructions about the terms of her will, and there was no one present at the time to help, or to guide her, and he drew the will solely from her instructions. She had walked to the second story floor of the Cache Valley Bank Building — long and arduous steps for a person claimed to be feeble in mind and body. (R.38.)

Villa Bronson, granddaughter and a contestant, testified that Mrs. Buttars was not as mentally alert as she was before her illness (R. 63); and that she was not as keen as she used to be; but here witness was talking about a time two weeks before the death of testatrix, or seven years after the will was made. Witness testified that on Easter, 1945, two or three weeks after date of will, she visited her grandmother, and that she was keeping her own home, was a good housekeeper, and that she kept house in a neat and tidy manner; that testatrix had remembered the exact number of Dan's children though some first names were misspelled.

Ted Buttars, grandson and contestant, testified that he had been on a mission for the Mormon Church for some years (R. 85) and upon his return he was called into the navy in 1944, and returned in 1946. (R. 86.) Her memory probably wasn't as good as it was then (R. 87.)

It is very important to note Ted's testimony about his grandmother, when comparing her in 1946 to that of 1940. "She had been sick longer, and naturally she was older and more feeble, and I introduced her to my wife and she told me she was glad that we were married and so forth. But there was no definite conversation on any one thing. Just like natural acquaintances would talk about." Some complaint was made all through the testimony of these grandchildren that she sometimes failed to recognize them. Ted testified that his grandmother had 44 or 45 living grandchildren, 78 living great grandchildren, or a total of 122 grand and great grandchildren (R. 89,) and yet the fact that Mrs. Buttars sometimes failed to recollect some of their names and family connections, is given as a reason for her failing memory. We submit this to be a preposterous contention, and we will later show in this summary that not once did she ever fail to recognize her own immediate sons and daughters, and we call the further attention of the court that the will was made during war time, when most younger people were engaged in much travel about the world, and conditions were much unsettled to the minds of even the most astute people.

Ted believed his grandmother incompetent to make a will because she was 80 years old (R. 91,) but if Mrs. Buttars actually went to Mr. Daines office, gave him the information to make the will, without a memorandum, that she was comparable to any person he had ever seen eighty years of age. (R. 92.)

Omer Buttars, grandson and contestant, testified that he belived his Grandmother incompetent because — "I believe if she had been sound and capable of making a

will that involved as much property and all as her estate did, I don't believe she would have left us out like she did." (R. 108.) This witness was not so much concerned with mental capacity as he was at the disappointment he and his brothers and sisters had experienced, because he testified (R. 111-112.) "The reason we're in court contesting the will is that we don't think if she was sound in her mind and able to dispose of her property, that she would have cancelled off what little indebtedness she had at one time with my father, and then in the next paragraph in the will turn around and give the rest of them six or eight thousand dollars apiece. Q. And that's ^{the} reason you don't think she was competent? A. That's right."

Wendell Buttars, grandson and contestant: This witness was in the military service between the dates of February 20, 1941 and April 15, 1945. (R. 120.) He gave as some of his reasons for his grandmother's incapacity that she did not "break down" at his father's funeral some weeks previously, and yet he would not contend that she was insane. (R. 124.) He stated that she always recognized the people who had been with her, and it was the people who had been away three or four years that confused her. (R. 127.) Then he was asked: Q. "I want you to tell the jury one case, if you know of, when you were there when she failed to recognize her sons and daughters. A. No."

Maybell Griffiths, daughter: This is a very interesting witness. She stated that when her Mother was sick in 1944 (we claim that this sickness was 1946 — later shown), that there was not as great a difference as in the 1940 sickness. R. 236-7.) She was asked if her mother had a sound

and disposing mind and memory, and she answered, "Well, not to handle any amount of money." (R. 244.) Then she gave the reason why she wants the jury to find her mother incompetent to make a will. (R. 251.) Q. "Isn't it a fact that in that petition all you ask the court to do is appoint your brother Melvin as administrator? That's all you ask in that, isn't it? A. Well, that's fine." She was one of the petitioners to have her brother Melvin made Administrator—will annexed, to the same will she now questions. She wanted two things — that Melvin and not Wallace be executor, and she wanted Dan's sons and daughters to share in the estate. (. 252-3.) She wants the will probated, and she knows that if Melvin could be the executor of it, it "would be swell with her." (R. 253.)

