

Privy Council Appeal No. 73 of 1924.

Charles Edward Wilson - - - - - *Appellant*

v.

Beatrice Maud Kinnear and others - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 30TH MARCH, 1925.

Present at the Hearing :

VISCOUNT HALDANE.

LORD DUNEDIN.

LORD PHILLIMORE.

LORD DARLING.

[*Delivered by* LORD DUNEDIN.]

The appellant, Charles Edward Wilson, and the late Mrs. Wilson, of whose will probate is sought in this suit by the first two respondents, executors named in that will, being members of the sect known as Christian Scientists, went in 1891 through a so-called ceremony of marriage celebrated by a lady member of the same sect. They lived together as man and wife till 1916. In that year Mrs. Wilson, conceiving that she had just cause, complained in respect of Mr. Wilson's relations to another lady member of the sect, brought the matter before the Church Court and accused her husband of adultery. The reply he made was that he could not be charged with adultery as he was not married, the so-called marriage being no marriage in the eye of the law. This defence, though well-founded in law, not unnaturally provoked great scandal in the Church to which the parties belonged, and the parties separated. In 1917, however, Mrs. Wilson, having discovered new facts, wrote to Mr. Wilson explaining that she was now convinced that in the matter he had been more sinned

against than sinning and sought a reconciliation. The reconciliation was effected. The parties came together again and were then married, this time legally, on the 6th April, 1918. After that the spouses lived together in terms of complete friendship in Vancouver. Mrs. Wilson was née White and she had a brother H. G. White and a sister who had married a Mr. Kinnear, who all lived in Toronto. They are, with others who are beneficiaries under the will, the respondents in this action. She had also a mother alive, who lived in Toronto. In 1920 the mother died and there ensued litigation as to her succession. As Mrs. Wilson was one of the parties interested she came to Toronto, leaving her husband at Vancouver, in order to attend to her interests in the litigation. She arrived about the latter half of November, 1920, and went to the house of her sister, Mrs. Kinnear, where she stayed till the 5th January, 1921, when she went for five days to the house of her brother, returning thereafter to her sister's house, where she stayed till her death. The litigation came to an end with the result that Mrs. Wilson received a considerable accession of fortune, roughly speaking about \$30,000, ~~she having already a private fortune of about \$20,000.~~ Then there ensued a question which caused much friction among the Toronto party. Mrs. Kinnear had financed the litigation and she thought that the others, *i.e.*, the brother and Mrs. Wilson, should make a contribution to her out of their shares, of 5 per cent. She also urged that Mrs. Wilson's share should be so settled that, at her death, it should go to her, Mrs. Kinnear's, son. The Wilsons were childless. These claims were resisted by Mrs. Wilson. This dispute went on all during December, 1920, and the beginning of January, 1921. During all this time Mrs. Wilson was corresponding with her husband, who was still in Vancouver.

It would be useless in a case such as the present, where the present judgment must be final and where no question of law arises upon them, to set out the letters at length. It is sufficient to say, by way of summary, that the letters are uniformly affectionate in tone, that they narrated in terms of sharp criticism the demand made by her sister, and that they further disclosed that during all this time her sister was rubbing into her the bad behaviour of her husband in the past and that she resented her so doing.

Besides the question of the litigation Mrs. Wilson had other business in Toronto as she possessed, as part of her own fortune, some real property on which there were mortgages. It was her wish to use some of the mother's money to get rid of the mortgages and to sell the property. During the course of the litigation she was taken by her sister to the office of Mr. Redman, a lawyer, who was Mrs. Kinnear's solicitor. She asked him if he had ever made a will for her mother and he replied that he had not. She remarked to him that when the litigation was over she wished him to make a will for her, a natural remark in view of the accession of fortune which she was in the course of obtaining.

