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DAME LINNIE HOLLAND McEWEN (*Plaintiff*) ..... APPELLANT;

AND

ESTATE CHARLES RUITER JENKINS ET AL. (*Defendants*) ..... RESPONDENTS;

AND

EDITH HOLLAND ET AL. ..... MIS-EN-CAUSE.

*Mar. 6, 7, 10, 11, 12
*Apr. 23, 24, 25
Oct. 7

DAME LINNIE HOLLAND McEWEN (*Plaintiff*) ..... APPELLANT;

AND

ESTATE CHARLES RUITER JENKINS (*Defendant*) ..... RESPONDENT;

AND

WESLEY H. BRADLEY ET AL. (*Defendants*) ..... MIS-EN-CAUSE.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Wills—Power of attorney—Capacity—Burden of proof—Action to set aside will and power of attorney—Accounting—Arts. 831, 835, 919 of the Civil Code—Arts. 566, 578 of the Code of Civil Procedure.

When a *prima facie* case is made against the *juris tantum* presumption of sanity, the person supporting the instrument has the burden of showing that the giver of the instrument was of sound mind. This obligation of proving lucid intervals by preponderance of evidence applies in the case of a will as well as in the case of a power of attorney. Furthermore, in order to avoid the instrument it is not necessary that the giver be totally insane, the rule being that a disposing mind and memory is one able to comprehend, of its own initiative and volition, the essential elements of the transaction.

The plaintiff, a particular legatee under the will of the deceased and also one of his heirs-at-law as a first cousin, instituted proceedings in annulment of the deceased's will, made 25 days before his death, and of a power of attorney signed 14 months prior, on the ground of fraud and incapacity. The power of attorney had been signed in favour of the defendant J, and both he and the defendant B had been appointed executors and trustees by the will. The action was directed against both defendants personally.

The trial judge held that both the will and the power of attorney were null and void and ordered the defendant J to account for his administration under the power of attorney, and dismissed the action against the

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Judson JJ.

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defendant B. The plaintiff appealed on the grounds that the trial judge had failed to find fraud, had failed to order both defendants to account for their administration under the will, and that the action against B had been dismissed. The estate of the deceased defendant J cross-appealed, but was the only party to do so.

The Court of Appeal, by a majority judgment, dismissed the appeal, declared valid the power of attorney and confirmed the judgment at trial as to the invalidity of the will on the ground that it had become *res judicata* since no interested party had appealed the judgment on this point.

Held: The action should be maintained. The will and the power of attorney were null for lack of mental capacity, and, furthermore, the judgment at trial avoiding the will was *res judicata* and could not be challenged.

The proponents of the will and of the power of attorney have failed to satisfy the onus, resting upon them, of establishing that at the time of signing the instruments, the deceased had the necessary mental power to execute them and that his weakness of mind allowed him to comprehend the effect and consequences of the acts which he performed. It has been shown that the deceased's mind was, at the relevant times, habitually in a state of confusion, incapable of discernment, and no satisfactory evidence was adduced that the instruments were executed during periods of lucid intervals.

The plaintiff, being an heir *ab intestat* if the will was void, had a sufficient interest to attack the power of attorney so as to increase the value of the estate.

None of the universal legatees having appealed to the Court of Appeal, the judgment at trial avoiding the will became *res judicata*. The executor had no interest to appeal that part of the judgment, as he does not represent the estate. His intervention in the contestation of a will is limited by art. 919 C.C. to exceptional instances only.

As the obligation to account rests also upon a person whose authority to act is derived from an instrument found void for lack of mental capacity, there should be an accounting of the administration done under the will as well as under the power of attorney.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], varying a judgment of Mitchell J. Appeal allowed.

R. S. Willis, C. D. Gonthier and *J. D. Hackett,* for the plaintiff, appellant.

A. Rousseau, for the defendant Jenkins Estate.

J. de M. Marler, Q.C., for the mis-en-cause.

The judgment of the Court was delivered by

TASCHEREAU J.:—We are concerned with two appeals in the present matter, in which Dame Linnie Holland McEwen is the appellant in both, arising out of an action instituted by her in the Superior Court for the district of St. Francis,

[1] [1955] Que. Q.B. 785.

in annulment of a power of attorney and of the last will of the late John C. Holland executed by him some time prior to his death, by reason of fraud and incapacity.

