IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

PROBATE SUIT P. 1057 OF 1974

BETWEEN	SARAH ELIZA PEREZ	PLAINTIFF
A N D	AGATHA SANDCROFT	DEFENDANT

Muirhead Q.C., and Dr. Adolph Edwards — for Plaintiff

Horace Edwards Q.C., and A.G. Gilman — for Defendant

Heard: 1978: June 5-7; December 11-15

1979: April 2-5; December 3-6.

June 19, 1980.

Parnell, J.

This is an action designed to have proved in solemn form the purported Will of Herbert Alexander Perez late of 116 Brunswick Avenue, Spanish Town. The disputed Will is dated April 19, 1974.

The deceased died on April 21, 1974. The claim of Sarah Perez the widow of the deceased is based on the allegation that the said deceased was so ill on the date of the execution of the Will, that he was unable physically or mentally to execute a valid Will. In the alternative, it is claimed that :

> "the alleged execution by the deceased of the alleged Will dated 19th April, 1974, is a forgery."

The action was well contested. Each side called seven witnesses. And on each side an expert in handwriting was called. But the experts are not in agreement. The conclusion of one supports the contention of the plaintiff that the Will is a forgery. On the other hand, the other expert has taken the view that from an examination of the relevant documents submitted for his examination, the signature of the testator on the will is genuine.

Certain particulars outlined

1. The deceased was a successful businessman who once operated a Supermarket. He had no children by his wife but left a son Dividas Gideon Perez who used to assist him in the operation of the Supermarket.

2. The defendant Agatha Sandcroft otherwise called "Agar" was regard

by the deceased as a daughter. Born in Spanish Town, she was taken from her parents by the deceased at the age of about two years. She grew up in the home of the deceased and lived at 116 Brunswick Avenue with Mr. and Mrs. Perez until she was 22 when she got married.

Mrs. Sandcroft was educated by the deceased and on her wedding day, she was given away by the deceased whom she called "daddy."

3. In the disputed will, four separate premises are mentioned. No personal or other property is designated and there is no residuary clause. The intention of the testator as ascertained from the Will is as shown hereunder :

No:	Property	Disposition
(a)	4 French Street Spanish Town.	To charity. Property to be sold and proceeds to be equally divided between Lepers Home and the Salvation Army.
(b)	116, Brunswick Avenue (Matrimonial Home)	Life interest to his wife, remainder to charity; i.e. proceeds of sale to Children's Hospital.
(c)	3, Rum Lane Spanish Town	To Agar Sandcroft "to do as she pleases with same in her own time and convenience."
(d)	12, Beckford Street Spanish Town.	To wife and son Gideon (to be equally divided.)

4. Properties which were not disposed of by the Will include the following:

(a) Land comprising of about one and a half acre and valued at $15,000. This land is at Irish Pen, St. Catherine and brings in a rental of about $400. yearly.

(b) A 1972, Vauxhall motor car.

5. The property known as 12, Beckford Street was registered in the names of the deceased and Sarah Eliza his wife as joint tenants in fee simple. Registration was effected on September 14, 1961. On his death, the widow became the sole owner of the property as a result of the right of survivorship. That portion of the Will which purports to devise the joint property to the wife and son Gideon in equal shares is ineffectual, And it means that Gideon Perez has not received any benefit by virtue of the Will.

6. The only interest under the will which the widow has received is the life interest in 116, Brunswick Avenue.

Any reason why Will was so constructed?

The defence has tendered evidence to explain why the deceased demonstrated his intention in the Will so clearly. A vast portion of his estate has been given to charity, the son has received nothing by way of a direct devise or bequest and in the case of the widow, the bounty of her husband did not go beyond the limit of a life interest in the matrimonial home. The evidence on this aspect of the case will be examined in due course. But it is clear that if the Will is valid, the reason why the testator disposed of the property therein mentioned in the manner outlined, is irrelevant. And the widow would benefit substantially more if there is an intestacy than under the testament if it is upheld.

Testator is taken ill and hospitalised

Two professional witnesses were called by the plaintiff. They attended the deceased between January 1974 until about three days before his death on April 21, 1974. The substance of their evidence is to the effect that the deceased was not in any physical or mental condition to make a Will on April 19, two days before he expired.

