

**(1924) 06 CAL CK 0031**

**Calcutta High Court**

**Case No:** None

In Re: Goods of Kumar Guru  
Prosad Sinha

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** June 16, 1924

**Citation:** 87 Ind. Cas. 534

**Hon'ble Judges:** Page, J

**Bench:** Single Bench

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### **Judgement**

Page, J.

This case is of great importance to those who are concerned in propounding the Will. It is also of interest to the medical community, because it illustrates the pitfalls which lie in the path of professional men who through carelessness or complaisance stray from the straight way marked out for their progress by the traditions of a great profession. The Will in suit is propounded by one Lila the sole executrix and the residuary legatee. The contesting caveator is the Ram Krishna Mission; the Kumar's daughter, Princess. Lukshmi, claiming only that the Will be proved in solemn form. About 3 or 4 p. m. on the 21st November 1920 the testator, commonly known as the Raja of Khaira, is alleged to have made the Will, the validity of which is challenged in these proceedings. About 1 a. m. on the 22nd November 1920 Kumar Guru Prosad Sinha was seized with an attack of delirium tremens of so violent a nature that he threatened to kill Lila with whom he had been living, and to whom, a few hours before, he had left the bulk of his fortune under the terms of the alleged Will. From and after the early hours of the morning of the 22nd November until his death on the 28th November it was conceded by all parties that the Kumar was incapax testimonii.

2. Two issues fall for determination in these proceedings:

(1) Did the Kumar execute the alleged Will?

(2) If he did so, was he at the time when he executed the Will, possessed of testamentary capacity. In respect of these issues, an argument ensued at the Bar as to where the onus of proof lay. Now, when a Will is propounded, there is no doubt: that a burden lies upon the propounder of satisfying the conscience of the Court that the document in suit is in truth and in fact the last valid Will of a free and capable testator.". "The onus is in general discharged by proof of capacity and the fact of execution from which knowledge of and assent to the contents of the instrument is assumed." [per Baron Parke in *Barry v. Butlin* (1838) 2 Moo. P.C. 480 : 12 E.R. 1089 : 1 Curt. 614 : 46 R.R. 123] but whenever circumstances exist which excite the suspicion of the Court, and "whatever their nature may be, it is for those who are propounding the Will, to remove such suspicion, and for prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done : that the onus is thrown upon those who are opposing the Will to prove fraud and undue influence or whatever else they rely on to displace the case made of proving the Will." Per Lindley, L. J., *Tyrrell v. Painton* (1894) P. 151 : 6 R. 540 : 70 L.T. 453 : 42 W.R. 343. See also *In the goods of Gopessuar Dutt* 13 Ind. Cas. 577 : 16 C.W.N. 235 : 39 C. 245. In this case, however, I am not concerned to consider or to decide upon whom the onus probandi lies. In *Basanta Kumar Roy v. Secretary of State for India* 40 Ind. Cas. 337 : 44 I.A. 104 : 44 C. 858 : 25 C.L.J. 487 : 1 P.L.W. 593 : 32 M.L.J. 505 : 21 C.W.N. 642 : 15 A.L.J. 398 : 19 Bom.L.R. 480 : (1917) M.W.N. 482 : 6 L.W. 117 : 22 M.L.T. 310 (P.C.), Lord Sumner observed that "as" their Lordships find the evidence sufficient to establish a clear conclusion of fact, it\* cannot matter now by which party it was given.". In this case not only have the parties adduced before me a large body of evidence, but I have had the advantage of a skilful and analytical survey of the evidence by Counsel on both sides who have not spared themselves in the endeavour to present their clients' cases in the most favourable and attractive form. The burden which they have taken upon their shoulders has considerably lightened the weight of my labours, and I have formed a clear and unhesitating opinion as to the judgment which I ought to give.

3. Now, in considering the evidence relative to the issues raised, the first matter which demands my attention is the Will itself. It is not a long Will, nor a Will of great intricacy, but it is couched in technical language; it excludes each and every one of the near relations of the Kumar from benefiting thereunder, and it provides specifically that the whole of his property shall be given to persons who are not of his kith and kin. According to the witnesses who gave evidence in support of its validity the draft of the Will was dictated by the Kumar without assistance, and without any previous discussion having taken place as to its terms, and the Will itself, after having been read out, was executed by the testator and by the attesting witnesses. Three witnesses affirmed that it was executed by the testator in their presence, and one of these witnesses Dr. Premnath went further, for he stated in writing on the document itself that at the time when the Will was executed, the Kumar was "in full possession of his senses." Now, a number of signatures admitted

