# Judgment In Hopper-Dunsmuir

## Hon. Justice Drake Delivered Judgment In Famous Will Case Yesterday.

### James Dunsmuir Wins Suit With Costs Against Plaintiff and Intervener.

(From Sunday's Daily.)

Yesterday morning the Hon. Mr. Justice Drake delivered his judgment in the famous will case, Hopper vs. Dunsmuir. There was a large crowd in the Assize Court to hear the decision which was in favor of the defendant, with costs against both plaintiff and intervener. The judgment will be appealed.

In the Supreme court of British Columbia. Hopper vs. Dunsmuir; Joan Dunsmuir, intervener.

Judgment of the Honorable Mr. Justice Drake.

This is an action brought by Mrs. Hopper, the step-daughter of Alexander Dunsmuir, against James Dunsmuir, the executor and legatee of Alexander Dunsmuir, to set aside the will of the said Alexander Dunsmuir on the usual grounds of undue influence, incapacity and insanity; and also to set aside a deed made between Josephine Dunsmuir, formerly Josephine Wallace, dated 1st December, 1900, whereby in consideration of an annual payment of $2,000, the said Josephine Dunsmuir waived and relinquished for herself, her heirs, executors, administrators and assigns all right, claim and interest to all real and personal property left by the said testator wherever situate, and all family allowance arising under the laws of British Columbia or California. With regard to the plaintiff's right to attack the will of the testator I fail to see any right, legal or equitable, which enabled the plaintiff to take such a step. If the testator died intestate the widow would be entitled to do so, but the plaintiff is no blood relation, and the tables of consanguinity do not recognize a step-daughter, or any one who is not of the blood of the testator.

With regard to the deed of the 1st of December, 1900, it is alleged that deed was obtained by undue influence, as to which I will refer later when I discuss the evidence—admitting for the sake of argument that it was obtained by undue influence, it therefore was a voidable transaction, and is good until disaffirmed. Mrs. Josephine Dunsmuir did not disaffirm it in her lifetime, and the plaintiff cannot disaffirm it now, being personalis moritur cum persona.

After this action had been partly heard and the plaintiff's case was drawing to a close, Mrs. Dunsmuir, the mother of the testator and of the defendant, applied to be joined as intervener which was allowed, and she, as next of kin, set up, as against her son, the defendant, the same case as the plaintiff, against the will of the testator. This case has taken a preposterous time—42 days—to try, and although eighty witnesses were examined, many of them were of no assistance to the case, and a great deal of irrevelant testimony was adduced which had no bearing whatever on the issues; but I allowed considerable latitude owing to the statement of counsel that the line of examination was necessary to the full appreciation of the case they intended to present, which, however, when admitted did not support their view. Objections were taken to the admission of a great deal of the testimony, but instead of disposing of them as they arose, counsel agreed to argue these objections at the close of the case, as there was so much jury, but no argument at the close was addressed by either side on these points, and consequently the notes are encumbered with a mass of utterly immaterial and irrelevant matter.

The testator was about 46 years old when he died. He had been in California since 1877 on his father's business representing his father, Robert Dunsmuir, until his father's death in 1888. After that date he continued to manage the business for himself and his brother, the defendant, until 1896, when the business was converted into a joint stock company, of which the testator was president. The business in California was confined to selling coal from Vancouver island; chartering ships; obtaining employment of the company's own vessels; and arranging all matters of this sort. The business was a very large one. The coal was supplied by R. Dunsmuir & Son, of Victoria, and the coal mines of which supplied the coal, and the railway from Victoria to Nanaimo all belonged to the testator and his brother equally. The testator was president of the railway and the various coal mines were operated as separate joint stock companies for the convenience of book-keeping. The testator is spoken of by many business men as a man of marked business capacity, very shrewd and keen, but he was rather a silent man, difficult for strangers to get on with; abrupt in his speech, and, I should say, rather domineering and arbitrary. He did not go into society, owing perhaps to his social relations with Mrs. Wallace, whom he shortly before his death made his wife.

The evidence discloses the fact that he drank to excess, and was frequently laid up because of periodic drinking bouts. He had three or four attacks of delirium tremens, but one characteristic habit of his was that he never was seen by any of his employees under the influence of liquor during his office hours, which generally lasted until about 1 p. m.; after that period he undoubtedly drank more or less. When he had been on a spree, as some witnesses describe his actions, he kept away from the office until he entirely recovered. These sprees lasted from a few days to two or three weeks. This is the character of the man as disclosed in the evidence, and it is on this habit of excessive drinking that the plaintiff's case is founded.

The evidence runs in two lines. First, the class of evidence relating to his home life, where all the follies of intoxication, the delusions, incoherencies, mutterings and irrational remarks are all set forth in detail as if they were the ordinary condition of the testator when not suffering from alcoholism. The class from whom these witnesses are drawn are bell boys at the hotel, barkeepers, hotel men, car cleaners, and people of this class, not one business man among them; and some deserving of little credit. Others are speaking of a period five to ten years anterior to the will, such as W. D. Hopper, Buzzelo, Geo. Hock, Mrs. Douglas. This latter evidence is worthless if the medical evidence is correct that the disease which they alleged he died from was alcoholic dementia, as that only takes from 18 months to two years to run its course. But here again the doctors differ. One says he never knew a case of less than two years, and others speak of months.

