HELEN M. C. KAULBACH .....APPELLANT; 1901

AND *May 7, 8, 13, 14.

FRANCIS H. W. ARCHBOLD AND JAMES R. LITHGOOD, EXECUTORS ..... RESPONDENTS. *Oct. 29.

In re WILL OF EDWARD P. ARCHBOLD.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Capacity of testator—Undue influence.

A codicil to a will executed shortly before the testator's death, increasing the provision made by a former codicil for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece.

Held, reversing the judgment of the Supreme Court of Nova Scotia, Taschereau and Sedgewick JJ. dissenting, that as the testator was shown to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece even if it had been proved that she urged him to make better provision for her than he had previously done such would not have amounted to undue influence.

Held, also, following *Perera* v. *Perera* ([1901] A. C. 354) that even if there was ground for saying that the testator was not at the time of execution capable of making a will if he were when he gave the instructions the codicil would still have been valid.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the ruling of the Probate Court Judge who refused to admit to probate a second codicil to the will of Edward P. Archbold.

The testator, E. P. Archbold, died on June 29th, 1898, aged 83 years. By his will he left $600 a year to the appellant which was increased to $800 by a codicil not attacked in these proceedings. A second

*PRESENT:—Sir Henry Strong C. J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

1901

KAULBACH v. ARCHBOLD.

In re ARCHBOLD.

codicil, increasing the annuity to $1,000 and bearing date June 16th, 1898, was refused probate, the probate Judge holding that the appellant had not satisfied the conscience of the court that the testator was capable of making a will at that date and that it expressed his last will.

The executors impeached the last codicil on the grounds that the testator was too infirm and feeble in mind to administer his affairs; that the codicil was made at the instigation and under the influence of the appellant; and that it was prepared and executed during the absence of the residuary legatee, testator's only son, and secretly, which were suspicious circumstances not explained away by the latter. The Supreme Court of Nova Scotia, the Chief Justice dissenting, affirmed the ruling of the Probate Judge in refusing probate of this codicil.

Newcombe K.C. for the appellant. Suspicions entertained by the court must be "pregnant suspicions" in order to justify rejection; *Raworth* v. *Marriott* (1); *Goodacre* v. *Smith* (2). The testator's instructions were sufficient; it is not necessary to show that the codicil was read over by him before he signed it; *Raworth* v. *Marriott* (1); *Goodacre* v. *Smith* (2); *Parker* v. *Felgate* (3). As to the law respecting undue influence we refer to *Adams* v. *McBeath* (4); *Hall* v. *Hall* (5); *Beamish* v. *Beamish* (6); *Wingrove* v. *Wingrove* (7); *Boyse* v. *Rossborough* (8); *Parfitt* v. *Lawless* (9). The judge in first instance admitted improper evidence on the part of the executors, and improperly excluded evidence favourable to appellant, *Crowninshield* v.

(1) 1 Myl. & K. 643.
(2) L. R. 1 P. & D. 359.
(3) 8 P. D. 171.
(4) 27 Can. S. C. R. 13.
(5) L. R. 1 P. & D. 481.
(6) [1894] 1 Ir. 7.
(7) 11 P. D. 81.
(8) 6 H. L. Cas. 2.
(9) L. R. 2 P. & D. 462.

Crowninshield (1). We also rely upon *Aitkin* v. *McMeckan* (2); *Re Stulz* (3).

Drysdale K.C. for the respondents. The question involved in this appeal is one of fact, passed upon by the trial court and the Court of Appeal, and ought not to be reversed. *City of Montreal* v. *Cadieux* (4); *Senesac* v. *Central Vermont Railway Co.* (5) The concurrent findings on questions of fact in the courts below should not be interfered with upon appeal.

The second codicil was prepared by appellant, who takes a large benefit under its terms, under circumstances which raise the suspicion of the court; it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the court that the will was the voluntary act of the testator, and that he knew and approved the contents of the instrument. *Tyrrell* v. *Painton* (6); *Fulton* v. *Andrew* (7); *Barry* v. *Butlin* (8); *Ashwell* v. *Lomi* (9); *Baker* v. *Batt* (10); *Parker* v. *Duncan* (11); *Brown* v. *Fisher* (12); *Parfitt* v *Lawless* (13).