I shall refer briefly to the evidence of these witnesses.

(1) Aston Gordon-Hay referred to himself as a naturopathic physician (person skilled in curing an ailment without drugs). He is also an osteopathic surgeon (curing a disease on the idea that bone manipulation is enough). His business card is revealing and interesting. He is a specialist in the circulatory disorders of not less than 21 complaints from arthritist to prostrate troubles. An impressive list of disorders is outlined.

He is not a registered medical practitioner but a registered drugless practitioner. Trained in London for about 7 years, he did not readily recall the address of the Institute where he received his training. As a witness he was inclined to be combative and testy but firm in his opinion. He showed the ability to defend his theories under careful cross-examination.

Mr. Gordon-Hay started to treat the deceased on the 31st January, 1974. High blood pressure was observed, the heart and kidneys were affected. By March 5, a trace of sugar was detected but it seems that the first trace of sugar showed a high content. The extent of the sugar was put as "300 plus, plus, plus," or is commonly called "three pluses." Shortly after, the patient was admitted to the Spanish Town Hospital. He was discharged from hospital on April 12. Thereafter Mr. Gordon-Hay continued to visit and treat the deceased. If his evidence is reliable, there was rapidity in the decline of his condition as shown hereunder.

Date	State of Health
13. 4. 74	Patient getting weaker. Urine was not tested.
1 . 4. 74	Condition remained the same.

Date	State of Health
15. 4. 74	Patient unable to take solids. Skimmed milk, fruit and fruit juices prescribed as diet.
16. 4. 74	Condition of patient unsatisfactory.
17. 4. 74	Condition regarded as bad. Sugar content in blood found to be high.
18. 4. 74	Patient could hardly recognise anyone. Was in a state of semi-coma. Was unable to contract any business or give instructions.
19. 4. 74	Visit paid at 9 a.m.. Patient found to be in full coma. By this time according to the witness, the patient was unable to write or sign his name.
20. 4. 74	Patient found to be in deep coma.

At the end of his re-examination, the Court asked him the following questions.

Q: "If you had given the patient a pencil or pen to hold during the last week of his life, could he have held it?

A: No Sir, his hands were shaking; he could not hold a pencil.

Q: From about when did you observe this condition?

A: From about the 13th April.

Q: Did this condition change?

A: Not at all; it worsened from day to day until he died."

A nurse tells her story:

(2); Hazel Hall, a state registered nurse with 17 years experience attended the deceased for about one week before his death.

She was asked by Dr. Hagley, the Consultant physician at Spanish Town Hospital to visit the patient at his home.

This witness visited the deceased every morning and tested the urine. Insulin was administered to control the sugar for three days beginning on Thursday, April 18, the sugar content was found to be high. The nurse found "three pluses" of sugar.

I shall outline, as I understand her evidence, the state of the condition of the deceased from Thursday, April 18.

Date	Events
18. 4. 74	Patient found to be weak. Three pluses of sugar detected.
19. 4. 74	Three visits paid that day.

Date	Events
19. 4. 74	8-8:30 A.M.: Found to be restless; he tossed in bed and was disorientated. Was unable to understand anything. Sugar content was three pluses. Insulin was administered.
	11 A.M.: Patient found to be in the same condition. Three pluses of sugar found when urine was tested. Found to be incontinent.
	2-3 P.M.: Condition remained the same. Three pluses of sugar detected. There was no tossing observed.
20. 4. 74	8:30 A.M.: Patient was unable to recognise his nurse. Sugar was still three pluses.
21. 4. 74	No change in condition. Decision taken to send the patient to the hospital where he died later in the day.

In cross-examination, the witness who impressed me as frank, experienced and knowledgeable, admitted that the condition of a diabetic may fluctuate, depending on the amount of sugar in the system. And that the amount of insulin administered to a patient may tend to improve the condition of the person. The nurse further admitted that where insulin is administered, it takes sometime to act on the system and that the condition of the deceased could have improved after she had given him the insulin and after she had completed a visit which usually lasted for about one hour.

