

*Privy Council Appeal No. 16 of 1958*

Robert Sidney Acosta - - - - - *Appellant*

v.

Alfred Owen Longworth and others - - - - - *Respondents*

FROM

**THE SUPREME COURT OF BRITISH HONDURAS**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER 1964**

*Present at the Hearing:*

LORD HODSON

LORD GUEST.

LORD DONOVAN.

*[Delivered by LORD GUEST]*

This is an appeal from an order of the Supreme Court of British Honduras (Mr. Justice Cools-Lartigue) granting the respondent Margaret Turton leave to reopen her defence in this action for the purpose of calling W. P. Thomson to give evidence.

The action was brought in the Supreme Court of British Honduras by the plaintiff appellant against the administrators of the estate of the deceased Robert Sydney Turton (who included the respondent Margaret Turton) to revoke the will of the deceased, dated 10th May 1918 and the grant of letters of administration to the respondents and to pronounce for the will of the deceased, dated 12th November 1955.

The deceased died on 15th November 1955. The appellant's statement of claim alleged that the deceased executed a will on 12th November 1955, that this will could not be found and that its contents were as stated in two affidavits of one Doyle Prince. It was conceded that if the will of 12th November 1955 was valid, it revoked the earlier will of 10th May 1918. The respondents in their defence denied the existence of the will of 12th November 1955 and asked for probate of the will of 10th May 1918.

The history leading up to and subsequent to the making of this will is recorded at length in the voluminous evidence before the trial judge. It is however only necessary to state the salient facts in order to bring out the point at issue on the appeal. The plaintiff led evidence to establish that prior to his death the deceased was seriously ill and that on 12th November 1955 after making several drafts he dictated a final draft to the witness Doyle Prince, a clerk, and it was then and there executed by the deceased as his will and witnessed by Prince and one Roland Dewgard. There was evidence that on the next day the deceased showed the will to one Nellie Price a public stenographer and instructed her to prepare a codicil. The will was then put in the deceased's hip pocket.

The subsequent history of the will up to and after the death of the deceased is somewhat confused, but the purport of the evidence is that after the death of the deceased the will could not be found having either been lost or destroyed. The will of 10th May 1918 was found, but further attempts to find any other will were unsuccessful. In February 1956 according to the evidence of Doyle Prince when he heard that the administrators were searching for another will he went to see W. P. Thomson then Registrar-General of the Supreme Court in his house and informed him of the will of 12th November 1955 and of its contents. The Registrar sent Prince to the Lord Chief Justice

who in turn sent Prince back to the Registrar. About 8th February 1956 Prince gave the Registrar a statement setting out the terms of the will of 12th November 1955 as far as he could remember them and the Registrar typed it and he (Prince) signed it.

According to the evidence of Roland Dewgard the Registrar subsequently on a date in February 1956 sent for him, and after Dewgard had told the Registrar of his part in witnessing the will, the Registrar typed out a statement which Dewgard signed.

After the defendants had called their evidence their case was closed. Counsel addressed the Judge who on 6th December 1956 reserved judgment. On 29th January 1957 the respondent Margaret Turton lodged a motion to call further evidence, but her affidavit was struck out on 5th March 1957 for non-appearance. She lodged a further motion on 13th May 1957 to reopen her defence and to call further evidence. In her affidavit it was stated that the evidence which she sought to lead was the evidence of W. P. Thomson former Registrar-General of the Supreme Court of British Honduras and that this evidence could not reasonably have been called at the trial. Attached to her affidavit was a statutory declaration by W. P. Thomson who stated *inter alia* that he was unable to type, that he did not on 8th February 1956 type out information given to him by Doyle Prince purporting to be the contents of a will made by R. S. Turton on 12th November 1955, that he did not present Roland Dewgard with a typed statement and that he had never at any time possessed a typewriter.

The argument for the appellant before the trial judge was that Thomson's evidence was inadmissible as going solely to the credit of Prince and that it had not been shown that the evidence could not have been obtained at the trial.