The learned counsel then dealt with the alleged suspicious circumstances attending the preparation and execution of the will and contended that they indicated both improper influence by the appellant and incapacity of the testator.

The appellant, by the codicil, practically raises her own annuity from the $800 a year provided in the former codicil to $3,250 a year at no remote date, as by the death of any one of the three annuitants (both the others being advanced in years), the provisions for

(1) 2 Gray (Mass.) 524.
(2) [1895] A. C. 310.
(3) 17 Jur. 749.
(4) 29 Can. S. C. R. 616.
(5) 26 Can. S. C. R. 641.
(6) [1894] P. D. 151.
(7) L. R. 7 H. L. 448.
(8) 2 Moo. P. C. 480.
(9) L. R 2 P. & D. 477.
(10) 2 Moo. P. C. 317.
(11) 62 Law Times 642.
(12) 63 Law Times 465.
(13) L. R. 2 P. & D. 462.

1901

KAULBACH v. ARCHBOLD.

In re ARCHBOLD.

the annuitant who dies accrue to the survivors and the whole amount provided for the three annuities goes to the last survivor during life. The trial judge discredited the appellant and disbelieved her story; and was fully justified in doing so, not only by her demeanour but in the matter of her testimony; and her statements are improbable, inconsistent, contradicted and uncorroborated. As a large benificiary, who procured the codicil in her favour, she was bound to see that the testator received proper and independent advice, and the testimony in support of the codicil should not be that of herself alone, but independent and impartial.

The judgment of the majority of the court was delivered by:

GWYNNE J.—In *Adams* v. *McBeath* (1) I was unable to concur in the judgment of this court affirming a will executed under the circumstances appearing in that case, for the reason that in my opinion the case came within the principle laid down by the House of Lords in *Fulton* v. *Andrew* (2); by the Privy Council in *Baker* v. *Batt* (3); and *Barry* v. *Butlin* (4); by Sir John Nicholl in *Paske* v. *Ollat* (5); *Billinghurst* v. *Vickers* (6); *Ingram* v. *Wyatt* (7); and by Sir John Hannen in *Parker* v. *Duncan* (8); and *Brown* v. *Fisher* (9); and because I was of opinion that the person who had caused the will in question in that case to be prepared and executed giving all the property of the deceased to himself, had not removed the burthen imposed upon him by the principle laid down in those cases.

In the present case I can see nothing in the evidence which brings it within the principle laid down in the above cases; nothing whatever justifying the impeach-

(1) 27 Can. S. C. R. 13.
(2) L. R. 7 H. L. 448.
(3) 2 Moo. P. C. 317.
(4) 2 Moo. P. C. 480.
(5) 2 Phillim. 323.
(6) 1 Phillim. 187.
(7) 1 Hagg. Ecc. 384.
(8) 62 L. T. N. S. 642.
(9) 63 L. T. N. S. 465.

ment of any conduct of the appellant in connection with the testator's making the codicil in question, as constituting undue influence.

It is quite possible, although no evidence of the fact was offered, that as a niece of the testator's deceased wife who had lived with her uncle the testator for many years, and in the latter years of his life as his housekeeper, the appellant may have persuaded the testator that he should make some better provision for her than was contained in his will as then already made, but such persuasion if established could not be characterised as undue influence. There is in my opinion no evidence of the codicil which is impeached having been procured to be executed by any undue influence whatever exercised by her. The evidence abundantly establishes the competency of the testator and that a day or two before he caused the codicil to be prepared he communicated to an intimate friend his intention to alter his will, whereupon that friend advised him to consult a solicitor, which it appears that he did, and the codicil was prepared by a professional gentleman of the highest reputation, upon instructions given both in writing under the testator's hand and also orally; and the codicil so prepared the testator copied in his own handwriting and executed. The recent case of *Perera* v. *Perera* (1), in approving *Parker* v. *Felgate* (2), is an instructive case which would have supported this will even if there had been any foundation for a suggestion that the testator had not sufficient mental capacity to make a will. The appeal should, in my opinion, be allowed with costs and probate be ordered to be granted of the will and codicils.

TASCHEREAU and SEDGEWICK JJ. were of opinion that the appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Borden, Ritchie & Chisholm.*

Solicitors for the respondents: *Drysdale & McInnis.*

(1) [1901] A. C. 354. (2) 8 P. D. 171.