Conflict detected between professional witnesses

When the Court questioned nurse Hall, an apparent conflict of opinion between herself and Mr. Gordon-Hay emerged. The nurse made it very clear that she tested the urine for sugar on every occasion before she administered insulin. The amount of insulin administered varied with the amount of sugar detected. But in no case, did she detect more than "three pluses" of sugar. I shall now quote what she said in answer to questions from the Court -

> "When a person has sugar in a bad way, it can go up to four pluses. This is the highest it can go and at this stage, the patient is bordering in a coma."

Q: Can coma come on before 4 pluses is reached?

A: If there are other complications, coma could come on before it reaches 4 pluses. Other complications could be like kidney problems?

Mr. Gordon-Hall had found the patient in semi-coma on April 18, full coma on April 20. But a patient and careful nurse found nothing like the escalation of sugar which produced the comatose condition so strongly stressed by Mr. Gordon-Hay. Indeed, the evidence of nurse Hall on this aspect of the case indicated that if the state of sugar in the system was the main factor contributing to the declining state of the deceased, at no time did she detect a total of full content of sugar, that is to say "four pluses." It does not require an expert or a medical consultant to say that a man may have a high sugar content in his system and yet it does not bring on a state of coma. Similarly, a man may be subjected to a high blood pressure reading and yet he does not suffer a stroke. But another person with a reading which is much less may collapse under the pressure. The resultant effect varies from person to person and as Nurse Hall has stated, an element to be considered is whether the patient has "complications" with the sugar content.

Another question which was asked of Nurse Hall by the Court should be noted:

Q: "When you saw Mr. Perez on the Thursday, do you feel that he could have engaged you in a serious discussion on a matter of importance?

A: No! no! because he was much weaker."

Son and an executor called.

Dividas Gideon Perez, a son of the deceased gave evidence concerning the physical condition of his father during the last week of his life. He is a disappointed beneficiary under the Will. As I have already pointed out, he will get nothing under the purported devise which gives him an equal share of 12, Beckford Street with his step-mother Sarah Perez. The defence is maintaining that on April 19, 1974, the deceased executed his Will at a time when he was in a condition so to do and that both Dividas Perez and his step-mother, went for Mr. Lloyd Francis the Insurance Executive and the then Manager of the Spanish Town Branch of the British American Insurance Company. He prepared the Will after he had obtained clear instructions from the deceased. The step-mother did not give evidence and Dividas Perez has not admitted being a party to the summoning of Mr. Francis to the home of his ailing father.

The relevant portions of his evidence may be stated as follows:

(1) From about April 14, the deceased was unable to understand what was happening and he was incontinent.

(2) On April 15, the deceased was unable to recognise anyone. He had to be fed and he was only able to take liquids.

(3) By April 16, the condition was worse. A spouted cup had to be used to give him liquids.

(4) On April 17, the condition was the same but on this date it was observed that the deceased was "folded up" in the bed. He was unable to speak nor could he understand when spoken to.

(5) On April 18, the deceased was worse. He was not making any improvements at all.

(6) On April 19, the deceased was dormant; he was unable to hold a pen or pencil. The end was near. The deceased was unable to understand anything. But this bit of evidence which I regard as very important was also given by the witness.

> "On the 19th April, Mr. Lloyd Francis came there at about 10 a.m. I was coming out of the bedroom into the living room when Mr. Francis passed me going into the bedroom where my father was."

Why the visit of Francis?

The disputed Will is dated April 19. It is said to be a forgery. According to Mr. Francis, a Friday was a very busy day for him at his office. And according to the nurse, the sugar content of the deceased throughout her three visits on that day was "three pluses." And an insulin injection could have improved his condition. Unless "complications" had set in, coma would not have made an appearance at that level of the sugar content.

The question, therefore, is this:

Why did Mr. Francis pay a visit to the home of the deceased on April 19 at about 10 a.m.? Did anyone summon him? If yes, did the person or persons saw an opportunity which was appropriate for the visit in question? I shall deal with this aspect of the evidence when I examine the defence.

Handwriting experts called.

Mr. Arthur James Bromfield, a Superintendent of Police and who calls himself a registered criminologist, was called by the plaintiff. With over 20 years practical experience and versed in his scientific theories, Mr. Bromfield came to the conclusion that based on an examination of the admitted signatures of the deceased and that of the signature of the testator in the disputed Will, the signature on the will is not that of the deceased. A forgery was detected. On the other hand, Mr. Wilford Williams, a retired Detective Sergeant of Police was called by the defence. With an experience of 32 years in the investigation and

identification of handwriting, he came to the conclusion that the signature of the testator on the Will is that of the deceased.