The plaintiff-appellant is a first cousin of the late John C. Holland and she is a particular legatee of $1,000 under the will, and she is also one of his heirs-at-law.

John C. Holland, retired printer and publisher, domiciled in the village of Rock Island in the district of St. Francis, Province of Quebec, made his last will and testament in the form derived from the laws of England on February 18, 1949. After having bequeathed all his property both moveable and immoveable, real and personal, to his executors and trustees, IN TRUST, he made some particular legacies to his sister-in-law Mrs. Agnes Holland, and to each of eleven cousins, of $1,000 each. He left to his friend Dr. Carson, to Mirabelle Robinson, to his physician Dr. Schurman, the sum of $1,000 each, and to Mrs. Helen A. Batchelor and Alma Talbot the sum of $500 each. He instructed his trustees to pay without interest the rest, residue and remainder of his estate in equal parts, share and share alike, to the Salvation Army and to the Canadian Red Cross Society, to be used for the general charitable and philanthropic activities of these two organizations.

He appointed as executors and trustees his friend Charles R. Jenkins, of the village of Rock Island, and his attorney Wesley H. Bradley, of the city of Sherbrooke.

On January 30, 1948, John C. Holland also signed a general power of attorney in favour of Charles R. Jenkins, appointing him his mandatory as his sole and exclusive agent and attorney, with full rights to sell, buy, hypothecate, discharge, discuss, transact, compromise, settle and turn to any account, the whole or any part of certain described properties in the power of attorney at his full discretion. Jenkins, in the same document, agreed and obligated himself to render an accounting to the mandator of all things done by him at the request of the mandator, and to show the equal division of profits and revenues to which each of them was entitled, by reason of an understanding existing between them in connection with said properties, but no evidence of which has been adduced.

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This power of attorney was signed in the presence of Dr. Schurman, his physician, and Mrs. Helen A. Batchelor, his nurse.

John C. Holland died on March 15, 1949, viz, 14 months after signing this power of attorney, and 25 days after the signature of his last will and testament.

The appellant who, under the will, inherited as a particular legatee of a sum of $1,000, and who, as a first cousin is an heir-at-law, instituted legal proceedings in the month of August 1950, in which she claimed that the late John C. Holland was not, after January 20, 1948, of sound and disposing mind, memory or judgment; that he was incapable of assenting to and understanding any act of alienation of his property by will, sale or otherwise, and that at and after January 20, 1948, he was under the undue influence, power and control of one of the defendants, Charles R. Jenkins. She concludes that the power of attorney executed on January 30, 1948, by the late John Calvin Holland should be declared invalid, illegal and of no effect; that all the deeds executed by the said defendant Jenkins under the power of attorney be annulled, set aside and declared invalid; that the last will of the late John Calvin Holland be declared invalid and of no effect; that the executors and defendants be condemned jointly and severally to account to plaintiff and to the mis-en-cause, the heirs-at-law, for the property of the late John Calvin Holland and for their administration thereof, and give to plaintiff and the mis-en-cause, the heirs-at-law, the immediate possession thereof; and further that the defendants, personally, be condemned to pay the costs of the action, and that the mis-en-cause be condemned to pay the costs only in the event of contestation.

The action was directed against Charles Ruiter Jenkins and Wesley H. Bradley personally, and the heirs-at-law were mis-en-cause, as well as the other parties referred to as the legatees mentioned in the last will and testament of the late John C. Holland. Five other parties of Rock Island and the surrounding villages referred to as the purchasers, under the power of attorney, were also mis-en-cause, as well as James W. Downing, Registrar for the Stanstead division, registry office of the district of St. Francis.

The Superior Court maintained with costs the plaintiff's action against the defendant Charles R. Jenkins, dismissed it against Wesley H. Bradley, and maintained it against the mis-en-cause, contesting, The Salvation Army and the Canadian Red Cross Society, with costs against the estate of the late John C. Holland. The Court decided that the alleged last will and testament of the late John C. Holland was null and void for all legal purposes as well as the power of attorney dated January 30, 1948. The Court also annulled, saving the rights of the purchasers to claim from the estate of the late John C. Holland any and all things to which they were by law entitled, six deeds of sale executed by Charles R. Jenkins under the power of attorney, and finally declared Charles R. Jenkins *comptable* to the estate of the late John Calvin Holland, of his administration as a result of the said power of attorney.