The next class of evidence is the medical testimony, and this requires careful consideration. The first witness was Dr. Marshall, who attended from 1886 to September, 1897, who says that he had attacks approaching delirium tremens about every six months, and he noticed a gradual breaking down of his health; and he speaks of times when the testator was afraid of being poisoned, and heard voices, and he did not consider him of sound mind. During the time he was attending him he was called in about twenty times. In all of them he was always suffering under the influence of liquor, but when sobered he was sensible enough. This evidence refers to the general results of intoxication. All the indications the mentions are clearly due to drinking and not necessarily to insanity for he says he talked sensibly enough when he was sober.

The next medical witness is Dr. Culbert, of New York, who attended the testator in January, 1900. He says he was in bed more or less delirious. The testator had an alcoholic breath and his speech was incoherent and unintelligible. His mental condition was weak and he was suffering from alcoholic dementia which must have been of some years' standing. His examination occurred very shortly before his death, and he certified the cause of death was meningitis, which usually does not last longer than two weeks, and in the case of the testator it lasted five to seven days; and the symptoms might equally relate to alcoholic monomania, or alcoholic dementia. The latter is a form of insanity from which persons do not recover, and a person suffering from it is incapable of managing business affairs; his judgment is poor and his memory impaired, and he could not comprehend business transactions at all.

The next witness, Dr. Edward Janeway, is stated to be a man universally known over America as a man of great ability and famous as a diagnostic of diseases, and he says he was suffering from alcoholism which had produced impairment of mental conditions, and he was physically weak. But he says that he has seen worse cases make a permanent improvement; and in reply to a question, "Would you characterize his condition as alcoholic dementia?" he says, "I think that is the best word for it." "But," he says, "I had hoped he might entirely recover, and people do recover from alcoholic dementia in the sense I use it." This evidence of a man of Dr. Janeway's standing is, in my opinion, far more important than that of Dr. Culbert or Dr. Dumond. He does not diagnose the case as alcoholic dementia, which Dr. Culbert and Dr. Dumond both do in explicit terms, but he says you might call it so, and yet he hoped he might entirely recover. He, therefore, looked upon the recovery as possible if his physical strength kept up. All the medical testimony that was called assert in strong terms that there is no recovery known from alcoholic dementia. It is a progressive disease with no sane moments. Dr. Janeway, therefore, did not look upon it as alcoholic dementia, for he must have known that if it was so, no recovery was possible. This evidence, therefore, is completely at variance with the other medical witnesses. The symptoms which both doctors speak of are consistent with other forms of disease arising not only from alcohol but from other affections of the brain. Dr. F. C. Buckley saw him in 1888, and he ordered him abroad. He says when he returned he was semi-idiotic from drink, and had Bright's disease. The latter complaint is denied by all the medical men who attended him. This statement of Dr. Buckley must arise from lapse of memory or from a mistake in his diagnosis. This is the medical evidence of the plaintiff in support of the charge of insanity, except that of Dr. Carlos F. Macdonald, an expert, who stated that he had read the evidence of the witnesses examined in New York and San Francisco, and came to the conclusion that Alexander Dunsmuir was suffering from alcoholic dementia. This witness admitted that the symptoms of meningitis were almost identical with the symptoms of alcoholic dementia, and mental symptoms do not differ from other forms of dementia; and he admitted that a man suffering from alcoholic dementia could not understand the nature and extent of his property, for the disease blunts the capacity of understanding. It might not be noticeable by an ordinary layman, yet in the early stages he could do business; transact important business, and make suggestions and sign cheques, yet be mentally incompetent. This expert testimony is of little value. If a man can transact important business yet be mentally incompetent it is a contradiction in terms which I cannot appreciate. If mental incompetency arising from disease existed it would show itself, more especially when his faculties are engaged in deciding very important matters. If he is capable of deciding important business he is capable of making a will. Men are not all formed with the same mental faculties, and yet if Dr. Macdonald is correct, a man of feeble intellect, yet showing no mental derangement, is still incompetent to manage business matters. I place but little reliance on evidence of this character; it is of the usual class when an expert is retained on one side or the other. He is not impartial and struggles to impose his views on his listeners. Dr. Macdonald had no evidence before him of the business ability the testator exercised in business matters. He knew nothing about the business matters which occupied his attention when sober, or of the opinion held of his capacity and shrewdness by those with whom he was brought into contact. The evidence that satisfied him was the ravings and follies of a drunken man, and the supposition that he never was otherwise. He was not, therefore, in a position to form a proper diagnosis of the case, a previous history is all essential.