This clash of opinion between the two experts reminds one of the difference of opinion between medical men which may arise in a case. Where a Court is caught in the middle of a dispute between men of science, one safe way of dealing with the situation is to examine other evidence in the case, if there is any, before a conclusion is drawn from the division of the competing opinions propounded. I hope I will be pardoned, if I make a parody of Pope.

> "Who shall decide, when experts diasgree,
> And soundest casuists doubt like you and me?"
> (Moral Essays; Epistle 3, Lines 1 and 2).

An attesting witness depones.

On the authority of Re Webster /1974/ I W.L.R. 1641, Mr. Muirhead sought a ruling on the question as to the duty of calling Mr. Ernest Banton an attesting witness and by whom. The argument of Mr. Muirhead was to the effect that since the defendant seeks to prove the validity of the Will, the onus was on the defendant to call him.

The pleadings of the plaintiff placed Mr. Muirhead almost on the horns of a dilemma. According to him, both sides had interviewed Mr. Banton who at all material times was a tenant of the deceased and was still a tenant of the estate at the time he was to be called. If, as it has been alleged, the Will is a forgery, then Mr. Banton would be a party to the fraud and the appropriate warning concerning answering incriminating questions would have had to be administered to the witness before he began his evidence. The witness would then be introduced to the Court under a handicap. In such circumstances, the defendant could not have been forced to call him if another attesting witness was available. The plaintiff's cautious approach - if not timidity - in the handling of Mr. Banton is understandable. The Court allowed Mr. Banton to be called but he was treated as a witness of the Court.

I shall return to the evidence given by this witness in due course.

What happened on April 19?

As I have already pointed out, there is no dispute that a very important witness Mr. Lloyd Francis did pay a visit to the home of the deceased on April 19, 1974 at about 10 a.m. The evidence of the defence that Mrs. Pe

accompanied by Dividas Perez personally summoned Mr. Francis on the morning of April 19, is overwhelming. But Mrs. Perez was not called to give evidence. Dividas Perez gave an explanation why she did not enter the witness box.. The relevant portion of his evidence was given on June 7 in these terms:

> "During father's illness, Mrs. Perez showed signs of sadness and of breaking. She started to fret. Since that time she has 'fallen', that is to say she is not the same. She has had a brain damage. An artery has been broken since father's death..... She also has a glaucoma problem. Her blood pressure is high. He Doctor is Dr. Gill at Martin Street, Spanish Town."

This eloquent and detailed "explanation" given by a layman why the witness was not called must be placed under suspicion. He did not confine himself to symptons which he personally observed. An excursion into an area which only the qualified and experienced professional may venture, was made by him boldly and with cocksureness. No attempt was made otherwise to explain why Mrs. Perez was not called.

Instructions given by the deceased?

An undisputed fact is that Mr. Lloyd Francis was a tenant of the deceased. The office of the Spanish Town Branch of the British American Insurance Company was located at 12, Beckford Street, Spanish Town. The deceased was a friend of Mr. Francis and used to visit Mr. Francis regularly at the office. And the evidence of Dividas Perez is to the effect that Mr. Perez used to consult Mr. Francis on business. What I understand Mr. Perez to be saying is that he is not denying that Mr. Francis did not have an opportunity on the morning of April 19, to see the deceased but that if he did see him, the deceased was not in any shape or condition to give instructions concerning the making of a Will. And further that the deceased was unable to execute a valid Will.

Mr. Francis arrived at the house - according to Mr. Perez - to find Mrs. Perez, Miss Jean Brooks and Mr. Ernest Banton in the bedroom of the deceased. What was going on in the house did not appear to have stirred much interest in Mr. Perez. His motor car which was outside was giving him some trouble. It needed tuning and to this his attention was directed. But within fifteen minutes Mr. Francis emerged from the house, spoke to him and then left. Questioned by the couft, Mr. Perez answered as follows:

Q: When was the first time you got information that your father had made a Will on April 19?