The plaintiff, although having succeeded on several grounds in the Superior Court, appealed from that judgment alleging that the trial judge had failed to grant some of the remedies prayed for. Particularly, the plaintiff complained that the Superior Court failed to find fraud, failed also to order the defendants Charles R. Jenkins and Wesley H. Bradley to account for their administration of the property of the late Holland, condemning only Jenkins to account for his administration under the power of attorney, without setting a delay within which the account must be rendered, and because it dismissed the action against defendant Bradley.

The Court of Queen's Bench[1] unanimously dismissed this appeal and confirmed the judgment of the learned trial judge as to the points appealed from.

Before the Court of Queen's Bench, the estate, by reprise d'instance, of the late Charles Ruiter Jenkins cross-appealed, and the Court, Mr. Justice Gagné dissenting, allowed the appeal of the late Charles Ruiter Jenkins, declared valid the power of attorney executed by Holland in his favour, quashed the order enjoining Jenkins to account for his administration under the power of attorney, and dismissed the action against him. The Court

[1] [1955] Que. Q.B. 785.

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of Queen's Bench, however, confirmed the judgment of the Superior Court, which had maintained the action against the mis-en-cause contesting, the Salvation Army and the Canadian Red Cross Society, the sole residuary legatees under the will, and had declared the will invalid, on the ground that this judgment had become *chose jugée*, no interested party having appealed from the judgment on this point. It will be noted that *only* the estate of Charles R. Jenkins cross-appealed, and that neither the Salvation Army nor the Canadian Red Cross Society, who were universal legatees under the will annulled by the judgment of the Superior Court, availed themselves of this right.

Before this Court, the plaintiff in the Superior Court Lennie Holland McEwen appeals from the judgment of the Court of Queen's Bench dismissing her appeal, and also appeals from the judgment of the same Court allowing the appeal of Charles R. Jenkins. The Canadian Red Cross Society and the Salvation Army before this Court cross-appeal from the judgment confirming the maintaining of the plaintiff's action against them, and confirming the declaration that the will and probate were null and void.

The first point that has to be considered is the capacity of the late John C. Holland to execute the power of attorney and the last will and testament which he has made. The learned trial judge has, I think, clearly expounded the law in his judgment. He applied the principle that if it is once shown that a party is not in his right mind, in reference to a future transaction, the onus is thrown upon the party who wants to sustain the validity of that transaction to show that, although not at one time in his right mind, he had recovered and was *compos mentis*. (Vide *Russell v. Lefrancois*[1], *Phelan v. Murphy*[2], *Thuot v. Berger*[3], *Mathieu v. Saint-Michel*[4]).

In this last case Mr. Justice Rand, speaking for Taschereau and Locke JJ., said at page 487:

> The evidence . . . was sufficient to raise a prima facie presumption of that degree of mental weakness or unsoundness and to cast upon those supporting the instrument of donation the burden of displacing it by convincing proof that the deceased at the time was able to give such a consent.

[1] (1883), 8 S.C.R. 335.
[2] (1938), 76 Que. S.C. 464.
[3] (1938), 77 Que. S.C. 211.
[4] [1956] S.C.R. 477, 3 D.L.R. (2d) 428.

In the same case at page 488, Mr. Justice Abbott speaking for himself and Mr. Justice Fauteux, said:

> In my opinion the medical evidence was sufficient to raise a prima facie presumption of mental incapacity. On the principle enunciated in *Russell v. Lefrançois* (supra), the burden of establishing capacity to have made the donation and the will was therefore shifted to the propounding party and in my view the appellants failed to discharge that burden.

The Judicial Committee of the Privy Council had also said previously in *Robins v. National Trust Company*[1]:

> Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form, will be presumed to have capacity, but the moment the capacity is called in question, then at once the onus lies on those propounding the will to affirm positively the testamentary capacity.

In *Baptist v. Baptist*[2], it was held, affirming the judgment of the Court below,

> that art. 831 C.C. which enacts that the testator must be of sound mind, does not declare null only the will of an insane person, but also the will of all those whose weakness of mind does not allow them to comprehend the effect and consequences of the act which they perform.

The first part of art. 831 C.C. reads as follows:

> Every person at full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, . . .

Article 835 C.C. says:

> The capacity of the testator is considered relatively to the time of making his will . . .