I will now discuss the medical evidence adduced for the defendant and point out that this evidence is based, with one exception, on personal attendance on the testator. Dr. Thorne knew the testator since 1890, but commenced to attend him medically from October, 1897, to August, 1899. His first visit was in consequence of a debauch. After that he had to perform an operation for hemorrhoids, in November, and the result was that the testator was confined to his bed for some time, as his recovery was slow. He became convalescent the latter part of January, and, in addition, he suffered from herpes, a distressing complaint, which pulled him down, and he did not recover till March. He partially abstained from liquor during this period, but broke out in May, and was ill all that month, and continued drinking for the next two months, and came to Victoria about the end of August, 1898, having been drinking more or less up to his arrival in Victoria, and was threatened with an attack of delirium tremens, on which occasion Dr. Davie attended him. When he recovered the testator and a party, including Dr. Thorne, went away on a fishing trip, during which period he was perfectly well and took an active part in the excursion and enjoyed a good appetite; and he further says when he was free from the effects of alcohol he was all right—with no signs of any mental derangement, and no indication of it was ever mentioned by Mrs. Wallace, who nursed him during his drinking attacks. The doctor never, all the time he knew him, found him incoherent or mumbling in his speech except when drunk, and he was not suffering from alcoholic dementia or chronic meningitis. He never had delirium tremens when the doctor attended him. The doctor made a careful examination of him at the Grand hotel, and found disease of the liver and heart. As Alexander Dunsmuir had told Dr. Thorne he had been told by a doctor that he had Bright's disease, the kidneys were carefully examined, but no sign of the disease found. The doctor found no sign of want of coherency in his speech and no tremor. He described him as an overbearing man to his employees, intolerant of contradiction, impatient in argument; not given to talking much; his mental powers had not been weakened since 1897 down to 1899. The intimate relations between doctor and patient during the years that Dr. Thorne attended him must surely have brought to the doctor's attention anything indicating insanity, particularly if, as Dr. Culbert states, it must have been of several years' standing, which is, after all, an opinion not founded on any knowledge of the history of the case, but a presumption only.

Another medical witness is Dr. Davie who had known him for ten years before, and who treated him in 1898 when in Victoria when he was suffering from alcoholism, and he states he was a man of very strong constitution and great recuperative powers, and when he had recovered from the attack he went away on the fishing trip before mentioned, and returned in first-class condition. Dr. Davie made a careful diagnosis of his condition and says his mental condition was first rate, but when he was ill his speech was difficult, but this did not last after his recovery. He walked erect and there was nothing peculiar in his walk. He further stated that death from alcoholic dementia was very rare; people suffering from alcoholism died generally from heart or arterial troubles. He differs from Dr. Culbert's evidence as the symptoms in his opinion did not warrant a diagnosis of alcoholic dementia. The symptoms given might belong to many other diseases, and no diagnosis could be satisfactory without a complete history of the case, which was not obtained.

Another medical man, Dr. Huntingdon, in the latter part of November, 1899, was asked by Mrs. Wallace to make an examination of the testator, which examination took place about December 8, 1899, having been told of his drinking habits and sprees. He made a careful and exhaustive examination. He made him walk about the room, to test his walk, and says his lungs were normal; his heart accelerated; digestive organs fair; tongue clean, with a slight tremor; reflexes slightly exaggerated. Alexander Dunsmuir took him to see the house from cellar to attic, and explained the sanitary details; and he says his walk and talk was that of an absolutely normal man, which he says surprised him after the conditions which he had heard. He dined with him and another man. He eat heartily and discussed various topics. There was no dropping of food, and he says he did not think it was possible he was suffering from alcoholic dementia. The history he received prior to the examination he made from Mrs. Wallace led him to expect to find more serious conditions, instead of that he found him in a normal condition of mind and body. He was at this time quite sober, and the symptoms attributed the symptoms detailed to a fit of drunkenness, and unless he stopped drinking it was, as witness says, bound to kill him sooner or later; and he had known in his practice a case where three days drinking produced acute meningitis followed by death of the patient. He considered Alexander Dunsmuir belonged to the class of periodic drinkers, with great recuperative powers.

This closes the medical testimony on both sides, and the result is that from August, 1898, to December, 1900, he was attended medically for drunken sprees of longer or shorter duration; he was carefully examined by the different medical men and none of them discovered the slightest indication of mental disturbance. If the disease existed it is hardly possible to have escaped the trained eye of the gentlemen who were in attendance on him. In addition to these observers the defendant called a Dr. Gardiner, who for many years was superintendent of the Nova Scotia Asylum, and opened a private hospital for the same class of disease. He considers that the symptoms detailed were consistent with chronic meningitis, toxic effect of alcohol and alcoholic dementia. If he was suffering from alcoholic dementia he could not do business as there are no lucid intervals in that complaint. It could not develop in the months or escape his medical men. This is strong effect the testimony of Dr. Macdonald and Dr. Gardiner has in sweeping aspersions upon the medical profession, and deal with matters of business importance, and Dr. Gardiner has never known a case that developed in a year.