A: On April 22, the Monday. It was on Monday morning at the home.

And in re-examination, the following emerged:

Q: What did Mr. Francis say to you before he left on the morning of the 19th April, 1974?

A: Mr. Francis said to me:

> 'Mr. Perez, your father is very low. It does not seem he is going to make it.'

The disputed will has named two executors as follows :

> Dividas Gideon Perez of 87 Brunswick Avenue, Spanish Town and Sarah Perez of 116 Brunswick Avenue, Spanish Town.

And whereas the body of the Will is typed-written, the names of the executors are written in ink. The explanation given for this will shortly appear. But to the evidence of Mr. Perez under re-examination, I shall return: He was still referring to the dialogue he had with Mr. Francis on the morning of April 19 at the home of the deceased:

> "Mr. Francis asked me my name and I told him Dividas. He asked me to spell it for him and I did.

Q: What name did you give him?

A: Dividas Gideon Perez. I gave him my address and he said he would come to me or send someone. I saw him write it down."

Mr. Perez is not aware of a second visit paid to the deceased by Mr. Francis on April 19. What he is aware of of is that if Mr. Francis did pay a second visit "it was behind my back." . But later he was more positive.

> "I did not see Mr. Francis return and I do not think he did."

Mr. Ernest Banton is called.

The disputed Will shows that the second witness to the execution is "Ernest Banton, 116, Brunswick Avenue, Spanish Town P.O. (Upholsterer)."

His explanation as to the circumstances which caused him to be a witness is interesting. He had known Mr. Perez for about five years and knew that the deceased was ill. While he was at his workplace, someone called him to the house. When he went inside the house, Mrs. Perez told him that Mr. Francis would like to see somebody. On entering the room of the sick, he saw Mr. Francis who requested him to be a witness to the Will of Mr. Perez. According to Mr. Banton, Mr. Francis showed him a folded [illegible]

leaving only the writing at the top (showing that it was a Will) and the space at the bottom for him to sign. But Mr. Banton made a request that he be allowed to read the body of the Will. This request, was refused on the ground that :

"it is a Will and it is a private thing"

The request was further repeated and again it was refused. He then signed the document as a witness in the space provided for that purpose. Mr. Banton maintained the following:

(1) When he signed the Will, the sick man was on the bed in a "hooked position" with his face to the wall and away from the witness.

(2) He rejected the suggestion that he assisted Mr. Francis to prop up Mr. Perez with the aid of two pillows so that the deceased could append his signature.

(3) That neither Mr. Perez (the deceased) nor Mr. Francis (the witness) signed the Will in his presence.

(4) That the deceased did not speak to anyone while he (the witness) was in the room.

In the body of the Will, the name "Gillian" (referring to the witness Gideon Perez) is erased. The name "Gideon" is written in ink and three initials are shown. On the left of the word Gideon, according to Mr. Francis, the initials are those of the deceased. On the right, the initials are those of himself and beneath, the initials of Mr. Banton appear. With vehemence and indignation, Mr. Banton rejected the suggestion that he put his initials anywhere in the body of the Will and that he saw the operation which brought about the correction in question. Mr. Banton is a 46 year old St. Elizabethan. He left school at 14; attained the 5th standard in Primary School and was regarded in his early years as a "rude boy." When questioned by the Court, his answers were revealing. I shall record come of the questions and answers.

Q: "Have you ever been a witness to a Will before this one?

A: No, Sir.

Q: Do you think the testator should sign his Will?

A: Well, I do not know whether he should or should not.

Q: Do you know how many witnesses are required to a Will?

A: I have not investigated."

Mr. Banton struck me as barely literate but far from being cl[illegible]

as stupid. Inclinded to be evasive to a pertinent question and responsive to any alluring suggestion, he was somewhat uncomfortable under cross-examination. I find a common feature between himself and Miss Jean Brooks, a niece of the plaintiff.. Each indicated to Mr. Francis as a condition of being named as a witness to the Will that an opportunity be given to each of them to read the body of the Will. But apart from the novelty of the request, the deceased was anxious that his wife should not know anything of the contents of the Will and Mr. Francis was determined to respect the intention of the sick and to keep untarnished that confidence which the deceased had placed in him. If the request of Miss Brooks was based on a move to tell her aunt what the deceased had willed, some plausible reason would be forthcoming from her. What is baffling is the reason behind the request of the tenant Mr. Banton that he too should have been allowed to see what the Will had provided.