to be in the Kumar's handwriting were tendered in evidence, and I should be prepared to hold from a comparison of these signatures with the Kumar's alleged signature on the Will, that the Will, was not executed by the alleged testator. Not one" of the letters in the signature on the Will resembles the same letters as used in the signatures admitted to be in the handwriting of the Kumar. Not only are the letters dissimilar, but the words which compose the signatures, instead of being somewhat shaky and irregular (as was the case with the normal signatures of the Kumar) in the words of one witness "are written in a firm hand, and in a copy-book style." But I need not labour this matter, because Counsel for the propounded in his final address, frankly admitted that the signature on the Will was not in the Kumar's normal handwriting. Indeed, he went further, and upon the dissimilarity in the handwriting founded an argument in favour of the genuineness of the signature on the Will, because, in his contention, it is unlikely that anyone who was, minded to forge the Kumar's signature, would have made so poor an attempt to reproduce his normal handwriting. As an argument ad hoc this contention is ingenious, but it is a double edged weapon, for the admitted abnormality of a signature is at least some evidence that it is not the handwriting of the person who" purports to have written it. I am not prepared to hold, in a case where the character of the signature is such that the Court is satisfied that the signature is not that of the alleged testator, that the Court ought not to act upon its conviction and pronounce against the document as a valid testamentary disposition, but in a case where witnesses have positively affirmed that the testator did in fact execute the Will in their presence, the Court will be slow to hold the document to be a forgery unless evidence is to be found aliunde which tends to confirm the conclusion at which the Court has arrived independently and from a consideration of the nature of the signature by which the testator is alleged to have executed the Will. Is any such corroborative evidence forthcoming in this case?. In the course of the hearing, and; in the absence of the three Doctors whose evidence had been taken at various times on commission, I expressed the opinion that it would be desirable that some medical\* witnesses of distinction should be examined before me, and I have had the advantage of hearing Col Waters, Lt. Col. Connor and Lt. Col. Mosses in the witness-box. Now, it was admitted that the Kumar, who was 35 years of age, was a man who had led an, irregular and dissolute life. He was usually drunk, in the day time as well at night. His manner was that of an extremely nervous and unstable man, and, according" to Dr. Premnath "would give the impression that the Kumar Saheb was never in a fixed state of mind, but was in a kind of intoxication which I cannot explain by words. It was a peculiar way about him which is only known to those, who knew him." His hands at all time used to shake involuntarily, and when he was writing the hand which he used was seen to tremble. Admittedly, he was a man who had been endowed by nature With a full share of mental capacity, but, according to Dr. Kapur, who saw him about three hours before the time at which it is alleged that he executed the Will, "his nervous system was not that of a very intelligent man." Expert medical witnesses have been examined with regard to the signatures on the Will. In answer to questions pat \*to

him, Col: Waters stated.

Q. In the case of chronic alcoholics they usually have trembling of hands?--Yes.

And those patients usually do not write in a firm hand?

Probably not.

Would you look at the signature of Guru Prosad Sinha to the Will in suit? Yes.

That signature is a firm signature? I take it to be so.

What does it appear? It is a very fair signature.

That looks as if it was written very carefully? Yes.

It has the appearance of a carefully made signature; ordinarily an alcoholic does not write in a very clear and firm hand like this? He does not

And later on, in his evidence:

Q. Assume that he had been suffering from that for some time, for six months or perhaps years with his hand trembling throughout, and about seven or eight hours after he has a violent attack of delirium tremens, would you suspect his hand not to be tremulous during that intervening period? The man has been a chronic alcoholic. Drink has been stopped for four or five days. If he be proceeding towards recovery then naturally the trembling would tend to diminish.

Q. Supposing he was proceeding towards an acute attack then the tremour would probaly be there.

Colonel Connor was invited to look at the signature of the Will:

Q. Look at the signature; that is in a firm hand; is it impossible for a chronic alcoholic in the condition I have stated to write as firmly as you find the signature there? Not impossible. I would not expect so firm a hand.

Then I turn to Col. Moses.

Q. Look at the signature--It is in evidence that he used to suffer from trembling of the hands and remembering that he was ill from the 17th to the 20th and 21st when his temperature was 103-101 deg, and that he had an acute attack of delirium tremens. After that, would you expect the handwriting to be what it looks like there? No; this is quite firm and still.

Again.

Q. About the signature; is it your evidence, that chronic alcoholies can never write in a firm hand? They write in a very scrawly hand. There may be cases in which their hand is firm.

Q. From the description of Guru Prosad Sinha, is it your evidence that the man could never write in a firm hand? I would expect always a tremour in the writing.

Q. That is to say, shaky hands? Yes, he would write in a more scrawly hand....

Q. You would agree that some times-alcoholics may write in a firm hand? Yes.

Q. Would it be possible for him to write like this?

Yes, possible.