Having thus dealt with the medical testimony, I will now refer to the other branch of the subject—the ability of the testator to transact business during the twelve months of his death. He was president of the E. & N. Railway company; vice-president of the Union Colliery company; he was also president of R. Dunsmuir & Son company in San Francisco. The business in San Francisco occupied his chief attention, as he had sole control of it. They sold a large quantity of coal in San Francisco and elsewhere abroad. He had to arrange for chartering vessels to carry coal, and to get speedy despatch. All these matters were attended to by the testator. None of his employees ever saw him under the influence of liquor during business hours. The men with whom he transacted business, namely, J. H. Fritch, who was buying coal by the cargo, saw the testator almost daily, except when he was away from his office, and from the way he transacted his business he had no doubt of his sanity—that he was good memory. In December, 1899, he requested the witness to ascertain what the Nanaimo people were doing (this was a rival company) and he urged him again after a lapse of ten days or a fortnight to look after the company. This was a business matter that would not have struck an insane man. He also attended the Exchange almost daily to see freight and shipping. Mr. George Fritch, who had extensive business transactions with the testator, whom he had known for over twenty-five years, bought purchases from the company of which the testator was president, being from 25 to 30,000 tons a year, saw nothing to indicate incapacity. His mind was clear. Mr. W. E. Highell, president of the California Shipping company, knew the testator since 1882, and chartered ships from him in 1898 and 1899. In September, 1899, he arranged where the vessels were to load, and he chartered a ship of the testator's in 1899, and he speaks of him as sharp and shrewd in business matters. Saw no difference in his speech from the time he knew him first down until 1899, and physically only the change age would make. This witness saw the testator very frequently and they generally crossed by the Oakland ferry together as they both lived on the other side of the water.

Eugene M. Freeman, a pilot commissioner of San Francisco, knew the testator for over twenty years. Saw him almost daily, and on 20th December, 1899, talked with him. He was quite coherent and connected, and discussed business matters of the subject of chartering vessels, which he stated he would arrange in March on his return from New York. He attended a meeting of the directors of the company in San Francisco on the day before the will was executed. Mr. Young, manager of the Bank of British Columbia, speaks of frequent business discussions with the testator as to the bank account, and always found him quite sane and business-like. Further evidence of the same character was adduced, and in no case is there any suggestion of any weakening of the mental faculties, and no indication of anything approaching alcoholic dementia; and in further support of the defendant's case direct evidence is given of the building of the house at San Leandro and furnishing the same. The architect and the contractor for the building, who are entirely unconnected with the parties to the suit, both speak of him as clear in mind during the time. In April, Wharton speaks of him as weak and moving feebly, but his mind was clear. He was then recovering from a prolonged spree. He arranged with Wharton to build a stable and discussed the particulars, and also arranged for the removal of a cottage to another part of the grounds. He also built a powerhouse for the generation of electric power, and built almost a mile of telegraph posts; and during the whole of the year 1899 he was employed at these various works. The house and works were closely criticized by him and in some respects altered; and no indication of any weakness of mind or want of intelligence or memory. Fraser, who was the county surveyor, settled with Alexander Dunsmuir the situation of the house in April, 1899, and he wanted the drive altered, and he ordered him to survey the leased land. He saw the testator at various periods up to the end of October, and during these times there was no indication of any want of mind or memory.

Then Mr. Lowe, the secretary of the R. Dunsmuir & Son company, of San Francisco, and head man in the office, speaks of the fact that the testator was never under the influence of liquor at the office, and never noticed anything wrong with his memory, which was always good, or his articulation. He arranged the charters of the vessels, and if he was absent from business Lowe went to see him and took instructions. In November negotiations were commenced for the purchase of the property which the company had under lease for their coal yards, etc. The price was to be $300,000. The negotiations were carried on by Alexander Dunsmuir, and purchase money was arranged for between him and the defendant and the purchase was completed in December, shortly before the will was signed. Further evidence in this connection is found in the statement of A. E. B. Ridley who installed the electric plant at San Leandro; the contract for which was made in December, 1899, and which was signed by the testator; and this witness noticed no difference in him from what he appeared in 1896. J. E. Freeman, who saw the testator two or three times a week up to December 15, 1899, speaks of him as rational and sane. Richard Chandler, who had known him forty years, and saw him just before going to New York, always found him quite clear in his mind; and Wm. E. Highell, a prominent man, president of the California Shipping company, and a large ship owner, always found the testator a thorough business man, and in September, 1899, he arranged about the loading of a vessel, and on December 20 he discussed freights with him and found him very sharp and shrewd in business. Found no change in his speech or memory. Thus the evidence has traced the public and private history of the testator down to the time of his execution of the will and none of those witnesses with whom he transacted business ever saw any indication of any weakening of the mental faculties. They knew of his drinking habits, but they did not appear when he had business to transact.