Mrs. Wilson had previously made wills in 1904 and 1917. Both the wills were in the same terms. They left everything to her husband and appointed him sole executor. When Mrs. Wilson arrived at Toronto she was suffering from diabetes. Soon after arriving at Toronto she hurt her foot with a tight shoe and a sore developed, which became gangrenous, and the diabetes naturally militated against recovery. She was "treated" after the Christian Science methods by the Kinnears, who were both faith healers and practised as such. She also requested her husband to do his best at Vancouver. All this was disclosed in letters to the husband who, therefore, on the 9th January, 1921, offered to come to Toronto to look after her and help her in her business. From this he was dissuaded by telegrams. There was controversy as to whether the telegrams were really authorised by Mrs. Wilson, but their Lordships do not go into the matter as of at least one, that of the 12th January, 1921, there has been produced a draft in Mrs. Wilson's own writing. Mrs. Wilson got steadily worse. On the 11th or 12th January, 1921, she saw a Dr. Carveth, who pronounced her malady to be gangrene and described the case as hopeless. Nevertheless she only went on with Christian Science methods. He saw her again on the 31st January. She died on the 1st February, 1921.

On the 18th January, 1921, Redman got a telephone message from Mrs. Kinnear saying her sister was unwell and wanted to see him. On the 19th January he went to Mrs. Kinnear's house where he found Mrs. Wilson in bed. He had an interview with her of about an hour, during which he took her instructions for a will. From the instructions he, on his return to the office, prepared a will. By the will the executors nominated were her brother and sister. After providing a small annuity to a friend, the residue was divided into 15ths. Of these 15ths 8/15ths were to go to the brother, 4/15ths to the sister, both in life interest, and 3/15ths to the husband in life interest if the executors chose to allow it to him. The whole corpus of the estate after the life interests determined was left to Mrs. Kinnear's child. The executors were given the power to make advances if they wished to do so to the husband out of the corpus. Redman returned next day, the 20th January, with the will extended and ready for signature, but when Mrs. Wilson heard it read over she said, "That does not sound very nice, does it, in regard to Mr. Wilson?" "I wish you would strike out that part giving the executors the discretion to give him income and let him have it absolutely." Redman called her attention to the fact that if the clause as a whole went out the executors could no longer advance out of the corpus. Then she said, "That is all right. I want Mr. Wilson to have the income and strike out any reference to the discretion of the executors." Redman accordingly struck out the clause, got her to initial the alteration and then called up his clerk Grogan who was downstairs and with him witnessed Mrs. Wilson's signature. He then took away the will to his office.

On the 31st January, 1921, Redman was called up on the telephone by Mrs. Kinnear, who said that her sister was very ill and wanted some change made in her will. Redman replied that he could not go to the house that day owing to other engagements, but could she tell him what change was wanted. Mrs. Kinnear, after a pause, during which she left the telephone, said that what her sister wished was to revert to the original form giving the executors discretion. Redman then extended another will in the form of the original draft, *i.e.*, reinstating the clause which had been struck out and gave it to a young articled clerk Grogan, whom he instructed to go to the house and get the will signed. Grogan went and was shown up to Mrs. Wilson's room. By this time she was in a state of extreme weakness. She could not sit up in bed, and when it came to signing, her arm and wrist had to be supported as well as the body. When she was given the pen she could not support the weight of the paper and a book had to be fetched to be placed under it. Assisted in this way she managed to sign and the will was duly witnessed by Grogan and the sick nurse Ferrell.

Grogan depones that, when he arrived, he said to her that he had brought her a will to sign and that he said, "It is the same as the one you have already signed except that the clause has been re-instated as to the discretion of the executors," that he read the will and that, as he read she nodded her head in an approving fashion, but she did not speak, although she muttered some words which the nurse said were "discretion of executors." This is the will of which probate is sought in this action. The action was defended by the husband, the present appellant, and was tried by Middleton J. without a jury. He set aside the will on the ground of undue influence on the part of Mrs. Kinnear.

Looking at the terms of the letters which Mrs. Wilson wrote to her husband during the first half of January, he came to this conclusion because, to use his own words, "I cannot believe that the change from a condition of affection which made the husband the sole beneficiary, to the delivering of him to the mercy of the brother and sister resulted from any normal action of the testatrix's mind, nor can I understand how the woman who penned the passages of the letters and telegrams could be brought to execute the will of the 31st January by fair play."