Col. Davidson who attended the Kumar in his last illness was asked.

Q. Take it from me that the signature on the original Will is alleged to be the signature of Kumar Guru Prosad Sinha; kindly tell me if you expect a," signature, clear and firm like this from the Raja considering the condition that he was in on the 21st November mid-day coupled with the admitted fact that at mid-night he was suffering from an attack of delirium tremens? I should have thought that it was impossible. My opinion is that it is impossible.

4. But the matter does not rest there. Mr. A. K. Bose, a well-known and respected Solicitor of this Court who had been in constant communication with the Kumar in 1919 and for a certain period in 1920, unhesitatingly affirmed that the disputed signature on the Will, in his opinion, was not in the handwriting of the Kumar. Now, no expert evidence was, or, having regard to the above mentioned admission made by Counsel on behalf of the propounder--could have been adduced to rebut the evidence to which I have referred, or to counter the natural and reasonable inference to be drawn therefrom. In these circumstances" without doubt or hesitation I find as a fact that the disputed signature on the alleged Will was not in the hand writing of the Kumar, and that the document was not executed by the alleged testator. It" follows from this finding that in my opinion, the document in suit is not the Will of Kumar Guru Prosad Sinha.

5. I now consider the evidence adduced in respect of the second issue, namely whether at the time when the document was alleged to have been executed the Kumar was possessed of testamentary capacity. I take the test of testamentary capacity to be that which was laid down by the Judicial Committee of the Privy Council in *Horwood v. Baker* (1840) 3 P.C. 282 : 13 E.R. 117 : 50 R.R. 37 in which Mr. Justice Erskine expressed the opinion of the Court to be that "in order to constitute a sound disposing" mind, a testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration."

Now, leaving out of consideration the matters which are in controversy and applying this test of testamentary capacity to the admitted facts relating to the physical condition of the Kumar, and to the circumstances prevailing at or about the time when the Will is alleged to have been executed, in my opinion, the right and reasonable inference to be drawn therefrom is that the Kumar was not possessed of testamentary capacity at the time when it is alleged that he executed the document in suit. The Kumar's illness commenced on the 17th November 1920, and terminated in his death on the 28th. Throughout the period of his illness he was lodging in the house of one of the attesting witnesses, Fakir Chand, Vakil of the Lahore High Court. On the 17th November Dr. Premnath, a young practitioner in medicine and dentistry in Lahore saw him professionally. He was found to be suffering from fever, with a temperature of at least 102 or 103 deg. it appears that he complained also of pains in his joints. From the 17th November until the 22nd the Kumar was nursed by a woman called Lila, who for some time had been living with the Kumar. It was stated that she was not married to the Kumar, but whether that be so or not is a question which it is unnecessary for me to, determine in these proceedings, and I refrain from doing so. Dr. Premnath prescribed medicine for fever, and at the same time ordered that alcohol should be stopped. Now, the effect of depriving a person suffering from chronic alcoholism, as the Kumar was, of the opportunity of obtaining alcohol not infrequently is that after a period of depression an acute attack of delirium tremens supervenes; and such an attack is the more likely to occur when the patient is suffering from fever, pneumonia or shock. On the 19th November Dr. Premnath was not satisfied with the condition of the patient, and called in consultation Dr. Kapur, a well-known physician in Lahore. Dr. Kapur took a serious view of the patient's state of health, and he diagnosed the disease to be sand-fly fever; it may be, owing to the combination of high fever and pains in the joints On the 21st November the condition of the patient had become worse". In addition to fever and pains in the joints the Kumar complained of irritation in the throat, pain in the back, and loss of appetite while his body was exuding a disagreeable odour. On that date Dr. Premnath saw the Kumar on four different occasions. In the early morning Dr. Kapur expressed the opinion that his lungs or one of them, at any rate--were affected, and he took a sample of urine for analysis. Dr. Premnath, disagreeing with the view expressed by Dr. Kapur as to the condition of the lungs, and apparently being anxious to have another opinion, called into consultation Col. Davidson, the Civil Surgeon, and Professor of Medicine and Jurisprudence at the King Edward Hospital, at Lahore. Col. Davidson prescribed a fever mixture and some medicine for a cough, and left after he had taken a sample of the Kumar's blood for analysis. A few minutes after Col. Davidson had gone away, Dr. Kapur returned, and stated that the analysis of the urine disclosed the presence of albumen. There can be no doubt after the disclosure of the result of the examination of the urine, that everyone concerned became seriously alarmed at the patient's condition. About 9 p. m. Dr. Premnath gave the Kumar a sponge bath, and in the night about 1 a. m. a violent attack of delirium tremens broke out. It is

