Privy Council Appeal No. 55 of 1914.

Isaie Craig - - - - - - - - - *Appellant*

v.

Dame Arzélie Lamoureux - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from the Supreme Court of Canada, which reversed, the Chief Justice dissenting, a judgment of the Court of King's Bench for the Province of Quebec. That Court, in its turn, had reversed the judgment of the Superior Court for the Province, delivered in an action which was brought to set aside a will. The claim was made against the appellant as defendant, and was based on the contention that as the appellant, who was the husband of the testatrix, was the sole beneficiary under the will and had been instrumental in preparing it, the *onus* lay on him to show that he had not procured its execution by undue influence and misrepresentation, and that this *onus* he had failed to discharge.

Their Lordships feel bound to express their regret at the course which the litigation has taken. The amount of the testatrix's estate is small, and the costs of determining the issue raised must be out of all reasonable proportion to the sum at stake. But the judgments given have been successively reversed, and there is no course open to this Board but to deal with the matter without regard to consequences.

The respondent, the plaintiff, was an unmarried sister of the testatrix. The latter had been married to the appellant for twenty-four years, and the husband and wife had lived together through that period in the house of the appellant's father near Montreal. They were married with a contract providing for separation of property, under which the surviving spouse would not on intestacy take any interest in the property of the predeceasing spouse, a situation which they had, according to the evidence, only realised immediately before the death of the wife.

The events which have given rise to the controversy between the parties are shortly as follows :—The testatrix was seïzed with a serious illness on Saturday, the 1st July, 1911. Doctors who were called in thought her condition one of danger. The trained nurse, who was in attendance, finally suggested to the testatrix that she should see the parish priest, and he was summoned accordingly by the husband's father, Joseph Craig. The latter had heard the appellant and the testatrix talking with the idea that the survivor of them would succeed to the property of the other, and having doubts whether they realised that, from the nature of their marriage contract, this could not be without a will, he spoke first to his son, and then to the priest. The priest, after administering the rites of his Church to the testatrix, mentioned the point to her, but, according to his evidence, without suggesting that she should leave her property to her husband. When the priest had left her, the testatrix told the nurse to ask her husband to come to her room, as she had something to say to him. He came, and the nurse left the room. According to the husband's testimony, his wife asked him how it was that their affairs were not in order as she had always been told by him, and she requested him to get them arranged so that, as they had always agreed when she was in health, the property should go to the survivor. The husband then went to his brother, who lived in the house, and who was a lawyer. The latter wrote out a will in the following words :—

> " Par mesure de prudence, et sans me croire nullement dangereusement malade, je prends à tout évènement les présentes dispositions : Je donne et lègue, sans restrictions, à mon époux, Isaie Craig, tous mes biens tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches comme souvenirs."

The husband read this will to his wife, who asked him, according to his account, if he could do something for her own family, for her father had always asked her to think of these others if it was at all possible, as far as she would like to do so, and she said to him that she would like that he should do this if he could. The husband then went back to his brother and asked him to add a clause to the will. The brother re-drew it in the old terms, but with the following addition at the end :—

> " Suivant les recommendations de mon défunt père, je lui recommande de même de ne donner ou léguer ces dits biens à nul autres qu'aux membres de ma famille."

The husband and wife had had no children, and the wife's legal heiresses, apart from the operation of the will, were the respondent and her sister. She had inherited a substantial amount of property from her deceased father. What has been stated appears to their Lordships to represent the substance of what was proved by the witnesses on balance of testimony.

The wife was asleep after an injection of morphine when this second document was prepared. It was taken to her by her husband later on, between five and six o'clock in the afternoon of the same day (Wednesday, the 5th July), and was read over to her by the husband. She tried to sign her name to it, but the signature was illegible. The document was subsequently signed by three witnesses whose names appear on it, but as they did not sign in the presence of the testatrix, as required by the law, the execution was apparently invalid. It is not, however, necessary to go into this question, because when it was shown to the brother he pronounced this will valueless because of the illegible character of the signature, and it was in consequence superseded. The husband, who says he was under the impression that this was so, informed his wife of it. She then, according to him, asked him to bring her the first will which he had read over to her in the morning. According to the testimony of Madame Amyot, an intimate friend of the wife who was with her, there elapsed only a brief interval between the signature of the second will and the signature of that first prepared and for which she had finally asked. Madame Amyot says that the husband offered to read it over again to her, and that she said that she did not desire this to be done, adding that it was not necessary, for she was going to sign it at once. This she did by putting her mark in the form of a cross. At the end of this will the words had been added to this will:—"Et je déclare ne pouvoir signer"; the cross was marked underneath, and three witnesses attested the document in the testatrix's presence as being so executed. Their Lordships think that no question can be successfully raised as to the validity of this will so far as formalities are concerned. Nor do they think that it was shown that the testatrix was otherwise than capable of understanding what she did. The evidence of the nurse, who was one of the three attesting witnesses, supports this view. Miss Craig, a lady of mature age, who was also present when the testatrix put her mark to the will, and was one of the witnesses, says that the testatrix asked for her spectacles, and that she was in full possession of her faculties. The doctor, who had seen her twice that day, was not called to contradict this.