Margaret Jardine, daughter: She testified that her mother accused people of taking things, laying them away and that she did things "all older people do as they get older." (R. 260.) She said her mother at no time after 1942 or 1943 had sufficient mentality to dispose of her property by will (R. 282,) but then she said: Q. "And your mother was simply a person normal for the age of eighty years; isn't that right? A. Oh, usual. (R. 264.) And then became one of the signers to the petition which prayed to admit her mother's will to probate, but to have her brother Melvin administrator of the estate with will annexed. (R. 264.) "Q. Do you know what you signed when you sixed this? A. Papers. Q. It was a petition, wasn't it, and you wanted this court to probate your mother's will, didn't you? A. Yes." (R. 265.)

Melvin H. Buttars, son of testatrix: This witness was given a free rein to show his mother to be incompetent

and said. (R. 179.) "Well as time went on her memory wasn't so good." He would not set a date when he felt his mother was incompetent. (R. 180.) He testified that his mother was neither physically nor mentally able to make a will between 1940 and 1952, the date of her death, yet he did not know that she had made a will until 1950. (R. 184.) And this witness filed two cross-petitions; in the same proceedings, and same court, to have the same will admitted to probate. (R. 204.) The following quotation from the cross-examination will indicate to the court why the lower court set aside the verdict of the jury: Q. (reading from the petition which the witness signed) "I'll read it to him, 'Being of the age of about eighty years and being of sound and disposing mind and memory and not acting under duress or undue influence from any person or persons whosoever, do make, publish, and declare this to be my last will and testament.' Did you sign asking the court to probate that will? A. I signed a petition asking to probate it? Q. Yes. A. No, I didn't sign a petition asking to probate it. Q. I refer you to petitioners' prayer—and one of them is you, right there—for letters testamentary. Do you know what that means? A. It means testifying, I guess. Q. 'And that said will be admitted to probate.' That's exactly the one you're asking the jury now to deny probate because your mother was incompetent. And that letters be issued to you, Melvin. Am I right or wrong? A. You're right. Q. You're positive I'm right, aren't you? And you alleged it on the theory your mother was competent at the time she made the will, didn't you? The substance of that is that you allege to this court and represented under oath sworn to before a notary public, Judge

Harris, that your mother was competent at the time she made that will, did you not? A. It's on there, yes." (R. 205.)

This witness shows the extent that he will go to gain his own ends, i. e. to have a jury determine his mother incompetent. "Q. This is the document (referring to the petition this witness and two sisters signed) alleging to this court your mother was competent to make a will, and you presented it for probate. Examine it and see if I'm correct. (Examines the petition to make him the Administrator with will annexed — same will.) A. I signed it, yes, if that's what's in there Q. And you ask the court that said will be admitted to probate and that letters of administration with will annexed be issued to Melvin H. Buttars (the witness,) and you thereupon represented to this court that your mother was of sound and disposing mind on the day she made the will, did you not? A. That's what's in them documents I signed." (R. 205-6.)

He testified that his mother did business after the sickness of 1940 as she did before, and in fact right up to her death. (R. 222.) He says: "As far as the signatures and the checks being wrote out, yes. She signed all of her checks up until the last while of her life." (R. 222.)

The character of the evidence of contestants is all the same and on the other hand, Doctor Randall who attended her for years, and all of the witnesses for proponent testified as to her mental ability. We remark with the Supreme Court of California in the case of Dobzensky's Estate, 232 P. 2d. 886, that "While it is not determinative, nevertheless it is remarkable that in this case no intimate

acquaintance nor qualified physician, not even respondent, saw fit to testify that in his or her opinion the decedent lacked testamentary capacity. This case appears to be another example of a jury finding a testator incompetent because the jury did not like what was done” “It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent mindedness and mental confusion, (if present only to a limited degree) do not furnish grounds for holding that a testator lacked testamentary capacity.”

Our search for cases where juries have held the testator incompetent mentally, and the appellate courts either reversed the verdict of the jury, or sustained the lower court in setting aside the verdict of the jury, results in some interesting cases outside of Utah. In *Re Lingenfelter's Estate* (Cal.) 241 P. 2d. 990. There the facts were long and witnesses testified that the testatrix was not of sufficient mental capacity to make a will, but based their opinion on facts similar to those we have such as an unstable mind. In our case some of the contestants had been away between 1940 and 1945 and 1946 as outlined above. The California Court said:

“Accepting that construction of the evidence most favorable to Lenore, it shows no lack of testamentary capacity at the time of the execution of the will presented for probate. There is testimony concerning isolated acts, foibles, idiosyncracies, mental irregularities or departures from normal which do not bear directly upon and influence the testamentary act. But much more than that is required to set aside bequests of property. *The actual mental condition of the de-*

cedent at the time of the execution of the will is the question to be determined upon a contest based on his alleged incompetency, and evidence tending to show unsoundness of mind either before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will To overcome the presumption of sanity, the contestant must show affirmatively and by a preponderance of the evidence that the testator was of unsound mind at the time he executed his will The acts which led certain witnesses to express the opinion that she was of unsound mind had no bearing upon her testamentary capacity. (Italics supplied.)