conceded that after 1 a. m. on the 22nd November until his death the patient was incapable of making a Will. Now, the case for the propounder of the Will is that between 3 or 4 o'clock in the afternoon of the 21st November the Kumar who had not been told the result of the analysis of the urine, although it may be that he noticed signs of distress on the faces of those about him, suddenly expressed the desire to make a Will, and asked Fakir Chand to provide a scribe to write it out. Uttam Chand, a young Pleader in Fakir Chand's office, was sent for, and without making any remark to anybody the Kumar at once began dictating the Will to Uttam Chand who took it down in writing. During the dictation of the Will the Kumar, it is said, frequently suggested corrections and alterations therein. The draft was then taken away, copied out, and returned to the Kumar who read it through and extended it and afterwards the Will was read aloud, and signed by Fakir Chand, Uttam Chand and Dr. Premnath. The dictation of the draft occupied, it was stated, from half to three quarters of an hour. About half an hour after the Will is alleged to have been signed one Mehta Bahadur Chand appeared at the house, and he also signed the Will. It is to be observed that although the Will is couched in technical language, according to the witnesses who were called on behalf of the propounder, it was dictated without any assistance from anyone. The Kumar excluded from taking any benefit thereunder his wife, Bageswari, his daughter, Princess Lukshmi, and his brother Baijnath. After bequeathing a sum of money to two persons who were unrelated to him, the Kumar left a monthly allowance by way of maintenance to a woman, Susila by name, who it was stated had been living with the Kumar at the Grand Hotel Calcutta at the sometime that Lila was living with him there. The residue of his property he left to Lila. In the course of his evidence Col. Moses was asked:

Q. Would it be possible for him to concentrate his thoughts for a long time? No. He cannot sustain mental concentration for any length of time presuming that he is growing an attack of delirium tremens.

Q. In the morning, his condition is "throughout loss of appetite, high fever, and he smells badly, in this condition," can he concentrate his mind and can he sustain his mental condition, for any length of time? He cannot keep up his concentration. He relapses and he cannot keep up his concentration.

Q. Could he dictate a deed like that? You cannot state \* positively about these things.

Q. What would be the length of time during which he can sustain his concentration? Suddenly you rouse him up, your sharp questions may bring about an answer; and if you stop, he relapses." It is difficult to say the actual length of time.

Q. The Court: Do you mean that he would respond to some outside agency at the time? Yes.

Q. But not have the power to concentrate? Yes.

Again.

Q. Would it make any difference if the same man contemplated making this provision for the first time, and if he had thought it out before and merely recited it? I do not think it makes any difference, whether it was the first idea or whether it was not. I do not think he would be able to sustain mental effort for a sufficiently long time to have this Will made and to understand it.

Q. Is there any other reason? Except the chronic picture of a man who could not sustain any effort, on the verge of delirium tremens executing, reciting and dictating a Will like that.

Col. Waters:

Q. From what you said before, does it not appear that they try to regain their normal condition? Yes a man, a chronic alcoholic if roused, tries to pull himself together.

Q. In fact many alcoholics know that delirium tremens, is coming on and for hours they struggle against it? I don't know.

Q. The coherence of thought does not last long? Probably not.

Q. If in a few hours he is going to be in a violent state of delirium tremens would you expect him to be able to calmly dictate that document without any assistance with details of legacies, houses, etc.? Anything may be

Q. Would you be surprised to hear that it was so? I should certainly expect it as surprising. Anything may happen.

Q. The Court. Doctors are always in this difficulty, as distinct from our profession, which relates to an exact science, from which we know some a little more and some less, a Doctor's profession which is connected with a progressive science, it is difficult to say what may or may not happen? It is difficult to say, it is impossible? It is so.

Q. You would be surprised? Yes.

Col, Connor.

Q. Take this case; a man like that who had these symptoms in the morning and then broke out into delirium tremens, actually violent delirium tremens, at 12 A. m., would he be capable of coherent and sustained effort for an hour or more? I say again that that depends more upon his state of chronic alcoholism. If he is a man who is usually drunk I should not expect it.

Q. A man who is usually drunk but whose liquor has been cut off and then these symptoms supervene, you would not expect him to be capable of sustained coherent effort for over an hour at one stretch? I would not expect it, but I may say in parenthesis it would not be impossible.



Q. You know the distinction between impossibility and improbability? You say it would be improbable, but not impossible. Yes.

Q. The Court : Taking your answers upto now and taking that document which requires concentration, for it is a coherent document dealing in a regular form with persons he is going to benefit and those he is going to disinherit, would you expect such a man as this to write and dictate such a document? I would not expect a man such as has been painted to me to write such a document.

Dr. Kapur in his evidence on commission stated.

