JUDGMENT IN INTERESTING CASE OF CONTESTED WILL

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of gifts or other transactions inter vivos it is considered by the Courts of Equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment."

"The law regarding wills is very different from this. The natural influence of the parent or guardian over the child or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy so long as the testator thoroughly understands what he is doing and is a free agent. There is nothing illegal in the parent or husband pressing his claim on a child or wife and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion and that the volition of the testator, though biased and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another."

"The influence which will set aside a will," says Mr. Justice Williams, "must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." Lord Haldane in delivering the judgment of the Privy Council in Craig v. Lamoureaux says that "when once it has been proved that a will has been executed by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests upon the party who alleges it."

Unfortunately, I think, the Judge of Probate took a different view and held that "William Nelson by not coming forward to assist the Court failed in his duty and leaves the court no recourse but to put the most unfavorable construction upon those actions of his to which suspicion attaches."

At the opening of the hearing of this appeal, counsel for the appellant applied for leave to examine William Nelson as a witness urging as a special reason therefor the strictures of the Judge upon his not having been examined as a witness at the trial before him, and they asked that he should then be permitted to be examined as a witness. This application was opposed by counsel for the respondent and refused by the Court of Appeal on the ground that there was nothing material for him to answer and that the case had already lasted for an excessive length of time. On a careful re-examination of the evidence, I see no cause for changing that opinion.

In the case of Parfitt vs Lawless above quoted, the plaintiff, who was in a similar position to William Nelson in this case, was called and examined as a hostile witness by the parties opposing the will. The same course was open to the petitioners (respondent) in this case. Either side could have put him on the stand and the record shows he was in Court. It is impossible to estimate the extent to which the misconception of William Nelson's duty in this and other matters herein referred to may have influenced the learned Judge in the conclusion at which he arrived.

"Unscrupulous" Conduct Charged

It may have led him to regard as unfavorable his conduct in respect to the testator's bonds deposited in a safety deposit box on a bank in Charlottetown. The learned Judge referred to William Nelson's conduct as "unscrupulous." I think it is only fair to refer to this matter here and to say that in my opinion this censure is not justified. The evidence shows that William Nelson was aware of the contents of the Bell will —that he was the principal beneficiary under it. His anxiety in regard to the possession of the key was therefore natural. Mr. Tinney to whom the testator had entrusted his key had the full confidence of the testator and evidently deserved it, but the continued holding of the key by one who had no interest in the property involved was to say the least not in the ordinary course of business, and when the executors were appointed and it must have been evident that the testator's days for active business were over it was quite natural and right that they should be anxious that the key should be in the hands of those who were to have charge of the property which it represented rather than in the possession of one who had no interest in it. Their action may have been premature but there is no ground for saying that it was "unscrupulous" nor a "suspicious circumstance"

That vague and confused doctrine of "suspicious circumstances," (if any trace of it remains since the decision of the Privy Council in Craig V Lamoureaux) never went farther than to require for the removal of the suspicion that there should be strict proof of knowledge by the testator of the nature and contents of the will. The ground of "suspicion" must have been inherent in the circumstances, not the mere offspring of the suspecting person's mind; and the circumstances out of which the suspicion arose must have been related to the question of the testator's knowledge and understanding of the contents of the will which he had executed.

But in this case "Suspicion" was followed to run riot over the whole field. The result was the admission of a vast amount of irrelevant and hearsay testimony covering a period of 25 years or more.

If anything is clear in this case it is the resolute intention of the testator from early days to treat William Nelson as if he were his only son. Even if all that was said by petitioner were true, that testator frequently complained to her of William Nelson's conduct towards him saying in effect on one occasion in her house that it was his intention to cut him off without another shilling and to make a new will leaving to her, her sons, her brothers and sisters the major portion of his estate, he did not do it, nor did he at any other time or place show any intention of doing it, nor does it appear to have been again mentioned in his lifetime. Such an occurance would seem at most a strange interlude. There is no evidence that the testator was subjected to any undue influence in the making of his will nor is there any trace of fraud.