As in our case the California will was attacked because of an unnatural disposition of property, or disposition which contestants claimed testatrix would not have made had she been of sound mind, noting further:

But, when mental incapacity is the ground of attack, the dispositive clauses of the will are not, in and of themselves, evidence of mental incapacity which would overcome the presumption of sanity and competence."

The Arizona case of *In Re Greene's Estate*, 11 P. 2d. 947, is a very enlightening and important case where the issues were incompetence and undue influence. The action to deny probate of the will was entered by the wife, and several witnesses testified that the testator was incompetent. The trial court found the testator incompetent, but made no finding as to undue influence. In our case much stress is placed on the fact that the family of Mrs. Buttars considered the appointment of a guardian. Such was the consideration in the Arizona case:

“From the date of the amputation onward during the months of February and March, testator was delirious at times and admittedly during that period had various mental delusions. On the other hand, during most of that time he was apparently perfectly normal mentally. The strain of caring for him was great, both physically and financially, and his family and friends seriously considered *attempting to have him committed to the state hospital for the insane, but, as he improved, abandoned the idea.*” (Italics supplied.)

It will be recalled that Mrs. Allen, a Logan store owner transacted business with Mrs. Buttars almost up to the time of her death in 1952, seven years after the will. And the bank statements, both savings and checking, disclosed that Mrs. Buttars was managing her property and depositing the income in the bank to and including the year 1951, or within approximately six months of her demise. The Arizona case had this to say:

“On the contrary, it (evidence) is overwhelming to the effect that except during certain times in the months of January, February and March, when he was suffering great pain and worried over his physical condition, his mental capacity was good. He transacted considerable general business during and after this period, and the persons who did business with him stated that he displayed a full understanding of what he was doing. Even the witnesses for appellee admitted that most of the time he appeared perfectly competent. They based their testimony that in their belief he was not mentally competent to make a will principally on the fact that he unquestionably suffered from certain delusions during and shortly after his confinement to his bed The rule is that even though a testator does suffer from delusions or halluci-

nations unless the will itself was a creature or product of such delusions or hallucinations it is not invalid."

Contestants in case at bar make much of the matter concerning the fact of whether or not testatrix mistakenly thought her deceased son Dan owed her money. On this point, the Arizona case said:

"The testator may have been mistaken in the conclusions which he drew from his wife's conduct; but those conclusions were not so unwarranted, especially in view of the fact that the property in question was all accumulated by him before the marriage, that we can say that they show he was mentally incompetent to make a will. *Nor is a court concerned with the abstract justice or injustice of a will.*" (Italics supplied.)

In the Colorado case of *In Re Holmes' Estate*, 56 P. 2d. 1333, the court held that where the testator mistakenly believed that his sister was dead and therefore, made no provision for her, was not sufficient to invalidate the will. The court reversed the lower court because it was a jury question as to whether the belief of the demise of testator's sister was induced by fraud or other beneficiaries. Sane people are continually in the courts under the mistaken belief that others owe them money, and a verdict for defendant in such cases is no indication that the plaintiff is insane. We ask counsel for contestants to cite a case, where the mistaken belief was not induced by fraud sustaining his position in this respect.

A very important case is found from California in *Re Smethurst's Estate*, ⁵² 50 P. 2d. 830. The procedural matters were exactly like this appeal. In the California case, the jury found that the testator was insane at the time of the

execution of the will, and the lower court entered a judgment notwithstanding the verdict of the jury. The Supreme Court affirmed the judgment of the lower court after a review of the evidence saying:

“If the motion for a directed verdict is made at the conclusion of plaintiff’s case, the court cannot, of course, go beyond the evidence then before the court, *but if the motion is made at the close of defendant’s case, the court can review the entire record within the limitations imposed by law*” “Also there need not be and absence of conflict in the evidence, for, to deprive the court of the right to exercise this power, there must be a substantial conflict, and that presupposes at least a comparison of the substance of the conflicting testimony of contestants and proponents.” (Italics supplied.)