I saw him last on the 21st November 1920 a little after 12 noon. The deceased was in his usual senses then. He was talking rationally. He was capable of understanding his affairs.

Cross-examination.

Was the deceased capable of making a Will between 3 and 4 p. m. on the 21st November 1920? I am not sure of it.

What do you mean by saying that the deceased was in his usual senses? Usually due to hard drinking he was at times under the influence of liquor and his nervous system was not that of a very intelligent man.

Having regard to the uncontroverted facts alone relating to the physical condition of the Kumar on the 21st November and the circumstances surrounding the alleged execution of the document" in suit, I should be prepared to hold that between 3 and 4 p. m. on the afternoon of the 21st November 1920 the Kumar was incapable of making or executing the document in suit. But the evidence on this issue does not rest there. Both Col. Davidson and Dr. Premnath had given evidence on commission relating to, this issue. Col. Davidson testified that about 12 noon on the 21st November he : found the Kumar to "be suffering from great restlessness; I found it difficult to examine him properly owing to his restlessness and difficult to get him to concentrate his fixed attention upon any question." Knowing that delirium tremens is often the product of pneumonia in a drunkard (by product I mean sequela or complication) and also knowing that the disease may be precipitated by an attack of acute infection such as malaria, pneumonia, or sandfly fever, I wished to see what the cause of the fever was, as in all cases of delirium tremens the temperature does not rise very high except in very bad cases, and I believe I took personally a blood smear for examination to see if malaria was present, I sent it for examination, but no malaria was found, and I could find no signs of pneumonia till the reply about the blood was received. I believe I continued the treatment of Dr. Premnath.

Q. You have told us that he was suffering from very great restlessness; do you remember if you noticed any particular action on his part to denote restlessness?-. What I found was that he was continually pulling off his bed clothes and from the diagnosis of the disease there must have been tremors in his hands before, because

the disease is called delirium tremens because he suffers from hallucinations and tremens because of trembling of hands especially, and of the lips, mouth and tongue.

Q. What did you diagnose the disease to be? I diagnosed the disease to be delirium tremens.

Q. At the time when you examined him; had the disease attained an acute form or did you find premonitory signs of the disease? I found the disease present; hence it was not in a, premonitory state.

And later on:

Q. Will you kindly read this Will and tell me if a person in the condition in which you found the Raja of Khaira, on the 21st about 12 noon or sometime after could dictate unaided a Will of this length and description between 3 and 4 v. M.? I say No. A persons suffering from delirium tremens is incompetent to make a Will by all authorities. He has not any civil or criminal responsibility. He, suffers from want of combination and continuity of thought. Therefore, it is impossible for him to dictate a Will of this description.

6. Now if Col. Davidson's evidence is accepted, it is conceded that the Will cannot stand but it has been strenuously urged that no reliance ought to be placed on Col. Davidson's testimony, having regard to his conduct and the contradictory statements which he has made. Col. Davidson has not given evidence in this Court, and if it were not that I am satisfied that it is my duty to do so, indeed, it is not possible to arrive at a sound conclusion on the second issue without appraising the value of Col. Davidson's evidence, I should have been glad to refrain from any animadversion upon the conduct of a professional man. The course which Col. Davidson adopted was, indeed, a strange one. It appears that in January 1921 he was approached by one B.G. Chatterjee, who claimed to be an Advocate, and Chatterjee requested him to give him a certificate as to the soundness of the Kumar's mental faculties on the 21st November. That certificate he gave, he states, in the form of a written statement, but as this document was not forthcoming at the trial, I am unable to say what the terms of the Certificate were About the 8th August 1922, however, it appears that Chatterjee again approached-Col. Davidson in company with one Nipendra Sircar, who is a beneficiary under the Will Chatterjee, on this occasion, brought with him a set of interrogatories to be answered by Col. Davidson. The 6th interrogatory was as follows:

Dr. Premnath has stated on oath that Raja Guru Prosad Sinha did execute the Will in his presence on the 21st November, 1920, between 3 and 4 p. m. and was in possession of his senses and was quite, capable of making a Will at that time; are you in a position to differ from his" statement regarding the mental capacity of the Raja at that time, that is between 3 and 4 p. m. If you do differ, please state your grounds.

Answer : I am not in a position to controvert the statement of Dr. Premnath.