It is in the light of these sections that it has been established by the jurisprudence of the Province, that if a *prima facie* case is made against the *juris tantum* presumption of mental sanity, the person supporting the instrument has the burden to show that the testator was of sound mind.

Moreover, it has been decided, and these decisions are no longer challenged, that in order to avoid a will, it is not necessary that the testator be *totally insane,* and the rule is that a disposing mind and memory is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just

[1] [1927] A.C. 515, 1 W.W.R. 692, 2 D.L.R. 97.
[2] (1894), 23 S.C.R. 37.

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claims to consideration, revocation of existing dispositions, and the like. "Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole." *Leger v. Poirier*[1].

It is with these fundamental legal principles in mind that the learned trial judge approached the facts of the present case.

For a long time Holland had suffered from diabetes and in the year 1939 he had an automobile accident, as a result of which he was taken to a hospital in the city of Sherbrooke. He remained in the hospital for several months under the care of Dr. Ellis, who prescribed insulin for his diabetic condition. When he returned to Rock Island, his home town, his capacity had lessened considerably, and he was lame and walked with a cane. Very often he would fall asleep on his desk and at his meals. He showed less interest in his life, and the trial judge states that the evidence reveals that there was a gradual debility in his physical and mental functions.

On January 20, 1948, he was stricken with *un caillot au cerveau* which caused partial paralysis, and which necessitated his confinement to bed in the Newport General Hospital where he died on March 15, 1949. After his admission to the hospital on March 13, 1948, Mr. Justice White, after taking cognizance of the deliberations of the family council, found that Holland was incapable of carrying on his business, and appointed Herman A. Carson as judicial adviser with the powers given by art. 351 C.C. The learned trial judge also found that from the time that Holland became hospitalized until his death, he was a very sick man. This was the opinion of the medical experts, and it was also apparent to persons with no medical training who visited him at the hospital.

After having reviewed all the evidence on this question of fact, the trial judge says:

> I have heard the witnesess with the exception of Mrs. Batchelor and Miss Talbot, who were heard under a rogatory commission, and after having carefully studied and considered the voluminous transcription of all the evidence, I am left with a broad though clear cut conviction that the mind of the testator during the whole period of this fourteen months

[1] [1944] S.C.R. 152.

was one without any interest, devoid of initiative, and not capable of discernment. This state of mind is a complete contrast to the aggressive, independent and active mind of the late Mr. Holland before his illness. There is not one occasion indicated in the evidence when he can be said to have asserted his own will while in the hospital. There are multiple instances of his agreeableness. He always agreed. It is interesting to note that at any time when his consent or refusal to a proposal was obtained from him, it was at the instance of a question put to him, often in a leading form. On the whole taken together, the balance of the evidence is weighted heavily against the capacity of the late Mr. Holland at all times to which the evidence gives light.

The above statement of the trial judge has reference not only to the will he made on February 18, 1949, approximately one month before his death, but also to the power of attorney executed on January 30, 1948, ten days after he suffered the stroke which caused paralysis. The trial judge refers to a period of fourteen months as being "one without any interest, devoid of initiative, and not capable of discernment". In his judgment he says:

The position with respect to the power of attorney is different only in that it was signed on the 30th of January 1948, ten days after he was admitted to the hospital, and prior to the said judgment rendered by this Court appointing a judicial adviser to the late Mr. Holland upon a petition made by the Plaintiff to have him interdicted for insanity.

But the evidence is so strong that at many times both before and after the execution of the Power of attorney Mr. Holland was in a state of mind which would render him incapable of giving a valid consent to a document that any added burden put upon the Plaintiff because the Power of Attorney antedated the decision upon the Petition for interdiction by a period of about one month has in my view been rebutted.

Here again as in the case of the Will the evidence as to the late Mr. Holland's capacity at the time the Power of Attorney was executed is weak. I accept Mr. Frégau's statement that he was not present at the time the Power of Attorney was executed, without hesitation. The Defendant Jenkins was present but did not testify. Mrs. Batchelor, the nurse, was the sole witness offered and her evidence is no more convincing than in the instance of the Will.

In the Court of Queen's Bench[1], Mr. Justice St-Jacques held that the appellant had no legal status to ask for the annulment of the power of attorney, being only a particular legatee for $1,000. With this statement I do not agree, because the will being void, she was an heir *ab intestat*, and had an interest in obtaining a declaration of nullity of the power of attorney, so as to increase the value of the estate, of which she was an heir-at-law. Mr. Justice St-Jacques also held that when the power of

[1] [1955] Que. Q.B. 785.