A measure of collaboration between the witnesses on an important point suggests itself and a measure of suspicion as to the veracity of the evidence flows from the smell of collaboration.

A niece takes the stand.

Miss Brooks had known the deceased for about 17 years. She was living within walking distance of the home of the deceased and used to visit regularly her aunt Mrs. Perez. She told the Court that for the last week of his life, she saw the deceased every day. Her evidence is that the deceased stopped talking about the Wednesday before his death:

Q: "Could he recognize anyone on the Wednesday?

A: No Sir. I was calling him all the time and he could not respond.

Q: Did that condition change?

A: No Sir - he got worse.

Q: What was the condition of Mr. Perez on Friday the 19th April?

A: Very poor condition. He was unable to speak; unable to recognize anyone. His eyes were closed that day."

This lay witness has described a scenery more gloomy than that mentioned by nurse Hazel Hall, It was on 20.4.74 at 8:30 a.m. when the nurse found that the deceased was unable to recognize her. But according to Miss Brooks this condition existed from the Wednesday. The non-recognition on th

nurse was on the morning of the Saturday - the day following the alleged execution of the disputed Will.

Miss Brooks was at the house of the deceased for the whole day on Friday April 19, but she saw Mr. Francis come to the home once on that day. And this visit was about 10:30 - 11a.m. When Mr. Francis arrived, he found in the room of the deceased Mrs. Perez, Mr. Dividas Perez, Mr. Banton and herself. Mr. Francis gave the order that the room be cleared for a while. The order was obeyed under protest from Mrs. Perez. Shortly afterwards, Mr. Francis came from the room of the deceased and inquired of her age. Miss Brooks told him that she was 21. Whereupon Mr. Francis - according to Miss Brooks - used these words.

"O.K, you can sign"

She then followed him into the room. A folded paper was in his hands. She left the room to attend to a pot which was on the fire but returned to the sick room. Mr. Francis asked her to sign the folded paper.

"Can I read it?" she asked.

"No you are not supposed to read it" he replied.

The condition to be satisfied was put bluntly by Miss Brooks:

> "If I cannot read it, then I am not signing to any document which I cannot read."

She then left the room but heard Mr. Francis ask:

> "Anybody else about the place who can sign?"

To this question, Mrs. Perez re-acted. Mrs. Perez called Mr. Bant[illegible] who went into the room of the deceased with Mr. Francis. It was during cross-examination that it was made clear that this witness is unreliable and that her conduct in the witness box suggested that she was deliberately concealing valuable information:

Q: When was the last time he could recognize anybody?

A: The Monday.

And to further questions, the witness made these points:

(1) She stayed at the house the whole day on the Friday to help her aunt;

((2) Mr. Francis came to the house once only on April 19.

(3) Mrs. Perez did not visit the office of Mr. Francis on April 19.

As I have already indicated, the evidence of the defence that

Mrs. Perez and Mr. Dividas Perez visited the office of Mr. Francis on the morning of April 19 and summoned him to the bedside of the deceased is overwhelming. Before I proceed to examine the evidence of Mr. Francis on this aspect of the case, I shall refer to the evidence of two witnesses, namely Miss Wilma Johnson and Mrs. Vinnette Nam.

Wilma Johnson typed Will

Miss Wilma Johnson, a winsome and intelligent witness gave her evidence with assurance. Under cross-examination by Mr. Muirhead she was pellucid and unmoved. Her story is simple. In 1974 she was employed as a Steno-typist in the office of British American in Spanish Town. In that capacity she was the secretary to Mr. Francis the manager. She knew the deceased and also the widow Mrs. Perez and the son Mr. Dividas Perez. On a date which she did not remember Mrs. Perez and Mr. Dividas Perez came to the office. Mrs. Perez spoke to Mr. Francis but she did not hear the conversation. Shortly after, Mr. Francis, Mrs. Perez and Mr. Perez left the office. When Mr. Francis returned he gave her certain instructions and as a result, she typed a Will and handed it to him.