7. It is, I think, an extremely unwary and undesirable thing that a Doctor should in any circumstances answer interrogatories of this description, and it is even more inadvisable for him to do so without previously having satisfied himself as to the identity and position of his interrogator. Col. Davidson, however, being under the impression that Chatterjee and Sircar were in some way or other connected with the case in the interest of the persons who were seeking to invalidate the Will, although he appears to have made no enquiries in the matter, answered the interrogatories then and there, and received Rs. 200 for so doing. About a week later Chatterjee once more approached Col. Davidson, on this occasion being accompanied by one P. N. Sinha. A further set of interrogatories were handed to "Col. Davidson. These interrogatories in my opinion, were of a very improper nature. Interrogatories Nos. 12, 13, 14 and 15 were obviously in the nature of cross-examination of Col. Davidson on the answer which he had given to interrogatory No. 6, on the 8th August. They are as follows:

No. 12. Do you think from your observation of the condition of the patient at 12 noon and from the further admitted fact that at 12 midnight the patient was suffering from an acute attack of delirium" tremens, that it is likely that the patient dictated the Will between 3 and 4 p. m. without assistance from anybody?

Answer: I do not think it likely that he could have dictated a Will connectedly without marked assistance. In fact Taylor at page 896, 6th. Edn. on Jurisprudence considers a person suffering from delirium tremens incompetent to make a Will unless his mind clears up before death, but as the Will is said to have been made on the 21st and his condition of delirium tremens was more marked on the 22nd, this exception does not hold good.

No. 13. What is your reason for stating that you would not controvert Dr. Premnath's statement that he actually dictated the Will between 3 and 4 p. m.?

Answer : I think I would prefer to accept the opinion of Taylor. It depends upon what one means by dictation of a Will. in such dictation external help may have been largely exercised.

No. 14. Do you mean, not being present between 3 and 4 p. m. when the Will is supposed to have been dictated, you would not like to say anything against the statement on oath made by a Doctor known to you, on the strength of your opinion, although based upon scientific deductions?

Answer : See above.

No. 15. Do you believe that your opinion is supported by medical science?

Answer : Yes, by the highest authority.

8. I find it difficult to understand how Col. Davidson could have thought it in consonance with his position as a professional man to answer such questions, and my perplexity is increased when I find that he has admitted that between the date when the questions were left with him, and the date when he answered them, some three days later, he received 3 pages of blue paper filled with medical authorities upon the subject, and in substance suggesting the form which his answers should take. But answer them he did, and he received a further fee of Rs. 200 for the answers which he gave on that occasion. Nay more, on the 30th August he produced in Court a further set of answers to the identical questions which had been put to him on the 8th August, and on that occasion his answer to question No. 6 was in direct contradiction of the answer which he had given to question No. 6 on the 8th August. His answer is as follows.:

A. Yes, after seeing the Will, and knowing the condition of the patient when I saw him; also from the fact that the patient suffering from delirium tremens is mentally unfit to make a Will.

9. On these facts I am invited to come to the conclusion that Col. Davidson is a man who is ready to give a medical opinion, true or untrue, if only he receives adequate remuneration for so doing. For the reasons which I am about to give, I refuse to accept as correct this grave imputation upon the character of a well-known professional man. Col. Davidson has endeavoured to explain his answer to interrogatory No. 6 on the 8th August in more ways than one. He stated that throughout he was under the impression that Chatterjee was submitting questions to him on behalf of those who were opposing the Will. But, in my view, this suggested explanation is no explanation at all. There appears to be no reason why a scientific witness should not be a witness of one or more or all of the parties to a legal proceeding. To a professional man, it matters not which party calls him as a witness. What is of concern to a medical witness is the accuracy of the scientific opinion which he expresses, not the party by which such evidence is tendered. Col. Davidson also sought to explain this answer by indicating that if he had seen the Will before he had replied to the interrogatory No. 6 on the 8th August, his answer would have been to the contrary effect. But if, as he asserted, the Kumar at 12 noon on the 21st November was suffering from delirium tremens, it is conceded that he was incapable of duly making not only the alleged Will, but a Will of any description whatever. Further, Col. Davidson attempted to excuse his answer to interrogatory No. 6 on the ground that, although he was satisfied on the 21st November that the Kumar was not possessed of testamentary capacity, Dr. Premnath might honestly have formed a different opinion, and that Dr. Premnath's view depended upon what Dr. Premnath "considered sufficient mental capacity to form a Will." But was that a reason which would justify Col. Davidson in refraining from stating an opinion which he had himself formed as to the Kumar's condition? Surely not, for in such circumstances suppressio veri and suggestio falsi are one and the same thing. In my opinion, none of these suggested explanations have any substance in them. After