On 2nd September 1957 the judge granted Margaret Turton's application and in giving judgment said:

" I hold on the facts that the evidence could not have been reasonably obtained by due diligence on the part of the defendant before her case was closed. Thomson was not in the Colony when Prince and Dewgard gave their evidence, and the defendant could not have foreseen that Prince's evidence about typing or Dewgard's evidence (referring to the Registrar) would have been given. I hold also that the evidence must have an important influence on the result and in the interests of justice I feel I should grant this application.

The costs of the application must be paid by the defendant Margaret Turton."

It is against this order that the present appeal has been taken, final leave having been granted on 7th March 1958.

The sole question before the Board is whether in the whole circumstances Thomson's evidence was admissible. If it was not admissible, then the trial judge wrongly exercised his discretion to reopen the defence because there was then no further evidence to be called. If, however, any portion of Thomson's evidence was admissible, then it was conceded by counsel for the appellant that the appeal would fail. The question whether the evidence could reasonably have been obtained at the trial is one for the discretion of the judge and not a suitable matter for this Board (*Benoy Krishna Mukherjee v. Satish Chandra Giri* 55 I.A. 131).

If the evidence goes solely to the credit of the witnesses Prince and Dewgard, then it would be inadmissible. But if any of the evidence is relevant to the issue in the trial, it is admissible. In the course of Prince's examination in chief he referred to the document said to have been typed on 8th February by Thomson, and in cross examination he was referred to its terms. The document P.8 was put in evidence by A. O. Longworth, the acting Registrar of the Supreme Court, a witness for the plaintiff, who said that the document had been found among other papers in the Records relating to the Turton Estate. This was not the original of the document signed by Prince, but is apparently a copy. The concluding paragraph of the document is as follows:

“ I hereby certify that this is to the best of my recollection the Will which I wrote at the dictation of the late Robert Sydney Turton at his office on Saturday November 12th, 1955 and which was signed in my presence by the Testator and in the presence of Roland Dewgard and that after the Testator had signed Mr. Dewgard and I signed in the presence of each other and in the presence of Mr. Turton, I signing first. I have narrated all the circumstances under which the Will was made to the Registrar and am willing to testify to this in a Court of law.

Sgd. D. A. E. Prince.”

Their Lordships gravely doubt whether, if this document had not been produced, Thomson's evidence would have been admissible, as it would then have been directed solely to discredit Prince and Dewgard. But the document was referred to by the appellant's principal witness and produced by his witness in the course of his evidence. The appellant in order to succeed had to set up the will of 12th November 1955 and he sought by evidence and in argument to support his case by referring to the terms of the document which Prince said Thomson typed. Counsel for the appellant argued that this document was strictly inadmissible and that he was only founding on the oral evidence as to what was in the will. Their Lordships have difficulty in seeing how the appellant can object to the admissibility of a document which he himself produced although without objection by the respondents. The document is before the trial judge and it will be for him to estimate its value. Moreover, their Lordships consider that there is warrant in the case of *Sugden v. Lord St. Leonards* (1876) 1 P.D. 154. (Sir J. Hannen at pages 179 and 189) for the admission in evidence of such a document. If the document is admissible, and founded on by the appellant, then the circumstances under which it came into existence are relevant to the issue of what were the terms of the will of 12th November, 1955. The plaintiff in order to succeed must establish the terms of this will. Their Lordships have reached the conclusion that there was no legal objection to the trial judge granting Margaret Turton's application to reopen her defence and that it would not be proper for them to interfere with his discretion in granting the order against which the appeal has been taken. Nothing which has been said by their Lordships must be taken as in any way limiting or enlarging the scope of the evidence to be given by Thomson. It will of course be for the trial judge to decide himself on the admissibility or otherwise of any particular portion of his evidence.

Their Lordships regard the present as a special case dealing with the grant of probate to a disputed will in which class of case *Sugden v. Lord St. Leonards* (*supra*) is to be found. They do not regard the decision of the trial judge as in any way enlarging the right of a party to lead evidence solely directed to the credit of his opponent's witnesses.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

In the Privy Council

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ROBERT SIDNEY ACOSTA

v.

ALFRED OWEN LONGSWORTH  
AND OTHERS

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DELIVERED BY  
LORD GUEST

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