1905

*Nov. 28-30.
*Dec. 22.

THE BRITISH AND FOREIGN BIBLE SOCIETY..... } APPELLANTS;

AND

FREDERICK TUPPER AND EDWIN DICKIE..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Promoter—Evidence—Testamentary capacity.

Where the promoter of, and a residuary legatee under, a will executed two days before the testator's death and attacked by his widow and a residuary legatee under a former will, the devise to the latter of whom was revoked, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator who seemed to understand what he was doing, and there was a doubt under all the evidence of his testamentary capacity, the will was set aside.

Girouard J. dissenting, held that the evidence was sufficient to establish the will as expressing the wishes of the testator.

Per DAVIES J.—The will should stand except the portion disposing of the residue of the estate, the devise of which, in the former will, should be admitted to probate with it.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment of the judge of probate for Colchester County by which a will of Abraham N. Tupper was set aside.

These proceedings were instituted in the Court of Probate for the Count of Colchester, N.S., at Truro, under the provisions of section 34 of the "Probate Act" (N.S.) which provides that any executor may be required by any person interested in the estate to

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

have the will proved in solemn form. The testator, Abraham N. Tupper, who died on the 23rd day of February, 1902, left a will bearing date February 20th, 1902, also one bearing date September 4th, 1901. In the will of 20th February, 1902, the testator named his wife, Harriet N. Tupper, executrix, and the respondents, Frederick Tupper and Edwin Dickie, executors, and these proceedings for proof in solemn form of that will were instituted by the testator's widow.

The learned judge of probate pronounced against the will of 20th February, 1902, upon the ground that, in view of such will having been prepared by Frederick Tupper, who was one of the residuary legatees named therein, and of the doubtful capacity of the testator when instructions were given for the will, and entire incapacity at the time when it was executed, those seeking to establish the will had not done so by evidence of the clear and unquestionable character required in such cases, and he decided, therefore, that the will should not be admitted to probate. On appeal to the court *en banc* this judgment was set aside and the will of February, 1902, declared to be valid and the last will of the testator. The appellant society were residuary devisees under the former will of 1901, and parties to the proceedings in the probate court.

W. B. A. Ritchie K.C. for the appellants.

Newcombe K.C. and *Mellish K.C.* for the respondents.

THE CHIEF JUSTICE (oral.)—The appeal should be allowed and the judgment of the probate court restored. The appellants' costs on the appeal to the

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

The Chief Justice.

Supreme Court of Nova Scotia and on the appeal to this court should be allowed against Frederick Tupper personally.

GIROUARD J. (dissenting).—It seems to me, on the evidence, that in February, 1902, the deceased intended to and did make a new will purporting to dispose of his entire estate. The majority of this court proposes to reject this new will as invalid, as there is a suspicion that attaches to it, and which, in their opinion, has not been cleared up. The court *en banco* has unanimously found against the appellants, reversing the ruling of the probate judge who had held that the last will and testament of the deceased was a former one made in September, 1901.

At no time in the courts below did any one of the parties imagine that the court would make a third will out of the two made by the testator, as suggested by my brother Davies. The parties contesting the last will, and claiming under the first one, did not set up any such contention in any contestation or argument.

The probate judge did not suggest any such adjustment. He rejected the last will *in toto*. Taking his view of the evidence I doubt that he could have rendered a different decree. The full court of Nova Scotia understood the fact in a different light and restored the last will of February, 1902.

Taking the view of the facts proved in the case as expressed in the strong opinion of Mr. Justice Graham, in which I concur, I am of the opinion that the whole of the last will should prevail, and I would dismiss the appeal with costs.

1905

BRITISH AND FOREIGN BIBLE SOCIETY *v.* TUPPER.

Davies J.

DAVIES J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia (Fraser J. *hesitante*) reversing the decision of the county court judge for the County of Colchester (N.S.), acting as probate judge, refusing to admit to probate a will purporting to be that of the late Abraham N. Tupper, bearing date the 20th February, 1902, three days before his death.

The learned trial judge pronounced against the will of February 20th, 1902, upon the ground that, in view of such will having been prepared by Frederick Tupper, who was one of the residuary legatees named therein, and of the, at least, doubtful capacity of the testator when instructions were given for the will, and entire incapacity at the time when it was executed, those seeking to establish the will had not done so by evidence of the clear and unquestionable character required in such cases, and the learned judge concludes his judgment by saying:

> Not being, therefore, judicially satisfied that this will is the true last will and testament of the deceased, I think that it should not be admitted to probate and so direct.

The judgment of the trial judge and also that of Graham J., who delivered the judgment of the Supreme Court of Nova Scotia, are very voluminous and exhaustive. The latter judgment reviews all the facts and the conclusion is that any suspicions which may have been aroused as to the will of February 20th, 1902, not expressing the true mind and desire of the testator because of its having been prepared by his brother Frederick Tupper, who was a large beneficiary under the will, were sufficiently satisfied and allayed by the circumstances of the case and by the evidence of the draftsman beneficiary Frederick Tupper.

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

The will of 20th February, 1902, was contested by his widow, Harriet N. Tupper, his adopted daughter, Matilda Tanner, and also by the appellant the British and Foreign Bible Society and the Congregational Church of Truro, but the only contestant appealing to this court is the Bible Society.

The Bible Society and the Congregational Church were residuary legatees under a previous will made about five months before his death, viz., on the 4th September, 1901, and which was produced in evidence and proved.

The latter will of 20th February, 1902, did not profess expressly to revoke the former one of 4th September, 1901, and as I shall hereafter shew only did so impliedly in so far as the provisions of the latter will altered or were inconsistent with the former one.