mature consideration I am satisfied that the real reason which induced Col. Davidson to answer interrogatory No. 6 on the 8th August in the way he did, was that he knew that at that time there was no longer any real opposition to the Will: that all the persons who were believed to have an interest in the Kumar's estate had settled their differences, and that all parties were at one in their desire to establish the soundness of the testator's mental capacity. It was, in my opinion, with that information before him that Col. Davidson was invited to answer the interrogatories which were put to him on the 8th August. Col. Davidson stated that Chatterjee or Sircar soothed his misgivings by suggesting that Col. Davidson "could not call Dr. Premnath a liar," and that he replied "his answer depends upon what he considers mental capacity, but a man suffering from delirium tremens could not make a Will." Having salved his conscience by this protestation Col. Davidson, in my opinion, allowed himself to be, persuaded that he was justified in departing from what his professional instinct must have told him was the proper course for him to pursue. Hinciltee lacrimoe; I regret to say that in these Courts instances not infrequently occur in which medical men, not of any standing or distinction, give medical certificates, for instance, for the purpose of obtaining the adjournment of a case, on grounds which after investigation turn out to be wholly insufficient to justify the exemption of a witness from attendance, thereby forsaking their position as men of science in order to oblige a patient. But complaisance and the pursuit of science go ill together, and if as a result of this case every member of the medical community in future determines to hold the traditions of his profession sacrosanct and inviolable, then, indeed, the enquiry will not have been undertaken in vain. It was, however, contended by Counsel on behalf of the propounder that it is inconceivable, if Col. Davidson had found that the Kumar on the morning of the 21st November was suffering from delirium tremens, that he should not have prescribed specific drugs for that disease. I am not impressed with this contention. The medical evidence adduced was to the effect that the mode of treatment to be followed in the case of delirium tremens depended upon the urgency of the situation: that in case of delirium tremens the main endeavour of the physician should be to induce rest, and that the desired result would be obtained at least as efficaciously by good nursing as by the use of drugs. Neither Col. Waters, nor Col. Moses were prepared to say in the circumstances of this case that the course pursued by Col. Davidson on the 21st November was wrong. From these reasons I accept the evidence of Col. Davidson that at 12 noon on the 21st November the Kumar was suffering from delirium tremens, and was not of sound disposing capacity.; Having regard to the view which I entertain in respect of the evidence to which I have referred I find myself unable to place any reliance upon the evidence of Dr. Premnath. It is fair to this witness to state that he has consistently affirmed that at the time when the Kumar executed the Will in suit he was in full possession of his senses, but, in my opinion, both Dr. Premnath and Fakir Chand have also consistently minimised the gravity of the Kumar's illness. In his statement on the 26th March 1921 no mention whatever is made by Dr. Premnath that at any time during his illness the Kumar was suffering

from delirium tremens, or indeed from delirium at all. His description of the violent attack of delirium tremens from which admittedly the Kumar was suffering at 1 a.m. on the 22nd was as follows:

I was with him at 1 a. m. and gave a prescription. The Rani Saheb got medicine from a chemist's shop herself leaving me in charge of the patient. The medicine had the desired effect and the Kumar slept the rest of the night.

10. On the 31st October 1921 in his evidence on commission, Dr. Premnath went somewhat further, for he stated "After the same midnight I was sent for again and I went and found him excited." Until he gave evidence in July 1922, Dr. Premnath however never thought it necessary or proper that he should mention that the Kumar was : suffering from delirium tremens." On the 25th July 1922 Dr. Premnath in his evidence on commission stated that he had fever, and "otherwise he was all right." It is strange, indeed, if that were so, that it should have been necessary on that day for Dr. Premnath to visit the Kumar on four occasions, Dr. Kapur twice, and Col. Davidson once. From the time that he wrote his certificate of mental capacity on the Will, until his cross-examination on the 25th July 1922, Dr. Premnath, in my opinion, deliberately refrained from mentioning that the Kumar suffered from delirium tremens, because he was determined to support the hypothesis that the Will in suit was that of a free and capable testator. It is, to my mind clear that in this matter Dr. Premnath throughout assumed the part of a partisan, and not that of a scientific expert, and I am unable to place reliance upon his testimony. Upon the evidence I find that Fakir Chand and Uttam Chand were minded to pursue a similar course to that adopted by Dr. Premnath. and, in my opinion, having regard to the facts elicited at this enquiry, I find myself unable to accept the story told by" these witnesses as to the circumstances under which the Kumar dictated and executed the document in question. It is, in my opinion, an incredible story, and I reject it.

11. During the trial of this suit two persons were present in Calcutta, and were available as witnesses to material facts, Mehta Bahadur Chand, and Lila, the propounder of the Will. Mehta Bhadur Chand went into the witness box and in the course of his evidence he gave the following answers to questions put to him.

Q. On the 21st November what was the Raja doing? He was lying on the bed.

Q. Was he sleeping? No he was awake.

Q. Did you have any talk with the Raja? I simply asked the Raja whether it was his Will and he said it was and then I signed it.