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attorney was given, it was not established that Holland was not competent to sign the instrument. I will deal with this point later.

As to the will, he held that it was impossible to set aside the judgment of the trial judge because Jenkins, the executor and the only appellant by cross-appeal before the Court of Queen's Bench, had no status to support the will, the universal legatees not having appealed to the Court of Queen's Bench the judgment of the trial judge setting it aside. He thought, therefore, that there was *res judicata* as to the invalidity of the will.

Mr. Justice Gagné came also to the conclusion that as to the will, there was *res judicata,* Jenkins having no interest to appeal. He also reached the conclusion, agreeing with the learned trial judge, that it had not been established that Holland was competent at the time of signing his will. He also agreed with the trial judge that Holland was mentally incapable of signing the power of attorney. He therefore dismissed both appeals, being of opinion that the two instruments were null and void for lack of capacity, and that it was therefore unnecessary to examine the contention of the appellant that they were obtained by fraud or illegal manoeuvres.

Mr. Justice Hyde also held that the executor had no interest in the will and that as to it there was *res judicata.* He however reached the conclusion that the power of attorney was signed at a moment when Holland was *compos mentis.*

Three judges of the Court of Queen's Bench consequently held that as to the will, there was *res judicata,* and that the judgment should stand, but only Mr. Justice Gagné held that the testator was mentally incapable. The majority of the Court of Appeal, Mr. Justice Gagné dissenting, held that the power of attorney was valid.

I agree with the learned trial judge and with Mr. Justice Gagné, that at the time of signing the power of attorney and his last will, Holland did not have the necessary mental power to execute them, and that his weakness of mind did not allow him to comprehend the effect and consequences of the acts which he performed. He had even affixed his signature on a white piece of paper, evidently not knowing

that it was intended to be a power of attorney to be completed later, which Mr. Fregeau, Q.C., refused to do. It has been overwhelmingly shown that his mind was habitually in a state of confusion, incapable of discernment, and no satisfactory evidence has been adduced that the instruments were executed during periods of lucid intervals. This burden rested upon the proponents of the will and of the power of attorney. They have totally failed, on this point, to satisfy me.

I may add that the constant jurisprudence which imposes upon the proponents of a will the obligation to prove lucid intervals by preponderance of evidence, when a *prima facie* case of incapacity has been established, applies not only in cases of wills, but also in cases of execution of other instruments, as for instance *powers of attorney.*

Moreover, I am in complete agreement with the unanimous pronouncement of the Court of Queen's Bench, that as to the will, there was *res judicata,* the universal legatees not having appealed. Only Jenkins did, and he had no interest to do so. The principal function of the executor is to see to the proper execution of the will. He does not represent the estate; he is the mandatory of the deceased, and it is from him only that he holds his powers. An action to set aside a will cannot be directed against him. (Colin et Capitant, Droit Civil Français, t. 3, 1950, p. 961) (Encyclopédie Dalloz, Droit Civil, vol. 2, p. 690 et seq, verbo Exécuteur Testamentaire) (Aubry et Rau, Droit Civil Français, vol. 11, 5e ed., p. 425) (Baudry-Lacantinerie, Traité de Droit Civil, Des Donations et Testaments, vol. 2, p. 317) (Duranton, Cours de Droit Français, t. 9, p. 590) (Laurent, Droit Civil Français, vol. 14, p. 386) (Beudant, Droit Civil Français, Donations entre vifs et Testaments, vol. 7, t. 2).

In certain instances, the executor may support the validity of the will (919 C.C.), but his possible intervention is limited to certain cases only. As Demolombe says (Cours de Droit Civil, Donations entre vifs, vol. 22, t. 5, p. 66, nº 79):

> Et encore, pensons-nous que ce serait le droit et le devoir de l'exécuteur d'intervenir, s'il s'apercevait que les héritiers *s'entendent frauduleusement* avec les tiers pour dissimuler au préjudice des légataires, l'actif réel de la succession, soit par des jugements, qu'ils voudraient laisser rendre collusoirement contre eux, soit par des traités quelconques.