The action was tried before Bruneau, J. without a jury. The learned Judge found against the first will, that finally signed with a cross. He held that the true intention of the testatrix was expressed in the other or second will, which had been put aside on the representation that it was inoperative because of the illegible signature, and that she was led to sign her first will only because of this misrepresentation of the law.

The husband appealed to the Court of King's Bench, where

judgment was given by Chief Justice Archambeault, on behalf of himself and Lavergne, Cross, Carroll and Gervais, JJ. The judgment of Bruneau, J. was reversed, and the action dismissed for reasons given very fully by the learned Chief Justice. In his judgment he makes a close examination of the evidence. With his conclusions as to what really happened their Lordships are entirely in agreement, and to the reasons he gives for rejecting the conclusion come to by Bruneau, J. they have little to add. The Chief Justice points out the fallacious character of the argument that because of the departure from the second will being based on a mistaken idea about the law relative to the illegibility of the signature, the will signed in its place was therefore bad. For whether or not the testatrix was misled by this idea, she knew what she was doing when she finally signed her mark to the first will. She did not ask that it should be altered. She adopted it as it stood. Moreover, as the learned Chief Justice points out, if she had not done so she might have died intestate, inasmuch as the second will was not validly attested by the witnesses, and she would have defeated her purpose, which was that her surviving husband should take her property. The judgment does not proceed on presumptions of law. It simply weighs the evidence apart from such presumptions, and arrives at the conclusion that so regarded the plaintiff had failed to make out any case for upsetting a will which the testatrix must be taken to have elected to make with full consciousness of what she was doing.

The plaintiff appealed to the Supreme Court of Canada, where, unfortunately as their Lordships think, the majority of the learned Judges, notwithstanding the dissent of the Chief Justice there, were much influenced by the view that the validity of the will in such a case as the present depended on whether the husband had discharged a burden which they held to be on him of proving that his wife, in making a will in his favour, had such complete appreciation of the consequences of her action as probably nothing short of independent advice could have given her. They applied what they took to be a principle of universal application, that a person who is instrumental in framing a will under which he obtains a bounty is placed in a different position in law from ordinary legatees who are not called on to support by evidence of its honourable and clearly comprehended character the transaction as regards their legacies. In their case they thought that it is enough that the will should be read over to the testator, and that he should be of sound mind and capable of understanding it. But they considered that there was a further burden resting on those who take for their own benefit after having been instrumental in framing or obtaining the will. For they have thrown on them the burden of proving the righteousness of the transaction. This they considered that the husband had not done in the present case, and in the light of the principle so laid down they reviewed the evidence and decided against the will.

No doubt a principle such as that relied on by the majority

of the learned Judges in the Supreme Court of Canada is one which is very readily applied in cases of gifts *inter vivos*. But, as Lord Penzance pointed out in *Parfitt* v. *Lawless* (2 P. and D., 462), it is otherwise in cases of wills: When once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this. It may well be that in the case of a law agent, or of a stranger who is in a confidential position, the Courts will scan the evidence of independent volition closely, in order to be sure that there has been thorough understanding of consequences by the testator whose will has been prepared for him. But even in such an instance a will, which merely regulates succession after death, is very different from a gift *inter vivos*, which strips the donor of his property during his lifetime. And the Courts have in consequence never given to the principle to which the learned Judges refer the sweeping application which they have made of it in the present case. There is no reason why a husband or a parent, on whose part it is natural that he should do so, may not put his claims before a wife or a child and ask for their recognition, provided the person making the will knows what is being done. The persuasion must of course stop short of coercion, and the testamentary disposition must be made with comprehension of what is being done.

As was said in the House of Lords when *Boyse* v. *Rossborough* (6 H.L.C. 2) was decided, in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean. And the relationship of marriage is one where it is, generally speaking, impossible to ascertain how matters have stood in that regard.

It is also important in this connection to bear in mind what was laid down by Sir James Hannen in *Wingrove* v. *Wingrove* (11 P. D. 81), and quoted with approval by Lord Macnaghten in delivering the judgment of this Board in *Baudains* v. *Richardson* (1906, A.C. 169), that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained.

Their Lordships are of opinion that the majority in the Supreme Court did not sufficiently bear in mind what is the true principle in considering the evidence in the present case. They appear to have applied another principle which was not relevant

in the inquiry, and to have thrown a burden of proof on the appellant which was not one which he was called upon to sustain. Their Lordships agree with the course taken and the conclusions come to as the result in the judgment of the Court of King's Bench. They think that the judgment under appeal must be reversed, and that the respondent must bear the costs here and in the Courts below of an action which was misconceived. They will humbly advise His Majesty accordingly.

In the Privy Council.

ISAIE CRAIG

v.

DAME ARZÉLIE LAMOUREUX.

DELIVERED BY VISCOUNT HALDANE.

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