In that case some of the witnesses considered and testified to the fact that testator was insane at all times:

“It was testified he frequently drank to excess, and several of the witnesses testified they considered him insane. A few considered him insane at all times, but most of them considered him insane only when drinking, and when not under the influence of liquor they declared their opinion to be he was sane. The conception of most of these witnesses as to what constituted insanity was vague and uncertain.”

Upon the authority of that case we desire to direct the attention of the court to the fact, as pointed out in our review of contestant’s testimony, that the witness Omer Buttars, testified his grandmother, Mrs. Buttars, was incompetent because she did not make provision for the children of Dan Buttars.

In re Putnam's Estate, (Cal.) 34 P. 2d. 148:

In the matter of the estate of Adam Putnam, deceased, will contest by his son W. M. Putnam, opposed by the Wells Fargo Bank, etc. and other proponents. From a judgment for contestant entered on jury's verdict and from an order denying a motion for judgment notwithstanding the verdict, proponents appealed.

The evidence disclosed that he left an estate of about \$300,000. He devised and bequeathed to his executor, in trust, his entire estate. He was divorced from his wife, and left surviving daughter Edna, and a son W. M. Putnam, to whom he left monthly bequests of \$500.00, and \$250.00, respectively. His son filed an opposition to probate of his will. The testator died at the age of 82. It was charged that he used intoxicating liquor daily during the latter 40 years of his life which resulted in his insanity, and that because of liquors, testator had become so weakened in his physical and mental powers that he was incapable of testamentary act. The jury found that decedent was not of sound and disposing mind when the will and codicil were executed. The proponents moved for judgment notwithstanding the verdict which was denied. A motion for new trial was denied.

Upon appeal the judgment of trial court was reversed. In stating the contention of the contestant, the appellate court said:

“The contestant insists that the testator was possessed of an insane delusion which he described as an unexplained, intense, and unwarranted hatred and hostility toward his wife and her blood relatives, par-

ticularly the contestant; and unfounded and fixed belief that his children were worthless and incompetent; that they had "too much Johnston" and that they had no Putnam blood in them; an unfounded and fixed belief that whoever might marry his children had designs only on the testator's property and were awaiting his death to get hold of it; an unwarranted, unfounded, and fixed belief that his children were spendthrifts and would dissipate and squander his estate within three years after his death and become public charges."

In concluding that the testator possessed testamentary capacity to make the will in question, it held:

"The only reasonable conclusion from the record before us is that the testator was possessed of a parental belief, not abnormal or unfounded under the facts, relating to his son's ability to handle money, and that he took steps to protect him with an income adequate to his needs in addition to his own earnings for the balance of his life. Even though there may have been discord in the family during the decedent's lifetime or even injustice in the division of income between the children, that alone would not be sufficient to set aside a will executed by one in full possession of his mental faculties and otherwise competent to make a will."

In the Montana case of *In re Benson's Estate*, 98 P.2d. 868, the undisputed evidence discloses that Benson was taken to hospital on Wednesday, February 2, 1938, suffering from diabetes mellitus and left lobar pneumonia, from which illness he died at 8:45 a. m., Sunday, February 6, 1938. At time of his death he was 71 years of age. At his request a will was prepared on Saturday evening, February 5th about 12 hours prior to his death. When his will was

offered for probate, the executor named therein submitted proof in support of the allegations of his petition. Contest having theretofore been filed, the case was tried before the court and a jury. The trial and result thereof is stated in the opinion:

“A jury having been impaneled, the contestants submitted evidence in support of their contest, and at the conclusion of all evidence the court submitted a single interrogatory to the jury, as follows: Was John A. Benson competent to make a last will and testament at the time of the alleged signing of the instrument offered for probate as a will dated February 5, 1938? The jury answered the interrogatory in the negative, and thereupon the judgment aforesaid was entered.”

In reversing the judgment of trial court, the Supreme Court called attention to a fundamental rule, viz:—

“We must bear in mind that, in the solution of the question here presented, one who contests a will has the burden of proof once the allegations of the petition for probate have been sufficiently proven. In *re* Murphy’s Estate, 43 Mont. 353, 116 P. 1004, Ann. Cas. 1912C, 389. *Also that a testator may dispose of his property as he sees fit, and that courts cannot make wills for persons.* In *re* Silver’s Estate, 98 Mont. 141, 38 P. 2d. 277.” (Italics supplied.)

And the following observation made by the Montana Court is applicable to the situation present when Mrs. Buttars executed her will:

“It appears to us that the physical facts surrounding the execution of the will and the acts of the testator speak louder than the witnesses in supporting the proponent’s contention that the testator was competent.

