Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mary Ann Pilkington v. *Samuel Brownlow Gray and another, from the Court of General Assize of Bermuda in Chancery; delivered 24th February* 1899.

Present:

LORD HOBHOUSE.
LORD MORRIS.
Lord Davey
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

On the 6th September 1883 probate in common form was granted of a will of Samuel Chapman who died on the 28th August 1883 domiciled and resident in Bermuda and possessed of real and personal estate there. The probate was granted on the oaths of Gustavus Barron Griset and Alfred Stewart Perry the attesting witnesses that the will was duly executed and attested according to the law of Bermuda which is the same as the law of England. Under this will the Respondents who are father and son are trustees and executors and are each entitled to a legacy of 200*l.* and to professional charges for all professional services and to a commission of 5 per cent. on all monies passing through their hands. The testator left a widow and one son and three daughters. The will after making a provision for the widow left the whole of his property except a considerable estate in Cuba which was the subject of another will called his Cuba will for the benefit of Mrs. Neave one of the daughters and her children. The Appellant Mrs. Pilkington is another of the daughters.

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On the 20th December 1889 the Respondents filed their bill of complaint in the Court of General Assize of Bermuda in Chancery to have the will confirmed and established and for an order of administration. It appeared in the bill that this was done in consequence of doubts and suspicions having been thrown upon the validity of the will by the sayings and doings of the widow and the son and the Appellant and her deceased husband. The Appellant was the only Defendant who contested the will. Mrs. Neave and her husband filed an answer concurring in the prayer of the bill and the heir-at-law and the other Defendants did not enter an appearance. The Appellant had no solicitor and was represented by a Mr. Mark Golinsky, not a lawyer, who was under an old Act of Parliament of Bermuda of the year 1690–1691 allowed to represent her. In her answer she denied the validity of the will on the grounds that the testator was not in a sound mental condition to make and execute a will and that the will was not executed as required by law to pass real and personal estate in Bermuda.

The Respondent Samuel Brownlow Gray gave his evidence on the 11th and 12th July 1893. He deposed that he was a barrister of Lincoln's Inn, was called to the bar in June 1847, came to Bermuda the same year, and had ever since continuously practised his profession in Bermuda; that he was appointed Attorney General of Bermuda in June 1861 and had ever since held that office; that he was elected a member of the House of Assembly of Bermuda in 1856 and had continued a member of it ever since. He became Mr. Chapman's professional adviser in 1858 and was so until his death. He then deposed fully to the preparation of the draft of the will from the instructions of the testator given at several interviews with him between January and July

1883. On the 18th June the draft was completed and he went through the substance of each clause with the testator and it was satisfactory to him. Having himself engrossed the will from this draft he went with it to the testator on the 11th July 1883. He then read the will to him clause by clause and when the testator asked for explanations of technical expressions or the effects of certain provisions he gave them to him and he was perfectly satisfied that the testator understood the nature and purport of every clause in the will. Having finished reading the will he told Mr. Chapman he would require two witnesses and Mr. Chapman went out on the verandah and he heard him call two names to persons in the front yard. Two young men came upstairs who were strangers to him but whom he since knew to be Alfred Stewart Perry and Gustavus Barron Griset. They came into the drawing room where he and Mr. Chapman were and he said to them "Mr. Chapman wishes you "to witness his will." He then deposed to Mr. Chapman having signed the will in the presence of himself and those two witnesses and that they signed the attestation in the presence of each other and of Mr. Chapman.

The attesting witness Perry was examined by Mr. Golinsky as a witness for the Appellant. He said in his evidence that when he came into the house Mr. Gray asked him to sign a paper, to remember what it was as it was Mr. Chapman's will; that Mr. Gray asked him to try and get someone else, that he went to Mr. Chapman's front gate and Griset happened to be passing and he asked him if he would come in and he did. He then said Mr. Gray again told him to remember what he was going to sign, it was Mr. Chapman's will, he signed a paper and Griset signed also.

He was asked by Mr. Golinsky "Did you see " the said Samuel Chapman sign the said paper " and answered " No sir."

Now it is very improbable that Mr. Gray who must have perfectly known what was necessary for the validity of the will would have taken Mr. Chapman's signature to it before the witnesses came into the room or that Mr. Chapman having been told that witnesses were necessary would *have* signed it before they came in. Their Lordships are unable to believe this answer. The witness was examined more than ten years after the transaction. In his cross-examination by Mr. Gray he was asked how he came to witness the will if he did not see Mr. Chapman sign it and he answered " Because at " that time I did not understand the nature of " a will." It may be that not knowing what was necessary he did not observe Mr. Chapman signing or that his memory is imperfect. Or he may have been prepared for the question and had it suggested to him what to answer. He admitted in cross-examination that he had an interview with Mr. Golinsky and Mrs. Pilkington and that about a month after it he left his employment at the dockyard at Bermuda and shipped on board a vessel of which Mr. Golinsky was the master. But the witness went further. Being shewn at the end of his examination by Mr. Golinsky the will of which probate had been granted and asked " Did you sign that signature " A. S. Perry to that document?" he replied " No sir." If this be true Mr. Gray must have obtained probate of a will of which the signatures of the witnesses are forged and the testator's also as it is not credible that Mr. Chapman had signed two wills. Their Lordships cannot believe this answer of Perry. There appears to them in

this and other parts of his evidence to be ground for the opinion of the Bermuda Court that he had been tampered with on behalf of the Appellant.