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At p. 57, no. 68, he adds:

> Nous ajoutons qu'il pourrait prendre parti tout à la fois contre les uns et contre les autres, s'il arrivait que les héritiers et légataires s'entendissent pour tromper, de concert, les intentions du testateur.

The French law is similar to ours on this point, and Mignault shares the same views as the commentators of the *Code Napoleon*. He says (Droit Civil Canadien, vol. 4, pp. 477 and 478):

> En vertu des pouvoirs généraux que la loi lui confère, l'exécuteur testamentaire doit protéger le testament lorsque les héritiers ou légataires ou même des tiers tentent collusoirement de le faire annuler. A cet effet, l'article 919 porte que s'il y a contestation sur la validité du testament, l'exécuteur testamentaire peut se rendre partie pour la soutenir; et cette disposition doit s'entendre tant de la validité du testament tout entier que d'un legs qu'il renferme. Ce n'est pas que l'exécuteur soit le représentant de la succession ou qu'il ait qualité pour plaider au nom des héritiers; ces derniers seuls sont les représentants de la succession. *Mais comme l'exécuteur testamentaire a pour mission de veiller à l'exécution du testament, il convenait de lui donner le droit d'intervenir dans une instance où l'on attaque ce testament, afin d'éviter que par collusion l'héritier ne le laisse annuler.* Tel est le seul but de la disposition que j'ai citée. *On ne pourrait donc pas poursuivre l'exécuteur testamentaire en nullité du testament*: ne représentant pas la succession, il n'a pas qualité pour répondre à cette action. *L'action doit être dirigée contre l'héritier lui-même,* et l'exécuteur testamentaire peut intervenir dans l'instance, s'il le juge à propos, afin de soutenir le testament, mais là se borne son rôle. C'est ainsi qu'on doit entendre une décision du juge Larue dans une cause de *Poitras v. Drolet* (12 C.S. p. 461), à l'effet que l'exécuteur testamentaire n'est que l'administrateur des biens de la succession, et n'a pas qualité pour lier contestation sur la légalité du testament, *laquelle ne peut être débattue qu'avec les héritiers ou légataires du testateur.*

I have therefore reached the conclusion that the will and power of attorney are null for lack of mental capacity, and furthermore, that the judgment avoiding the will not having been appealed by the interested parties, constitutes *res judicata,* and cannot be challenged now.

Article 919 C.C. and the authorities cited above, not only establish the absence of interest of the executors to appeal before the Court of Queen's Bench, but also show that the action could not have been directed against them *es-qualité,* as claimed by the respondents and cross-appellants. The executors had to be sued personally as they have been, although I agree with the Courts below that fraud has not been conclusively shown.

I do not believe that it is necessary to determine if undue influence has been exercised to overbear the will of the testator. Having reached the conclusion that Holland was mentally incapable, this aspect of the case need not be discussed.

Jenkins and Bradley purported to act as executors of a will which is null and void, and Jenkins furthermore acted under a power of attorney which I find invalid. It necessarily follows that Jenkins and Bradley, having assumed the role of executors, and having administered the estate *de facto,* must account to the heirs-at-law, as well as Jenkins who acted under the power of attorney. The administration of property on behalf of another party, whether as trustee, mandatory, tutor, curator, testamentary executor, or *negotiorum gestor,* involves the obligation to account.

This obligation also rests upon a person whose authority to act, derives from an instrument which is found to be void for lack of mental capacity. The obvious conclusion is that Jenkins and Bradley must account to the heirs-at-law for the administration of the estate under the will, and the former must also account for his administration under the power of attorney. The heirs have the absolute right to know what has become of the assets of the estate, and under the *Code of Civil Procedure* (art. 566), a time limit must be determined. I believe that a delay of four months from the date of the pronouncement of this judgment would be fair and reasonable. If the respondents fail to do so, then the appellant must avail herself of the dispositions of art. 578 of the *Code of Civil Procedure.*

It has been argued on behalf of the respondents, and the cross-appellants, that this action cannot succeed, because it has not been shown that all the heirs-at-law were *mis-en-cause.* I entirely disagree with this proposition. When the estate is finally settled, all the heirs will of course have to be legally called, and if any have not been *mis-en-cause* in the present instance, a suggestion which I doubt very much, their rights may always be safeguarded. Moreover, as it has been said in *Russell v. Lefrançois, supra,* this technical question may not be raised here now, the respondents having failed to do so in the courts below.