Viewed in the light of the foregoing instructions, and from the evidence offered, it is clear that there is no question of incompetency by reason of insanity, or senility, or disease prior to the time testator was taken to the hospital, and that at the time of the execution of the will he had in mind the names of the objects of his bounty, and also the character of his property, and the manner in which he desired to dispose of it."

In the case *Klose et. al. vs. Collins et. al.*, 20 P.2d. 494, the Supreme Court of Kansas affirmed judgment in favor of defendants. On appeal, contestants assigned two principal errors, viz — "The findings and judgment of the court is contrary to the law and evidence," and "The court erred in sustaining defendants demurrer to the evidence."

The grounds upon which plaintiffs seek to set aside the will are mental incompetency of testatrix, undue influence, and want of independent advice:"

The testatrix, Hattie Weary, executed a will on August 4, 1931, at the age of 78. She died on December 1, 1931. For several years prior to her death she had been a widow, and she had no near relatives. The contestant's were children of half brothers and half sisters, who resided in New York and Pennsylvania. The defendants are Arthur J. Collins and Glen R. Sewell. They were president and cashier, respectively, of the National Bank of Sebetha, where she resided, and who had been friendly and helpful to her in the management of her affairs. They were appointed joint executors by her will. The contestants offered evidence to show that she had relied entirely upon the defendants in her business and personal transactions, since the death of her husband some seven years prior to her demise.

The trial court held that the evidence of plaintiffs was not sufficient to prove mental incompetency of testatrix or that undue influence or fraud had been exercised upon her.

In affirming judgment of lower court, the Supreme Court of Kansas referred to a well known rule which is followed in evaluating the evidence in a will contest:

“In order to possess the mental capacity to make a valid will the law, based upon the experience of mankind and common sense, does not require that the testator possess the ability to manage or carry on a complicated business enterprise. If necessary the mental capacity to know what property he has, and is able to make a disposition of his property with understanding reason, knows the persons and objects of his bounty, and their condition and relationship to himself, and is able to dictate the items of the will himself, this is sufficient.’ *Higbee v. Bloom*, 108 Kan. 723 733, 196 P. 1080, 1084.”

The court also called attention to another well known rule:

“The settled rule in this state is that one who is able to understand what property he has and how he wants it to go at his death, is competent to make a will even though he may be feeble in mind and decrepit in body.’ *Cole v. Drum*, 109 Kan. 148, syl. par. 6, 197 P. 1105, 1106. See also, *Risel v. McPherson County*, 122 Kan. 741, 253 P. 586; *Hoff v. Hoff*, 106 Kan. 542, 189 P. 613; and *Wisner v. Chandler*, 95 Kan. 36, 147 P. 849.”

In weighing the evidence the court said:

“There is no evidence here to indicate that the business relationship these two defendants had with the

testatrix ever reached the state of being such as might properly be termed confidential, nor the influence they may have had with her or over her being unduly used, in the making of the will or in other matters.” And then the court concluded:

“We conclude that the showing of mental incapacity was not sufficient under all the facts and circumstances to require the setting aside of the will on that account.’

It is respectfully submitted that the Supreme Court of Oregon in a recent case, *In re Scott's Estate*, 228 P.2d. 417, laid down a salutary rule:

“The last will and testament of a deceased person is an instrument of such great solemnity; that it will never be set aside unless the evidence is convincing that it should be.”

In re Peterknis Estate (Cal.) 73 P2d. 897, the facts are stated as follows:

“Under his will, dated May 12, 1931, with an holographic codicil dated September 23, 1933, he left his property to a sister, a cousin, seven nephews, five nieces, and four children of nephews and nieces. The will and codicil were admitted to probate on December 6, 1935. A petition to revoke the probate of said will was filed by the three sons and three daughters of the deceased upon the ground that on May 12, 1931, and for at least a year before and at all times subsequent thereto he was of unsound mind and incompetent to make a will, and upon the further ground that throughout said time he was in declining health and in an enfeebled mental condition; that he was suffering from delusions that his said children did not care for him, that they wanted him to die in order to get his property, that they were conspiring

to make his home life unhappy, and that they were unfairly siding with their mother in the domestic differences which had arisen; that said delusions grew until they became a monomania which existed at the time of the signing of said will and codicil and up to the time of his death; and that said delusions were the controlling mental factors governing the making of said will and codicil."