Q. How did you find him when you went there? He was ill.

Q. Was he in his senses or unconscious? He was conscious.

Q. Was he talking rationally? I did not have any other talk except asking him whether it was his Will and he said that it was and I signed it.

Q. From what you saw of the Raja on that occasion did it strike you that he was in a fit condition to make a Will, fit physically or mentally? He was sensible enough because a few minutes after he told me that he wanted to shift from this place because it was damp and he wanted me to engage some other house for him. Then I took the Rani with me in a motor car and went to another house on the Mall, Max Mink's house, which was available for rent but they said for a few days it could not be vacated.

Q. Did you see him on the 22nd? Yes.

Q. What was he like? I did not talk to him.

Q. What was he like to look at? He was at rest. He was not asleep, though he was lying down, and I think at that time he was under the care of a nurse.

Q. He was lying on the bed not asleep, resting? Yes.

Q. What was the difference between his condition as you marked it on the 22nd from what it was on the 21st? On the 22nd I did not speak to him, I only waited beside him and remained quiet.

12. Apart from speaking to you did he present the same physical appearance on the 22nd as on the 21st? No; his condition appeared to be worse.

13. In what way? His face did not bear that cheerful appearance as it did on the 21st.

14. He was lying on the bed on each occasion apparently neither asleep nor anxious to talk but the only difference in his appearance apart from not speaking was that" he had a cheerful appearance and in his breathing.

15. Breathing rather hard? Yes on the 22nd he had a less cheerful appearance than on the 21st.

16. Did you know what his temperature was? No.

17. Did you know that it was 104 deg? No.

18. Court: What do you mean by "cheerful appearance." Was he smiling? No. I only saw it was cheerful in comparison with his appearance on the 21st.

19. If he was not smiling he was lying there on the bed with his eyes shut on both occasions? Yes he was lying on the bed not wishing to speak.

20. With his eyes shut and not smiling? Yes.

21. On what ground do you base your statement that he looked cheerful? On the 22nd?

22. On the 21st? On the 21st his breathing was normal. I use the expression "cheerful" in the sense in which a man in a normal condition, who is not ill....

23. Therefore, the only difference was that on the 22nd he was breathing rather hard? Yes.

24. Now, if it be true that the Kumar's condition, except in respect of his breathing, was the same at 4 p. M. on the 21st November as it was at 4 p. m. on the 22nd November, then this witness's evidence corroborates the view that the deceased was not of sound mental capacity on the 21st November, for upon the 22nd November *ex concessis* the Kumar was incapable of making a Will. But I observed the demeanour of this witness as he gave his evidence, and I was not impressed with the manner in which he did so. He appeared to me to be indisposed to give direct or straightforward answers even to questions the answers to which could have presented no difficulty to him, and I do not feel that I should be justified in placing reliance upon his testimony. Lila was not called as a witness, although she is the propounder of the Will, and could have given invaluable testimony as to the physical and mental condition of the Kumar at all material times. In answer to an enquiry from me Lila's Counsel stated that if the Court believed the other witnesses called in support of the Will her evidence was unnecessary, and if the Court disbelieved the other witnesses, the Court, in his view, would not be disposed to pronounce in favour of the Will by reason of any evidence which Lila might give. In my opinion, Lila was the most important of all the witnesses, and ought to have been called in support of the Will, and the fact that she was deliberately kept back from the witness-box was made the subject of forcible, and I think justifiable, comment by Counsel for the contesting caveator. From her absence in the witness-box I am disposed to draw, as I am entitled to do, the inference that if she "had gone into the witness-box, and had told the truth, her evidence would not have supported the validity of the Will, while if she gave false evidence her actions in connection with the Kumar's affairs would not have borne investigation in a Court of Justice. In these circumstances, I find that the Kumar Guru Prosad Sinha did not execute the document in suit, and that at the time when it was alleged that he did so he was not possessed of sound disposing capacity. I hold that the document in suit is not the Will of the alleged testator Kumar Guru Prosad Sinha and I pronounce against its validity, and direct that Probate do not issue in respect thereof. I do not regard it as either desirable or necessary that I should express any opinion in connection with certain other matters relating to the disposal of the Kumar's estate after his death which were canvassed at the hearing. The main issue which I had to determine in these proceedings was whether or not the Kumar executed the document in suit. I have found that he did not execute this document. In these circumstances the question may be asked, who then did place the name of the Kumar upon the alleged Will? This is a matter as to which further enquiry will have to be made. All the documents in these proceedings will be impounded, and will be forwarded to the proper authorities for further investigation, with a view to ascertaining whether it is advisable or not to institute criminal proceedings against the persons who were concerned in the transactions relating to the document in



suit. All the three caveators who have appeared are entitled to have their costs as against the propounder of the Will. As regards any further question of costs, liberty to apply.