In my opinion the judgement appealed from cannot stand because in the Court below principles were applied not revelant to the present case which placed a burden of proof upon the appellants that they were not called upon to bear and because it appears that the will in question was well proved and the executors named therein entitled to probate thereof.

The judgment of the Court below should be reversed, the order rescinding the grant of probate cancelled and the will established.

Following the course adopted by the Privy Council in Craig vs Lamoureaux, the respondent must bear the costs in this Court and in the Court below in a proceeding which was misconceived. Owing to a prior arrangement between counsel, the stenographer's accustomed charges for reporting and extending the notes of evidence should be paid out of the estate.

JUDGEMENT OF MR. JUSTICE ARSENAULT

I have had the opportunity of reading the Judgment of the learned Chief Justice with which I fully agree and concur.

The facts therein are sufficiently stated and the law bearing on the case fully set out.

I can add little to the Judgment that can be of material use and I will confine myself to the review of some of the evidence that was given in the Court below and which was before the Court on appeal.

A great deal of irrelevant and scandalous evidence was tendered and admitted to show that at various times in a period extending back for some thirty years there were disagreements between William Nelson and the testator. I cannot understand very well what bearing such evidence has on the subject matters under consderation nor why it should be admitted. Supposing such evidence to be true, the fact remains that notwithstanding such squabbles the testator of his own volition went to Summerside and spent a day with his solicitor preparing and executing a will which did not materially differ from the will now attacked.

Should a will be set aside, which was dictated by the testator when he was in possession of all his mental faculties and so far as the evidence goes under no undue influence or coercion, because interested witnesses are produced who testified that years before William Nelson McWilliams said nasty things about the testator's wife or had a quarrel with her son and had disagreements with the testator himself. Admitting this to be true, what possible bearing can it have on a will executed years afterwards in pursuance of his oft repeated intention and in confirmation of a formerly undisputed will supposed to have been lost? In my opinion such evidence is only an incumbrance to the record and, in the face of repeated objections on the part of counsel for the executors, should not have been admitted.

The learned Judge of Probate in his judgment is of opinion that Dr. Champion, who drew testator's will, as an executor and as such entitled to a commission on the Estate was naturally interested and prevents weight being given to his evidence. I find nothing in the law to support such a contention. Executors under a will are usually allowed a commission on the winding up of an estate in compensation of the work they have done. Such commission is in the Judge of Probate's discretion and may be little or much and in any event cannot exceed five per cent of the value of the estate. Such executor is not an interested party except in so far as he is interested in the winding up of the estate and carrying out the provisions of the will. This commission allowed him is by way of compensation for his work and trouble and is in the nature of a quantum meruit and not a gift or legacy under the will and the executor can never be sure beforehand what such compensation will be and it could not possibly influence him when drawing a will for his commission bears no relation to the contents of the will.

Some comment has been made upon the silence that was kept as to the making of the present will. Neither the testator, the Doctor, the nurse nor any of William Nelson McWilliam's household said anything about it on the occasion when Mrs. Lidstone and the members of her family visited the testator after the will was executed. The testator doubtless had his reasons for preserving that silence. It was his right and gives rise to no inference against the will. Childless men in the position of the testator with a host of next of kin are thus safeguarded against the importunity of self-seeking relatives. In such a case it would be a gross breach of faith for a doctor in professional attendance, the nurse and others in a confidential relation, to have given out any information as to the existence of the will or of its contents except at the request of the testator.

In view of the circumstances under which the will was dictated by the testator and bearing in mind the fact that a year before the testator had made a similar will which he thought had been lost and about the validity of which no question has been raised, I can see no reason for setting the present will aside. I agree that an order shall be made in pursuance of the learned Chief Justice's Judgment just delivered.

FALL DOWN ON PACKING

"The quality of Canadian fruits and vegetables is undoubedly better than the great bulk of those imported but we certainly fall down on our grading packaging" is the comment of a circular recently issued by the Canadian Horticultural Council Growers and shippers who will conscientiously follow the regulations prescribed by the Federal Fruit Act and Regulations and the Root Vegetable Act will give little cause for consumer complaint. In this connection the shipping print inspection service of the Dominion Fruit Branch is an invaluable aid.