The trial was had before a court and jury. At the conclusion of contestants evidence, a motion for non-suit was granted. The Supreme Court posed the familiar rule:

"Under familiar rules the question presented is whether, viewed in the light most favorable to appellants, was there any substantial evidence which would have supported a judgment in their favor."

The evidence which is related in the opinion covers misconduct of the testator, in his relationship with his children whom he disinherited. Nevertheless, the Supreme Court affirmed the judgment of the trial court. The following well known rules were relied upon in the determination of mental competency sufficient to make a valid will:

"The law is well settled in this state that a 'testator is of sound and disposing mind and memory, if, at the time of making his will he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recall the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty, and whose interests are affected by the provisions of the instrument.' " Estate of Bemmerly, 110 Cal. A pp. 550, 294, P. 33, 37."

The court also relied upon the following rule:

“ ‘Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix’s estate.’ ” “ ‘Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion’ ”

The Court did not approve of testator’s conduct, but nevertheless held such conduct was not evidence of incompetency. We quote from the opinion:

“While the evidence indicates that the testator possessed many qualities which are not admirable, it is far from sufficient to show general mental incompetency at the time the will was made or that he did not then have sufficient mental capacity to understand what he was doing and to understand and recall the nature and situation of his property and his relations to the persons who had a natural claim on his bounty.”

In our search for Utah cases, not cited by appellant, where this court has passed upon the question of mental incompetency of a testator or testatrix, we find In re Bryan’s Estate, 25 P.2d. 602, and In re LaVelle’s Estate, 248 P.2d. 372..

The facts in the Bryan Estate case show that Bryan died at Ogden, August 15, 1929. His will was made on August 6, while he was confined in the hospital and immediately after a major operation had been performed. He left as his property a bank account of about \$8,000.00,

which he bequeathed to the St. Joseph's School at Ogden. He disinherited an only surviving sister Bertha M. Clinch, who resided in the state of Nebraska, and she filed a contest, in which she alleged mental incompetency and undue influence.

The contest was heard before the court, without a jury. At the conclusion of the contestant's case, proponent moved for judgment of non-suit, which motion was granted and upon appeal judgment was affirmed.

Although the evidence showed that decedent was a very sick man when he executed the will, the doctor testified that his mind was sound and that he could make a will. And the trial court and this court so held. We submit that the following excerpt taken from the opinion is in point on the issue of mental competency and burden of proof:

"In the instant case the burden of proof was on contestant to show mental incapacity and undue influence, and the proponent of the will could meet this by proof of a negative, that is, that he did not procure the execution of the will by undue influence, and that the testator was not mentally incapable."

In a recent decision rendered by this court in re LaVelle's Estate, 248 P.2d. 372, an interesting question is raised which is present in the case at bar. In that case testatrix lived for more than a year after the will was executed, and in the case at bar Mrs. Buttars lived seven years and three months. In considering the claim of contestants that Lucille LaVelle was incompetent at time she executed her will, this court said:

"There is another aspect of the case which is strongly persuasive that this third testament repre-

sented the will of Lucille Lavelle: It is indisputable that after its execution she lived for a year: about six months in Odgen and about six months in the Holladay rest home; during this time she had communication with others but made no effort to revoke the will or to make another. There is no evidence and no finding that she was incompetent at any time after the will's execution; and no reason appears why she did not have ample opportunity to change it if it had not conformed to her desires. As a matter of fact, there is no indication that she ever expressed any dissatisfaction with it."

The evidence in case at bar discloses that Mrs. Buttars actively kept account of her income from the property, real and personal, after executing her will. The bank statements show that she deposited large sums of money each year. She renewed a lease in 1948. During the seven years and three months the Buttars will remained in Attorney Daines office, so Mrs. Buttars had ample opportunity during that period, to make a new will or change the will, she made in March 22, 1945. Yes, Mrs. Buttars had ample opportunity to change the will, and as was stated by this court in the LaVelle decision — "there is no indication that she ever expressed any dissatisfaction with it."

Point 11. *The sole point raised by appellants on this appeal is that the verdict of the jury was supported by substantial competent evidence, and all legitimate inferences deducible therefrom, of lack of testamentary capacity on the part of the deceased at the time of the execution of the will in question and because thereof the lower court usurped the function of the jury in rendering judgment notwithstanding the verdict.*

In support of his contention counsel cites and relies upon *In re Alexander's Estate*, 139 P.2d. 432, and *In re Dong Ling Hing's Estate*, 2 P.2d. 902, to the effect that a will contest is an action at law, and hence the court cannot weigh and pass upon conflicting evidence, or pass on the credibility of witnesses.