The other witness Griset was not examined and it was necessary for the Respondents to explain this. A witness named Pitt was called by them who deposed that he was the brother-in-law of Griset; that the latter was a purser in a steamship trading between New York and the West Indies and had been out of Bermuda several years and had only visited Bermuda three times for from one to four days on each occasion since he left it in 1889. The Respondents applied for the issue of a commission to examine him on oath and the Court refused it on the ground that it had no power to issue such a commission. The application was made on an affidavit of Mr. Reginald Gray the second Respondent who is a solicitor that he had made efforts to procure Griset's attendance in Bermuda but he insisted on the payment of a sum of money for his coming to Bermuda to give evidence which was considerably in excess of what the Respondents thought reasonable and just and they did not feel justified in acceding to his terms. There is in their Lordships' opinion a sufficient explanation of his evidence not being taken. It also affords some reason for the delay in bringing the case to trial.

Upon the question whether the testator was competent to make a will the evidence in support of it was that of the Respondent Mr. S. B. Gray who deposed that when he took the general instructions for the will he tested the testator's memory with regard to his property and other matter before he spoke to him about the will. He had gone at his request to talk to him about his will. He knew that he had had a recent illness the nature of which he was not aware of. He found that his memory was quite clear; he was most distinctly of testamentary capacity

at that time. He would have had no hesitation in transacting any business whatsoever with him or taking his signature to any document however important. On the 11th July when the will was executed he found him in much the same state as on the former visits; he was certainly on that occasion of testamentary capacity. James Bell Heyl a druggist who had known the testator from the time when he came to Bermuda to the time of his death deposed that he visited him seven times at his request between January 1883 and his death, on each of those occasions he conversed with him for hours and never saw anything wrong about his mental state, he seemed worried sometimes, on the occasions referred to he conversed on general subjects and was quite capable of transacting business, he never saw any signs of mental decay in him. The Reverend F. J. F. Lightbourn, rector of the parish of St. George, Bermuda where the testator had resided for some years before his death deposed that he frequently visited him, he had known him before he came to St. George's, his acquaintance with him increased after he came to live there and he saw him frequently during the last year of his life at his own house. From his intercourse with him during the last few years of his life he should take him to be a man of sound mind, he saw nothing to make him think differently. When he saw him in March, June and early in July 1883 if he had been called on to witness a will made by him he should have considered him capable of executing it. Andrew Greig who was in the testator's employ at the time of his death in charge of his stores in Water Street St. George's and had been in his employ for upwards of five years deposed that he saw him frequently during the last few months of his life, pretty nearly every day, he transacted his own business as far as the witness knew up to

the time of his death. From the time he entered Mr. Chapman's employ up to the time of his death he did not notice any signs of mental decay in him, his mind was quite clear during the last few months of his life, he never knew it to be otherwise.

The evidence for the Appellant upon the unsoundness of mind was that of Mrs. Chapman the widow. She deposed that from her husband's actions during the time they resided in Bermuda she concluded that he was of unsound mind, that she had known him incapable of transacting business for some some months before his death. But she said she never consulted a doctor about it and when shown in cross-examination a letter dated 3rd September 1889 purporting to be from her to Mr. S. B. Gray in which is this passage "As to the state of Mr. C's mind when he made "his will, as she was not there in St. George's, "she knows not how he was but she does know "that when she last visited him his mind was "clear and bright enough to receive her most "affectionately and whenever she visited him "he always received her in his usual manner "without any appearance of lunacy and why "not when he made his will," she said it was her writing. What had occurred between September 1889 and June 1893 when she was a witness to account for what she then said is not apparent. The other witnesses upon this matter were Perry, Mary Ann Bell his mother who said she had worked for some months for Mr. Chapman in the store, Cross a stonemason who had worked for him, but who said he had left his employ entirely about a year or two before he died and Luckenbach who became acquainted with him in 1878, and saw him for the last time in the autumn of 1882, and Mrs. Pilkington the Appellant. Their evidence is not of any value on this question, nor are the several

letters which were referred to by the learned Counsel for the Appellant. It would be difficult indeed to present to any court a weaker case against the competency of a testator than the present one. The testator may have been an eccentric man. The Court of Bermuda thought that he was, and their Lordships do not differ from that view, but eccentricity alone does not prevent a man from disposing of his property by will. The lower Court has made a decree according to the prayer of the Respondents' bill of complaint and their Lordships will humbly advise Her Majesty to affirm it and to dismiss the Appeal. The Appellant will pay the costs.

Their Lordships direct that the original documents in the case be returned to the Court from whence they came.