I now deal with the execution of the will. The defendant, at the request of the testator, brought the will prepared by Mr. Pooley down to San Leandro. He handed it to the testator, who read it and asked his brother to keep it until after the wedding. The witnesses to the will prove he was perfectly sober at the time. The clergyman supports this evidence. After the marriage the will was executed, and I will now trace the reasons for the will which was made. In September, 1898, Alexander Dunsmuir gave Mr. Pooley, K.C., instructions to prepare his will, and those instructions were to leave all his property to James Dunsmuir and $50,000 to each of his surviving sisters. He wanted to put this money in the hands of trustees, but Mr. Pooley advised him to give it direct. Subsequently he returned to the office and decided not to have trustees: On the 5th of October he came and read the will. He said it might hamper James, and therefore instructed Mr. Pooley to make a will leaving everything to James and write a letter directing James to pay $50,000 to each of the sisters, which it would be convenient. The will was thus prepared and taken away and subsequently signed at the club, not in the presence of Mr. Pooley. The solicitor told Mr. Pooley he had signed the will but had torn up the letter. In November, 1899, the defendant came back from California and told Mr. Pooley his brother was going to get married, and said he wanted a new will; and what he wanted was a copy of the will he had made before, and wished the defendant would bring it down when he came to the wedding. The will was prepared 12th December, 1899. It is a principle always observed that when a will is drawn on the instructions of a person who is benefitted by the will that the greatest care should be observed in scrutinizing every step that is taken and all the surrounding circumstances. Here there are surrounding circumstances. In 1897 he spoke to Mr. Bullen about his property, and said he was not long for this world, and he was leaving all to James and his children as he had been his father and built the business up. He was very devoted to his brother James, and he did not want his brothers in law to spend his money. Joseph Freeman was an intimate friend of twelve years standing, and was present when Alexander Dunsmuir told James to bring his will down, and this witness told him he could not make a will in San Francisco and leave his relations out. He said he could in British Columbia. He further told witness manifesto, he bought their mother out but she had charged them $400,000, and his sisters had their share. He also told Mr. Taylor that his wealth would benefit James and his children. This evidence shows that the testator prior to executing the will in question were clear and defined. It also confirms Pooley's statement that the instructions to prepare the will, to be executed after the wedding were properly conveyed to him by the defendant as Alexander Dunsmuir's own instruction." It is therefore to see that any undue influence was exercised over Alexander Dunsmuir by the defendant. In Barry vs. Butlin (1838) 2 Moore P.C., 480, Parke, B., says the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is that a party who writes or prepares a will under which he takes a benefit is a circumstance which ought to excite the suspicion of the court, and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. Fulton vs. Andrews (1875) 7 E. & L., 488, Lord Hatherley: "Those who have been instrumental in preparing or obtaining a will have thrown upon them the onus of proving the righteousness of the transaction." Here we have the intention of the testator expressed by authority responsible and reliable witnesses, carried out by a will made under his direct personal instructions in 1898, and an exactly similar will executed in 1899, the one in dispute. Also I have the fact that it is made in favor of his only brother and a partner in all his business transactions, and one in whom he placed the utmost confidence and reliance. I think the evidence entirely satisfies the onus thrown upon the defendant with regard to undue influence. It is said in Mountain vs. Bennett (1787) 1 Cox, 353: "Though a man may have a sufficient soundness and discretion to manage his own affairs still if such a dominion or influence be obtained over him as to prevent his exercising that discretion in making a will, he cannot be considered as having a disposing mind as will give it effect. Undue influence is neither persuasion or suggestion; it must amount to force and coercion, destroying free agency, as Mr. Justice Williams says in his book on Executors: and in Hall vs. Hall (1868) L. P. & D., 482, after defining what is meant by undue influence he winds up with a "testator may be led, not driven, and his will must be the off-spring of his own volition and not that of another." Applying these principles to the evidence adduced, I am of opinion there is no evidence of undue influence, and it is further to be remarked that the testator had such implicit confidence in his brother that he left it to him verbally to pay to his widow $1,000 a month, which his brother said was insufficient, and he raised it to $2,000 a month, which was subsequently increased at the pressure of Mrs. Dunsmuir's solicitor to $25,000 a year, and one-half of the profits of the San Francisco business after certain debts were cleared off, which was stated would take about two and a half years. It must not be lost sight of that his widow's name does not appear in the will, and the reason assigned is that he had provided for her. He had bought this property at San Leandro in her name, and built a residence on it at a cost of some $350,000, and he said that the rental of the leased portion of the estate would bring in some $8,000 a year, and that with the $1,000 a month, which his brother would pay her, would provide a sufficient income. This $1,000 was raised to $2,000 a month by the defendant, he inferring the testator's $1,000 a month was not sufficient to keep up the place.