There was no conflict in the evidence *In re Alexander's Estate*, *supra*. The evidence showed without dispute—"that the will was not signed by the testatrix in the presence of one of the subscribing witnesses." The witness testified — "No. I was not present when she signed it," and "I did not see her sign it." On that testimony, which was not in conflict, the court refused to admit the will to probate. The undisputed facts in the *Alexander Estate*, *supra*, cannot be compared with the undisputed evidence in the case at bar, since in the case at bar both subscribing witnesses appeared in court and testified that Mrs. Buttars, signed the will in their presence and at her request and in her presence and in the presence of each other, they subscribed their names to said will as witnesses, in fact, their testimony showed that all of the statutory requirements in the execution of the will were complied with.

In re Dong Ling Hing's Estate, 2 P.2d. 902, as stated in the opinion — "The chief issue before the court is the validity of the purported will, whether it was duly and lawfully executed and published by deceased, and duly attested by the subscribing witnesses." It appeared from the evidence adduced at the trial in that case, as reported in the opinion, that one of the subscribing witnesses when shown the purported will some time prior to the trial said—

"I didn't sign it." "No, that is not my signature." And when the other subscribing witness was contacted and he examined the purported will he likewise denied that he signed the document in question as a will, and that he did not sign it in the presence of the testator or the other witness. (2P.2d. 907 — 1st Column.) This testimony seemed to be undisputed.

The case of Galorowidz v. Ward, et al. 230 P.2d. 576 is cited by appellant in an attempt to show that the instant action, being one at law, the court cannot weigh and pass upon conflicting evidence. That case did not involve a will contest but a suit for damages resulting from an automobile accident. Galorowidz sued Robert Ward, a minor, his parents John M. Ward, and Mrs. John M. Ward, Max Siegel, and others. At the time of the accident Robert Ward was operating a car, the property of Siegel, who was the employer of John M. Ward. There was no dispute in the evidence relative to ownership of the car. It was conceded that Robert Ward, was at the time of the accident operating a car belonging to Siegel, but he was not Siegel's employee. Thus there was no conflicting evidence in that case on question of agency.

Since the contestant's did not call a physician to testify concerning Mrs. Buttars condition of health at the time the will was executed, there is an attempt on the part of appellants counsel to discredit the testimony of Dr. C. C. Randall, who testified that he had been her attending physician from the year 1934 to the time of her death which occurred on July 1st, 1952. He testified that with the exception of two occasions, the first in 1940, when she was confined in the hospital suffering from pneumonia,

and again in the year 1946, when she was again taken to the hospital for a short period suffering from a similar cause, her mental condition was normal for a woman of her age to and including March 1st, 1952. (R. 291-296.) Dr. Randall testified that her health and mental condition was normal during the year 1945, when she executed her will. (R. 260.)

On page nine of brief, appellant's counsel propounds the query? "Was the jury's verdict that the deceased lacked testamentary capacity at time will was executed, supported by substantial competent evidence?" The answer is definitely — No. Their verdict is contrary to the testimony of the two subscribing witnesses who testified that decedent furnished the information for the will, gave them the names of her children, and grandchildren, and stated why she desired to limit the childrent of Dan Butters, a deceased son to \$1.00 each. They testified that she declared it to be her last will and she signed it in their presences and they signed as attesting witnesses at her request, and in her presence and in the presence of each other. And the evidence shows that she took an active part in the management of her farm property each year after the date of will, until about March 1, 1952.

Counsel has cited the case *In re Swan's Estate*, 51 Utah 410, 170 Pac. 452, and contends that the Swan case is distinguishable from the case at bar. As a matter of fact the two cases are very similar in one or more important points, as the following review of the evidence in that case will show: Mr. Swan was a businessman of considerable wealth. He was 83 years of age when his will was executed. He was then suffering and, for a number of years

had been suffering from hardening of the arteries and with some disease of the kidneys, and at times he had spells of unconsciousness lasting several hours at a time; that these spells occurred about a month apart, and at times oftener. That when the spells were over his mind was usually clear. That he continued to transact business such as collecting his rents, and depositing the money in the bank. Mr. Swan wrote the terms of the will in long hand and then had it typed in proper form. He then signed the will in the presence of two of his business associates.