Although the will of the 20th January was not technically in question, as it had not been put forward for probate, it is certainly the case that the views of the learned Judge would cover that will equally with the will of the 31st January. Now, that the learned Judge should come to such a conclusion, cannot be made matter of surprise. Not only was there the contrast between the letters and the want of regard shown in the will, but there was the very ugly circumstance of the testimony of Mrs. Kinnear according to which, at the very time when the wife was writing these affectionate letters, she was telling Mrs. Kinnear that she loathed her husband. It is quite evident that the

learned Judge did not believe Mrs. Kinnear. Had the verdict been the verdict of a jury their Lordships think that it could not have been set aside. But the judgment of a Judge is in a different position. A Court of Appeal has not to consider whether there is any evidence on which the verdict could be reasonably based; it has to consider whether it, on the evidence, would have come to the same conclusion, and that is what the Appeal Court did. There is no doubt that the circumstances give rise to much suspicion. It is a will in which the husband is disregarded and by which Mrs. Kinnear, not only gets a more substantial share of the life interest than Mr. Wilson does, but all the corpus goes to her child. But mere suspicion is not enough; and in the same way there may be influence, without that influence being undue influence. Their Lordships will not repeat all that was said in the case of *Craig v. Lamoureux*, [1920] A. C. 349. After all, it comes to the question whether, when a will is executed, it represents the true will of the testator, the subject matter of it being understood, and the testator's mind free to express its true desires. Judged by this standard their Lordships, agreeing with the Court of Appeal, think the will of the 20th January unassailable. They come to this conclusion really in respect of the testimony of Mr. Redman, who seems to them a witness above suspicion as regards probity. If Mr. Redman is believed there is no doubt that the will of the 20th January as finally executed expressed the true views and, so far as can be seen, the uninterested wishes of the testatrix. Having come to that conclusion as regards the will of the 20th January the learned Judges of the Court of Appeal simply say that there is no evidence to show that the change wrought by the will of the 31st January was brought about by undue influence. But when we come to the will of the 31st January there arises another aspect of the case which their Lordships think escaped the notice of the learned Judges of the Court of Appeal. Their Lordships have already said that they are entirely satisfied as to the probity of Mr. Redman, but they are bound to say that they think he did not realise the true position on the 31st January. He had, on the former occasion, made a will, doubtless in respect of the instructions of the testatrix, in which the husband was left a mere pensioner at the goodwill of the executors, and when that will was read over and the testatrix grasped its full significance she ordered it to be altered and it was altered. On the 31st January he got no instructions from Mrs. Wilson herself, only a telephone message from Mrs. Kinnear, a strongly interested party. In such a case it was his imperative duty to make himself more than sure that the change was truly the wish of the testatrix, and not the will of someone else suggested to and impressed upon a dying woman. Had he been able to go himself their Lordships have no doubt that he would have fully satisfied himself on this point. He could not go and he had to send a young man instead. Here again their Lordships have no criticism to make on Mr.

Grogan. They think he carried out his mission as he was told to do, but he ought to have been armed with very special instructions on this point and he was not. As it was, all he did was simply to state the point and then read over the will, and he took the nodding of the head to signify approval. This lady was in the last stage of exhaustion. She suffered from diabetes and gangrene, each of which diseases, in their final stages, are apt to cloud the brain. No doctor was fetched at the time and the end came the very next day.

Their Lordships are clearly of opinion that a will making such a vital change, as this one did on the will of the 20th January, cannot in these circumstances be allowed to stand. The respondents might have given the will of the 31st January the go-by and sought probate of the will of the 20th January. They have not done so and there is left no issue but one for this case, which is to recall the judgment of the Court of Appeal and restore the judgment of Middleton J.

The appellant will have his costs before the Court of Appeal and such costs as are allowed to one who sues *in forma pauperis* before this Board. In accordance with these views their Lordships will humbly advise His Majesty.

In the Privy Council.

CHARLES EDWARD WILSON

v.

BEATRICE MAUD KINNENEAR AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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