To continue the story, it appears from the evidence of Henry Sample, a railway porter who accompanied the testator and his wife to Chicago, leaving San Francisco on the 22nd of December, 1900, that Alexander Dunsmuir drank to excess during the trip to Chicago, and stayed in his berth all the time. He arrived at New York on the 26 December in a very bad condition. He went to the Imperial hotel and continued drinking until the end came, with a few intervals, when he was sober enough to go out. During this time he had a recurrence of the symptoms spoken of as showing themselves whenever he was drunk, or recovering from a prolonged spree; but instead of recovering he gradually got worse, and from the 9th of January until the 30th, when he died, he was hardly sensible, or to a very slight degree.

The only other point which requires any remark relates to the document executed by Mrs. Josephine Dunsmuir and Mr. James Dunsmuir. This document was prepared at Mrs. Dunsmuir's own urgent request by her own solicitor. She had only Mr. Dunsmuir's word to rely on for the payment of the $25,000, and in case anything happened to him she might be left without any document substantiating her claim to this annuity. There is not the slightest evidence of any pressure upon her to execute the deed. It was drawn and executed under the advice of her solicitor, and when something was mentioned about the chance of breaking the will, she declined to listen to it. She said such a course would expose her life to her friends and acquaintances as she was believed to be the testator's lawful wife from any doubt from her affection for her husband she would not take any such steps. I am satisfied that there is no foundation for any suggestion that Mrs. Dunsmuir was induced by the defendant or the solicitor to execute the deed. It was her act only, and the reasons given to her solicitor were quite sufficient.

This disposes of a review of the evidence, and on the facts alone I am satisfied that Alexander Dunsmuir was of sound and disposing mind when he executed his will. That he had for a long time before expressed his intention to make a will in favor of his brother James, and the will he did make was in exact accordance with his previously expressed intentions of former years. I may remark that a disproportionate amount of attention is on the plaintiff's part given to the medical testimony rather than to the probable capacity of the testator as exhibited in action.—Aitkin vs. McMeekan (1895) A.C., 366. In 3 Add., 90, Sir J. Nicholl says: "The true criterion of the absence or presence of insanity is the absence or presence of what in a certain sense is comprised in a single term—delusion. When a person once conceives something extravagant to exist which has no existence whatever except in his disordered imagination, and is incapable of being reasoned out of it is the only test. In fact, delusion and insanity are controvertible terms." This definition was approved of in Broughton vs. Knight, 3 P. & D., 68. Applying this test to the present testator there is absolutely no evidence of delusion indicated or spoken of by any one living with whom the testator had business relations. He had delusions while he was in a state of intoxication bordering on delirium tremens. He thought his food and drink were poisoned and that fish were in the floor, but no one ever heard of these delusions lasting after the drinking fit was over; and no mention is anywhere made of them in his sober moments. In Banks vs. Goodfellow, L. R. 5 Q.B., 594, Lord Coleridge goes so far as to say that partial unsoundness not affecting the general faculties, and not operating on the mind of the testator in regard to his testamentary disposition is not sufficient to prevent a person disposing of his property by will. He then controverts the doctrine laid down by the House of Lords in Waring vs. Waring, 6 Moore, P. C., 341; and Smith vs. Tibbett, 1 L.R., 396, where it is laid down that a person insane on any object cannot make a will. If I accept the House of Lords cases as the strongest authority I cannot find anything in this case which indicates insanity at the time of the execution of the will. I agree with Chancellor Sprague in Waterhouse vs. Lee, 10 Grant, 176, that facts sworn to are of far greater weight than scientific opinion, and Aikan vs. McMeekan, A. C., 1895, to the same effect, and when I find facts that show business capacity, shrewdness, and a successful management of a large concern without delusions, I am of opinion that such a person is capable of making a will.

I, therefore, give judgment for the defendant with costs both against the plaintiff and the intervener.

M. W. TYRWHITT DRAKE, J.

# Doubt And Apprehension

(Continued From Page One.)

sought to learn whether Russia would be able to issue a loan and discuss it here. He consulted with one of the most eminent financiers of France. According to the financier, Russia's four loans total the colossal sum of $1,400,000,000 most of which came from France. Russia has now practically used up these loans in building the trans-Siberian railway, the new fleet and internal improvements in the waterways. The Trans-Siberian line alone has proved a terrible drain, the deficit last year reaching $200,000,000. Therefore, in the event of a conflict, Russia must have more sinews of war; and it is the conclusion of the financier from the foregoing facts that she is not likely to secure a further loan in Paris, which heretofore has been her chief reliance financially. On the other hand the diplomatist compared this with the announcement today from Tokio that Japan had succeeded in securing voluntary subscriptions of $1,000,000 towards her war fund.

"That would run a war for about one day," said the diplomatist. "With Russia unable to get more money here, and Japan unable to get it at home, it is believed that if a breakdown in the negotiations occur, each side will take a long breath before fighting."

One of the officers of a trust company of New York city, who was recently here, reached the conclusion that Russia would be unable to make a loan after he had personally discussed the subject with a number of leading authorities on finance.