Mr. Swan intentionally omitted Maude A. Blackford, a granddaughter from his will because he had previously given her all the property he intended to bestow upon her. She filed objections to the admission of said will to probate. She alleged that at the time will was executed, Swan was not of sound and disposing mind. That he was unduly influenced and was prejudiced against her. That the will was procured by fraud, circumvention and undue influence, practiced upon the deceased by his son Ulysses G. Swan, or someone in his behalf. That the will was not executed in the manner and form required by law. At trial contestant contended that when Swan executed the will he was suffering from senile dementia and for that and other reasons the will cannot be permitted to stand.

The Swan will was attested by two of his friends. Both witnesses testified to the execution of the will. The court said that their testimony constitutes a prima facie case in favor of the testators mental capacity, and his will was admitted to probate and, on appeal the judgment of trial court was affirmed. It is respectfully submitted that the decision in the Swan case supports the trial courts decision in case at bar.

To support his contention that non-expert witnesses are competent in cases of this kind, he cites *In re McCoy's Estate*, (Utah) 63 P.2d. 622; *In re Hansen's Estate*, 52 P.2d. 1103 and *In re Swan's Estate*. Respondent has no quarrel with the contention that non-expert witnesses are competent in cases of this kind, in fact in the instant case proponent's called ten such witnesses.

However, the decision rendered by this court in *re McCoy's Estate* supra, is based upon defects appearing in the execution of the will. The facts in that case reveal that Mrs. McCoy was 92 years of age, was in a very weak and feeble condition when certain of her relatives attempted to have her execute a will. There was a serious question whether she would have executed a will had she been in normal state of health. And moreover, the trial court found, based upon the testimony of the subscribing witnesses to her purported will, that they did not sign it at her request, but signed it at the request of Attorney Cooper, who prepared the will. The evidence in that case disclosed that Mrs. McCoy was in a very sick and weakened condition, and was not conscious of the fact that a will was being made. She passed away one week after the purported will was made.

In re Hansen's Estate, 52 P.2d. 1103, trial was had before the court. The trial court found for the protestant, and concluded that proponent had procured the instrument wholly by persuasion, inducement, fraud, and undue influence; found the purported will null and void, and refused to admit the same to probate. The evidence disclosed that the testatrix was a cripple, resulting from spinal meningitis. That she was abnormal in her actions,

conduct, and outlook on life. The proponent of the will prepared it and induced her to sign it in his apartment, at night. The witnesses which he selected were not acquainted with the testatrix. Although the testatrix's mental and physical condition was extremely abnormal and weak, the court said; "The answer he gave that she was not normal does not necessarily imply that she was incompetent to make a will. In that case, the court found that fraud, undue influence and duress had been practiced upon Miss Hansen. In the case at bar the jury found that no fraud, duress or undue influence had been practiced upon Mrs. Buttars.

Counsel contends, page 20 of appellants' brief, that Mrs. Buttars was incompetent because subsequently to the execution of the will, she transferred a portion of her real property and some stocks, and purchased some war bonds in the names of Wallace, Archulius and Hattie, the three younger children, when the will provided that she would give the nine living childrent equal shares.

The will did not describe any property and of course could effect only the property, real and personal, owned by Mrs. Buttars at the time of her demise, which was conservatively valued at slightly under \$40,000.00 (R. 1-6.)

The fact that she retained a life estate in the deeds to Wallace and Archulius, from which she received one-half of crops grown on said lands until her demise, indicates that she possessed keen business acumen. And as a result of this provision the income which she had enjoyed prior to date of these deeds was not diminished but remained intact, and accounted in part, for the large bank accounts which she left at her demise. (R. 2.)

From appellants' attitude as reflected in the latter portion of their brief, the reader would be led to believe, that because Mrs. Buttars had made a will, that she would thereafter be estopped from disposing of some of her property. Counsel in referring to the aforementioned deeds etc., called it an unnatural disposition of her property. But he does not refer the reader to any statute or case which provides or holds that a person can not freely and voluntarily dispose of his or her property. But she had a reason for her action viz., that she wanted to give the three younger children this property to equalize the value of property which she and her husband had given to the older children prior to their father's demise. (R. 384.)

It is submitted that the matter mentioned by counsel from pages 17 to conclusion of brief are immaterial. The law afforded to testatrix the right to make exceptions in her will. She explained her reason for limiting her deceased son's children to \$1.00 each. No doubt she reasoned that inasmuch as her deceased son Dan had not paid his debt to her, his estate would be enhanced to that extent, and his children would receive that increase.

For the foregoing reason proponent and respondent respectfully submits that the judgment of the trial court should be affirmed, with cost.

Respectfully submitted,

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