Part of the cross-examination was directed on the basis that she was mistaken about the facts deponed by her. The reaction was swift with emphasis that was tinged with charm she said:

> "the same day I saw Mrs. Perez is the day I typed the document for Mr. Francis..... I am not mistaken. I am sure I saw Mrs. Perez and Mr. Perez in the office."

Cashier depones

Mrs. Vinnette Nam, an attractive and quick-thinking witness was the cashier at the office of British American, Spanish Town in April 1974. She has known Mrs. Perez and Mr. Dividas Perez for sometime. The deceased was referred to by her as "our landlord." Another simple story was related. And it runs in this way.

Mrs. Perez came to the office one day to collect Mr. Francis. She was accompanied by her son. When Mrs. Perez entered the office she asked the receptionist for Mr. Francis. Shortly after Mr. Francis emerged from his compartment and summoned Mrs. Perez. They then left the premises

and following his practice, Mr. Francis indicated where he was going.

Q: Where did he say he was going?

To this relevant and important question, an objection was raised by Dr. Edwards that hearsay evidence was being elicited. But if the Will is a forgery, as has been pleaded, Mr. Francis would be the leader of the plot and, therefore, his words and actions preparatory to the execution of the scheme must be relevant and admissible. To this extent his state of mind as reflected by an utterance would be primary evidence. There would be no taint by the hearsay rule. As it turned out, however, the evidence is that Mrs. Perez and Mr. Dividas Perez were present when Mr. Francis disclosed the purpose of his leaving the office. To the question posed above, the witness said that Mr. Francis replied thus:

A: That he was taking Mrs. Perez to her house.

On the return of Mr. Francis, he gave Miss Johnson certain instructions and she typed something. Mr. Francis again left the office disclosing that he was returning to the house of Mrs. Perez. Mrs. Nam was unable to say what was the nature of the document which Miss Johnson typed but she was clear and positive that:

> "Mr. Perez's death was the week-end of this incident. I learnt of the death on the Monday morning when I went to work."

These two witnesses gave evidence on an aspect of the case which throws some light in an area which is very important. And in this area, Mrs. Perez did not seek to enter. The posture of Mr. Dividas Perez is one where he had denied any participation of his assisting Mrs. Perez to summon Mr. Francis in an hour of need.

Explanation of Mr. Francis

Having examined the substance of the evidence of the two witnesses aforementioned, I now turn to the evidence of Mr. Francis. He has had 29 years service in the field of insurance and was the manager of the Spanish Town Branch of the British Insurance Company in 1974. Mr. Francis had known the deceased from 1967. Both of them were friends. The deceased suffered from diabetes. On several occasions the deceased had spoken to Mr. Francis about making a Will. And on one occasion while the deceased was a patient in the Spanish Town Hospital, Mr. Francis was summoned by the deceased for the purpose of making

a Will. But the will was not made. The deceased was cautious and secretive. His wife was visiting him at the time and he did not want her to know that he was going to execute a Will. There being no suitable opportunity for Mr. Francis, who was armed with a will form, to write the will as evidenced by the directions of the deceased, the assignment was called off. A strategic move on the part of the deceased to get the wife out of the way by sending her for a glass of water, did not work. Another opportunity for Mr. Francis to prepare a will was offered on April 19, 1974. On this occasion, however, it was not the deceased who sent emissaries to Mr. Francis. The evidence which I accept is that it was Mrs. Perez who saw the need of the presence of Mr. Francis at the bedside of her husband, who personally went to call him.

And she was accompanied by her step-son Dividas Perez. The hurried mission was made at a time when the deceased was still in a position to give rational and clear directions towards the making of this will and that Mrs. Perez and Mr. Perez fully appreciated the situation. Mr. Francis, in obedience to the call from Macedonia, attended the deceased and received full and coherent directions. When he went to the house, the sick room was cleared and in this act, the deceased himself took a prominent part as outlined by Mr. Francis. Having received the instructions, Mr. Francis the draftsman of the will, returned to the sick room and read over the Will to the deceased. Being satisfied that the deceased was satisfied with what had been committed to writing, the will was duly executed by the deceased in the manner outlined by Mr. Francis. With regard to the naming of executors, Mr. Perez the deceased left it open to Mr. Francis. The widow and the son were named the executors and their names entered in ink as the Will shows on its face. If Mr. Francis had desired, he could have named himself the sole executor and indeed both Mrs. Perez and Dividas Perez expressed a wish to this effect. The validity of this aspect of the will has not been challenged and therefore the Court will make no comment on it.