A novel view is taken in a certain important diplomatic quarter, that the most effective means of preserving peace is for both Russia and Japan to claim a great diplomatic victory, thus satisfying home sentiment and subduing the war spirit. This view finds acceptance at the foreign office. This is given by the officials here as the main reason why accounts vary concerning the terms of the various notes, as it is said that each side has adopted a construction calculated to satisfy its own people. One of the most prominent Russian officials here said this evening that definite knowledge concerning the contents of the Russian reply would be communicated to the world certainly by Monday.

The official communiqué "War can be averted if Japan is willing, for substantial concessions have been made, upon which the negotiations can continue. Russia is prepared for eventualities and a rupture of the negotiations, not as ostentatiously as Japan, but none the less effectively."

The Temps' correspondent at St. Petersburg telegraphs that Russia's reply is "couched in most conciliatory terms, and recognizes Japanese economic supremacy in Korea, but opposes the erection of fortifications at the principal strategic points. In Manchuria Russia recognizes all the rights acquired, but will make no engagements for the future.

"The pacific disposition of the Czar and Foreign Minister Lamsdorff is expressed publicly. His Majesty is in excellent humor and seems happy. The mobilization of the expeditionary corps is proceeding rapidly. War will not be popular and will not provoke enthusiasm, but will be none the less energetically conducted. The finances of the empire are sufficiently prosperous to provide the government with all the money it may need."

Port Arthur, Feb. 6.—Viceroy Alexieff forwarded the Russian reply to Baron DeRosen, the Russian minister at Tokio by telegraph and the latter acknowledged its receipt. From the Russian point of view the note is regarded as pacific. Accompanying the note were instructions to Baron DeRosen for his guidance in certain events.

New York, Feb. 6.—A Russian officer who has lately returned from the Far East, is quoted by the Moscow correspondent of the Times, to the effect that the Russian Pacific squadron possesses at least two submarines. They were built on the Black Sea, carried East in sections and fitted together at Port Arthur, where they now are. The officer also states that the mouth of the Amur is heavily mined and that the river is equipped with light craft, each patrolling about sixty miles and carrying light artillery.

St. Petersburg, Feb. 6.—A despatch from Vladivostok says the Japanese commercial agent there, acting under orders from Tokio, issued a circular informing the Japanese residents of the country that those who wished may proceed to Japan on board the British steamer Afrida, which has arrived there.

Harbin, Manchuria, Feb. 6.—(9:30 p. m.)—The secretary of the Japanese consul at Vladivostok arrived here and has warned the Japanese residents to leave. They are all hurrying away, selling, even giving away their belongings. The prices of food and fodder are rising.

Berlin, Feb. 6.—The announcement that Russia's reply was handed the Japanese government today was communicated to the government departments and embassies this afternoon. Although the foreign office has not been advised of the contents of the note, yet it believes Japan will avoid war and probably realize part of her aims by occupying several places both on the coasts of Korea and in the interior of that country, which, it is again said, Russia would not consider cause for war.

At a recent Russian court ball, the foreign office is informed, the Czar gave the Japanese minister his hand and spoke to him in the most friendly manner. This incident is quoted as illustrating his majesty's peaceful intentions.

The Tageblatt finds direct German interest in the crisis by announcing the arrest of Captain Warnocke and other officers of the German ship Helene Rickmers, in charge of their ship, at the Japanese port of Moji, for locking up a Chinese crew so as to keep them from deserting. The officers were released on application of the German consul and claim $50,000 damages.

St. Petersburg, Feb. 6.—The zone of the Japanese trouble has shifted, and now Russia waits to see how or when the latest word is to be received. As each communication has passed between the capitals of the contesting powers, the situation has become more tense until it is now feared diplomacy is making its last exchange and that the questions at issue may go to the arbitrament of the sword. No mention is anywhere made of these in his sober moments. In Banks vs. Goodfellow, L. R. 5 Q.B., 594, Lord Coleridge goes so far as to say that partial unsoundness not affecting the general faculties, and not operating on the mind of the testator in regard to his testamentary disposition is not sufficient to prevent a person disposing of his property by will. He then controverts the doctrine laid down by the House of Lords in Waring vs. Waring, 6 Moore, P. C., 341; and Smith vs. Tibbett, 1 L.R., 396, where it is laid down that a person insane on any object cannot make a will. If I accept the House of Lords cases as the strongest authority I cannot find anything in this case which indicates insanity at the time of the execution of the will. I agree with Chancellor Sprague in Waterhouse vs. Lee, 10 Grant, 176, that facts sworn to are of far greater weight than scientific opinion, and Aikan vs. McMeekan, A. C., 1895, to the same effect, and when I find facts that show business capacity, shrewdness, and a successful management of a large concern without delusions, I am of opinion that such a person is capable of making a will.

I, therefore, give judgment for the defendant with costs both against the plaintiff and the intervener.