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In this latter case, Taschereau J., as he then was, said at p. 362:

> Les parties souffriraient une criante injustice si nous refusions maintenant d'adjuger sur le litige pour un tel motif. Dans la cause de *Richer v. Voyer* (5 Rev. Lég. 600), le Conseil Privé disait sur une objection semblable prise devant lui:
>
> > Their Lordships would be most reluctant to dismiss this suit for want of parties at this final stage, unless it was clearly demonstrated that they ought to do so.
>
> Ici, il n'est pas absolument nécessaire que toutes les parties intéressées à cette succession soient présentes pour que nous décidions de la contestation que le demandeur, l'intervenante et la défenderesse *Morin,* ont bien voulu lier ensemble en l'absence des autres. Notre jugement ne pourra, il est vrai, affecter en loi ceux qui ne sont pas en cause; mais il est à espérer, cependant, qu'il mettra virtuellement fin à toute contestation sur ce testament.

And further at p. 363:

> Ceci est encore une objection que cette cour ne peut que voir que d'un mauvais œil à cet étage de la cause. Il serait bien malheureux qu'après une contestation si longue et si coûteuse, le litige entre les parties fût tout à recommencer par suite d'une objection de cette nature prise au dernier moment.

I would therefore direct that the will be held invalid for mental incapacity, and on this point I agree that there is *res judicata,* and I would also declare the power of attorney void, as not having been executed by a person of sound intellect. I would order W. H. Bradley, as well as the Jenkins estate, representing the late Charles Ruiter Jenkins, to render an account within four months of the pronouncement of this judgment, of their administration of the estate of the late John C. Holland, and I would also order the Jenkins estate to account within the same period of time for the administration by Charles R. Jenkins under the power of attorney, signed by the late John C. Holland.

The plaintiff's appeals are allowed.

The judgment of the trial judge is modified as to the defendant Charles Ruiter Jenkins, former executor of the will of John C. Holland, now represented by his estate, who will have to account within four months from the date of the pronouncement of this judgment to the estate of the late John C. Holland. The action against Wesley H. Bradley, co-executor of the estate, is maintained, and it is ordered that he also account within the same period of time to the Holland estate. The power of attorney signed by John C. Holland on January 30, 1948, in favour of

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Charles R. Jenkins is declared null and void, as not having been executed by a person of sound intellect. The estate of Charles Ruiter Jenkins will also have to account to the Holland estate for his administration under the said power of attorney within the same period of time. The cross-appeal lodged before this Court by the Canadian Red Cross Society and the Salvation Army is dismissed.

The defendants, viz: the estate of the late Charles Ruiter Jenkins, and Wesley H. Bradley, will pay the costs in the Superior Court, but there will be no order as to the costs against the mis-en-cause the Canadian Red Cross Society and the Salvation Army.

In the Court of Queen's Bench, the respondents, viz: the estate of the late Charles Ruiter Jenkins and Wesley H. Bradley, will pay the costs, but the costs of the cross-appeal by Charles Ruiter Jenkins will be borne only by his estate. There will be no costs against the mis-en-cause, the two charitable institutions, who did not appeal.

Before this Court, the plaintiff-appellant Linnie Holland McEwen will be entitled to her costs in both appeals, and to her costs on the cross-appeal by the Canadian Red Cross Society and the Salvation Army, which is dismissed.

Appeals allowed and cross-appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Hackett & Mulvena, Montreal.

Attorneys for the defendants, respondents: Rousseau, Howard & Bradley, Sherbrooke.

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*Oct. 23, 24
Nov. 19

MICHAEL HARRISON and CLARE McKAY, an infant under the age of twenty-one years by his next friend, F. J. McKAY and the said F. J. McKAY (*Plaintiffs*) ..... APPELLANTS;

AND

MARY A. BOURN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Collision between car making left-hand turn across road and car coming in opposite direction—View of turning car not obstructed—Driver absolved from negligence by jury—Verdict unrea-

*PRESENT: Locke, Cartwright, Fauteux, Martland and Judson JJ.

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sonable and unjust—Duty under s. 41(1)(d) of The Highway Traffic Act, R.S.O. 1950, c. 167—Objections to judge's charge—Real issue never put to jury—New trial directed.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment dismissing the action after a trial by jury.