The suggestion that the will is a forgery is, in my opinion, groundless and unacceptable. Who benefits from the fraud? Certainly, Mr. Francis has not obtained one cent as a benefit and no reason was suggested why he would have taken part in this fraud conceived in a bedroom and brazenly carried out in the ear shot of Mrs. Perez and with the aid of a tenant. Mr. Francis even refused the office of executor although the opportunity was open for his appointment.

In view of the conclusion to which I have arrived, it is not necessary for me to examine in detail the evidence of three witnesses which tends to prove the following points:

(1) That the deceased and his wife did not enjoy a happy association as man and wife and that in his illness the deceased expressed strongly a desire to be removed from the matrimonial home. He wanted to recuperate at some other location.

(2) That the deceased and his son Dividas Perez did not enjoy a cordial relationship. The deceased had no confidence in his son and had expressed the view that the son helped himself improperly from the Supermarket operation.

(3) That the deceased had declared specifically that apart from his "daughter" Ada, neither his wife nor his son was going to gain any benefit under his Will.

The evidence above comes from retired Inspector of Police Mr. Neville Gray; Mr. Cecil Francis a Justice of the Peace and a friend of the deceased for many years, and from the defendant Agatha Sandcroft. Mr. Francis who shed copious tears in the witness box related how the deceased pleaded with him shortly before his death to remove him from Spanish Town to his home while he tried to recuperate. But Mr. Cecil Francis did not agree to this suggestion without the consent of Mrs.. Perez. And this witness deponed positively that on the Saturday night before the deceased expired, the deceased was able to converse with him and that if a pen or pencil was placed in the hand of the deceased, it could have been held by him. The Court accepts the evidence of the three witnesses above mentioned and in particular, it accepts the evidence touching the relationship between himself on one side and his widow and son on the other. It is clear that the deceased had a good reason to frame the will as exhibited. He was anxious to protect his adopted daughter and to bestow a good portion of his property to charity.

I find the theory and conclusion of Superintendent Bromfield to be unsatisfactory. The opinion of retired Sergeant Wilfred Williams is based on a reasoned and acceptable basis. And it is in accordance with the facts which I have found. Dr. John Hall was called by the plaintiff. The evidence of this witness trespassed in an area where he is not an expert. A specialist in neurology is not necessarily learned in handwriting. I do not accept his conclusion inasmuch as it is at variance with the factual situation in the case.

Submissions and findings

Mr. Muirhead and Mr. Edwards attained great heights in advocacy in the conduct of the case. Each of them referred to authorities and dissected the evidence in the case with skill. But no counsel is in a position to put his case higher than the facts with which he has to grapple. Even if he were to bury the court with citations, this performance brilliant as it may appear, will not help him. A probate action is no different from the ordinary case. And common sense is a factor which the tribunal of fact should utilise in arriving at a decision whatever the nature of the case.

It is unusual to find a civil case where forgery is relied on by a party and yet there is no evidence to show an intent to defraud or to deceive. And it is also unusual to find a probate action where fraud is expressly or impliedly suggested against those who rely on a will which is impeached, but when the will is examined it is found, as in this case, that a substantial protion of the estate has been given to charity and not to any of the persons against whom the finger of suspicion is pointed.

I find that the Will in this case is valid. A disgruntled beneficiary or prospective beneficiary may shed tears when he finds what a testator has done. But it is the duty of the Court to sustain the will of a deceased once it is satisfied that although he may have been at the point when the call was near, he voluntarily and with a clear mind outlined his intention and complied with the Act which governs the making of a testamentary disposition. The Court cannot make a will for a deceased nor is it permitted to enquire into the adequacy of the motive which prompted the formulation of a testament which is found to be valid.

The claim of the plaintiff is dismissed. And on the counterclaim there will be a declaration that the Will of the deceased dated April 19, 1974, is valid. The estate must bear the costs of the proceedings for each of the parties.