M. W. TYRWHITT DRAKE, J.

# Aorangi Sails For Antipodes

## Two Victorians are Passengers To Sidney to Purchase Steamer.

### Heavy Wind Storm in Straits—Princess Beatrice is Now a 16 Knot Boat.

The C. P. R. Co.'s steamer Aorangi left here last evening at about 9 o'clock for Honolulu, Suva, Brisbane and Sidney. She took a large freight for the Antipodes, and the following passengers from here: Mr. and Mrs. Snodgrass, R. E. Grant, C. H. Fitzpatrick and wife, G. McGregor, Capt. Whidden, S. A. Donald, J. N. Sherper, F. Gustafson, H. J. McHugh and F. Barnes.

Two of the passengers, viz., G. McGregor and Capt. Whidden, go on a very important mission. They are bound for Sidney, N. S. W., to inspect the steamer Eurimbla. If she is found to be a good vessel for these waters, she will be purchased and brought here.

The Eurimbla is a vessel which plies in the Australian coasting trade, running north and south from Brisbane. Her owners have offered her for sale because of the trade in which she is operated having outgrown proportionally the size of the ship, and they are desirous of substituting her with a larger craft. She is an ocean-going steamer with little superstructure and her lines are very similar to those of the Princess May of the C. P. R. line, although she is not so large as that vessel. Her speed is given as thirteen knots an hour. She is a vessel of 1,055 tons, 214 feet in length 31 feet in beam and 19 feet depth of hold. The company interested in her purchase is said to include Mr. McGregor, Capt. Warren and Robert Cunningham.

The reason for the mission is that it has been found that the Boscowitz is altogether inadequate to handle the growing business of the owners to northern British Columbia ports. If the vessel proves seaworthy and is purchased there, Capt. Whidden will be placed in charge to bring her to Victoria.

The storm which delayed the Blue Funnel liner Tydeus on Thursday morning at the Outer wharf was felt severely in the Straits and up Puget Sound. The steamer Jeannie, belonging to the A. P. N. Company, from San Francisco to Seattle, only steamed fourteen miles in four hours, and Capt. Mason, her skipper, says he never saw the wind blow harder in the Straits and seldom with greater velocity on the open sea. It swept down the channel with the, rapidity and force of a hurricane. The wind blew from the east to the southwest much of the time. It raged all Wednesday night.

At Olympia portions of the city were awash and the belated winter tide rolled in. While it was one of the highest tides seen in Olympia for years, no serious damage was done, and at 4 o'clock the waters were rapidly receding.

Around the manufacturing district the flood reached a dangerous height, and several factories were more or less threatened by the steadily rising water.

Fires in the engine room of the Olympia Door Company were put out for a time, and at Richardson's mill the tide interfered with the raising of steam in the boilers. In this section the waters almost reached Third street, and caused considerable alarm among the dwellers in the vicinity.

On the other side of the town the tide flooded the floors of the Olympia Cedar Mill, Fraser's mill to the depth of several inches, and also covered the track of the Northern Pacific for a considerable distance in the tunnel, but not to an extent that interfered with the running of trains.

The tide was caused by the exceedingly high wind which blew up the Straits all Wednesday night.

The steamer Princess Beatrice broke her own steaming record yesterday afternoon and is now no longer in the 15 knot class, as yesterday she made 16 knots against a gale. When she was passing Port Townsend the ex-Majestic, Whatcom, was just leaving that port, and they started as near even as possible. The Princess arrived at Victoria about half an hour ahead of her rival and fully half an hour ahead of her own schedule time.

### WEEKLY WEATHER SYNOPSIS.

Victoria Meteorological Office, 27th January to 2nd February, 1904.

During this week there has been a remarkable absence of precipitation both on the coast and throughout the interior of the province. On the coast the winds have been abnormally moderate in force, and in the vicinity the amount of sunshine received was above the average. The cause of these weather conditions is due to the prevalence of abnormally high barometric pressure over the North Pacific coast, while over California the barometer has been comparatively low. Frosts have occurred about Victoria upon three days, and upon the Lower Mainland upon six out of the seven.

The only storm area of any importance during the week crossed Northern British Columbia to the Territories on Sunday, 31st. It caused strong southerly to westerly winds on the Straits and Gulf of Georgia, and a fresh southerly gale at Cape Flattery. The weather in the Territories has been comparatively mild until the last day of January, when a pronounced cold wave appeared to the northward and during the remaining days of the week it spread south and eastward, accompanied by temperatures ranging from 10 to 30 below zero.

In the Yukon district the temperature has been comparatively high.

Victoria—Amount of bright sunshine, 10 hours and 48 minutes; rain, .04 in.; highest temperature, 46.3 on 31st and lowest 32.0 on 2nd.

New Westminster—Rain, .01 inch; highest temperature, 44 on 1st, and lowest, 28 on 28th.

Kamloops—No precipitation; highest temperature, 32 on 30th, 1st and 2nd; lowest, 14 on 29th.

Barkerville—Snow, 2 inches; highest temperature, 36 on 29th, and the lowest, 14 on 28th.

Prince Rupert—Snow, .04 inch; highest temperature, 38 on 