H. G. Chappell and *A. F. Rodger,* for the plaintiffs, appellants.

T. N. Phelan, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for Ontario which affirmed a judgment dismissing the plaintiffs' action after a trial with jury. The plaintiff Harrison was the owner and driver of one of the cars and the plaintiff McKay was his passenger. This car collided with a car owned and driven by the defendant Mary A. Bourn on October 4, 1956, a little before 9 p.m. on No. 11 highway between Thornhill and Steele's Avenue. Harrison was south-bound and Miss Bourn was north-bound. No. 11 highway at this point is a four-lane highway, two lanes north and two lanes south, divided by a double white line. Miss Bourn was in the north-bound passing lane and made a left-hand turn from this lane across the two south-bound lanes, intending to enter the parking lot of Loblaw's store. The collision occurred when her car was pointing in a westerly direction with its front close to the entrance to the parking lot. She was blocking the south-bound driving or curb lane and also part of the south-bound passing lane. She says that she did not see the south-bound Harrison car until the moment of impact. The evidence is undisputed that she had a clear view to the north for seven or eight hundred feet.

The jury absolved Miss Bourn from negligence and found the plaintiff Harrison entirely to blame for the accident because he was travelling at an excessive speed through an area marked "Caution". The caution sign is some three hundred feet north of the Loblaw store on the west side of the highway and is undoubtedly intended to warn south-bound traffic of the existence of the store and the probability of traffic entering and leaving the parking lot attached to the store. The Court of Appeal dismissed

the appeal, the majority holding that it was open to the jury on the evidence adduced to exonerate Miss Bourn from any causative negligence. Mr. Justice F. G. MacKay dissented on the ground that on the whole of the evidence, no jury reasonably could have exonerated the respondent from some degree of negligence causing the accident. He would have granted a new trial.

My opinion, with respect, is the same as that of Mr. Justice F. G. MacKay. On the defendant's own story, she did not see the oncoming car until the moment of impact. On any view of the evidence this car was in view during the whole time when she was making her turn across the south-bound two lanes. Her duty in making this turn is clearly defined by s. 41(1)(*d*) of *The Highway Traffic Act:*

> (*d*) The driver or operator of a vehicle upon a highway before turning to the left or right from a direct line shall first see that such movement can be made in safety, and if the operation of any other vehicle may be affected by such movement shall give a signal plainly visible to the driver or operator of such other vehicle of the intention to make such movement.

There was a plain disregard by Miss Bourn of the direction given by the first part of this rule. Quite apart from the objections urged against the judge's charge, this case appears to me, as it did to the dissenting judge in the Court of Appeal, to be one which requires the intervention of an appellate Court as being "so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it"; *McCannell v. McLean*[1]; *Adam v. Campbell*[2].

It is also my opinion that the appellant's objections to the judge's charge are well founded. The issues here were very simple—the speed of the Harrison car, the propriety of Miss Bourn's turn and her duty to look and to see what was coming across her proposed path. Had she looked she could not have failed to see the lights of the oncoming

[1] [1937] S.C.R. 341, 343, 2 D.L.R. 639.
[2] [1950] 3 D.L.R. 449, 454.

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car. She says that she did look and that she did not see any such car. In these circumstances, there was real substance in the plaintiff's objection taken at the conclusion of the judge's charge that there had been failure to instruct the jury in accordance with *Swartz v. Wills*[1], to the effect that "where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible". Such an instruction was at no time given.

I do not think that the real issue with regard to the allegation of negligence against the defendant was ever put to the jury. The sections of *The Highway Traffic Act* having to do with left and right turns at intersections; left turns from a one-way highway into an intersecting two-way highway; left turns from a two-way highway into an intersecting one-way highway; moving from one lane to another—none of which were relevant to the issues in this case and all of which were submitted to the jury—could only serve to obscure the one section that had real relevancy and which the jury appears to have ignored completely.

I would allow the appeal with costs both here and in the Court of Appeal and direct a new trial. The costs of the first trial will be reserved to the trial judge.

Appeal allowed with costs, new trial directed.

Solicitors for the plaintiffs, appellants: Chappell, Walsh & Davidson, Toronto.

Solicitors for the defendant, respondent: Phelan, O'Brien, Phelan & Rutherford, Toronto.

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[1] [1935] S.C.R. 628 at 634, 3 D.L.R. 277.