The testator at the time of his death was seventy-six years of age. He left no issue but had an adopted daughter, Matilda Tanner, now a widow, who, with her daughter Gladys, aged about ten, lived with the testator and his wife as part of the family.

The testator was one of the leading supporters of and contributors towards the Congregational Church at Truro, and was secretary of the British and Foreign Bible Society at Truro, in which he had always been greatly interested and to which he had frequently expressed his intention of leaving a portion of his property. At the time of the execution of the will of the 4th September, 1901, the testator was in good health and of strong testamentary capacity. The will which he then executed was one drawn by himself and in his own handwriting. The evidence was clear and strong that his interest in and warm sympathy with the Bible Society and the Congregational Church had continued unabated until his death, and

that on the other hand the relations between himself and brother had been for some time past very cool, if not strained. They seldom exchanged visits or saw each other.

There were substantial differences between the two wills which need not be set out at length. Under the former will neither Frederick Tupper nor his sister, Mrs. Fulton, got anything. They were not even mentioned in it. Under the latter they each got one of his farm properties. The farm devised to Frederick was valued at about two thousand dollars ($2,000), and the lot devised to Mrs. Fulton at about five hundred dollars ($500), and these two Frederick Tupper and Mrs. Fulton, in addition to the specific devises to them, *were substituted as residuary devisees in the places of the Bible Society and the Congregational Church.* There was also a substantial difference in the provisions made for his adopted daughter and grand-daughter, those in the first will being very much more favourable to them.

The entire value of his estate was agreed to be about $10,000.

Inasmuch as Mrs. Tupper, the widow, only had a life interest in the property left for her support the value of this residuary devise would be dependent upon the time of her death, and if that happened soon after her husband's death would be *very large* having reference to the value of the whole estate.

Having reached the conclusion concurred in by both courts below, that the evidence as to undue influence and want of testamentary capacity was not strong or conclusive enough to justify the setting aside of the last will, I do not deem it necessary to go at any greater length than I have done above into a discussion of the differences between the two wills.

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

The questions at issue here are, I think, reduced to the one whether or not the evidence in support of this will in favour of which the court is asked to pronounce, and under the terms of which the writer of the will became entitled to such substantial benefits, is sufficient to satisfy the court judicially that the paper does express the true mind and will of the deceased.

So far as the devise of the farm to Frederick Tupper is concerned, and so far as all the other parts of the will are concerned down to, but not including, the residuary devise, I am not satisfied that the doubts and suspicions naturally aroused by the evidence and all the circumstances are sufficient to justify us in pronouncing against the will. I have already said there is no sufficient evidence of the exercise of undue influence by either Frederick Tupper or his sister, Mrs. Fulton. I am more than doubtful whether the testator was at the moment of time of the execution of the instrument of sound mind and memory and capable of understanding the contents of what he was signing. I think there was sufficient evidence, however, to justify the courts in concluding that at the time he gave his instructions to the draftsman or writer, Frederick Tupper, he knew what he was doing and authorized the changes made from the former will outside of the disposition of the residue. As there is reasonable ground for holding the will as drawn (always excepting the residuary devise) did conform to the instructions the dying man gave it can, under the authority of *Perera* v. *Perera*(1), be upheld as valid.

But then we are face to face with the question whether the testator had actually changed his mind

(1) (1901) A.C. 354.

with regard to the residuary devise and had determined to omit the Bible Society and the Congregational Church from his will altogether, and substitute as beneficiaries for them his brother, who drew the will, and his sister, and whether he actually instructed his brother to make such an important change.

Then what is the law where a will is written or prepared by a party in his own favour. In Williams on Executors (10 ed), 1905, at page 86, it is said:

> By the Civil law, if a person wrote a will made in his own favour the instrument was rendered void. That rule has not been adopted by the law of England, which only holds that where the person who prepares the instrument or conducts its execution is himself benefited by its dispositions this fact, unless it be merely the case of a small legacy to him as executor, or other such circumstances, creates a suspicion of improper conduct and renders necessary very clear proof of volition and capacity as well as of a knowledge by the testator of the contents of the instrument.

This doctrine was fully considered by the Lords of the Judicial Committee in the case of *Barry* v. *Butlin* (1). In delivering the judgment of their Lordships in that case, Parke B. made the following observations:

> The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in by both sides. These rules are two; the first is, that the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. These principles, to the extent that I have stated, are well established; the former is undisputed; the latter is laid down by Sir John Nicholl, in substance, in *Paske* v. *Ollat* (1), *Ingram* v.

(1) 2 Moo. P.C. 480. (2) 2 Phillim. 323.

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

Wyatt (1), and *Billinghurst* v. *Vickers* (2), and is stated by that very learned and experienced judge to have been handed down to him by his predecessors; and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker* v. *Batt* (3).

These rules of law were expressly adopted by Lord Cairns and approved by the other law Lords in the case of *Fulton* v. *Andrew* (4), at page 461.

In the case of *Brown* v. *Fisher* (5) Sir James Hannen, the president, in delivering judgment, after citing with approval the doctrine laid down in Williams on Executors, above quoted, and the rules of law formulated by Parke B. cited above and approved of by Lord Cairns, goes on to say:

> I have usually taken the opportunity of referring to that as laying down what is the guiding principle to be acted on in cases of this kind. Now in the present instance the will was indeed prepared by a solicitor who was, however, carefully excluded by the plaintiff from all communication with the testator. The plaintiff of course says that he did so by the authority of the testator, but he has no evidence in corroboration of that statement and it depends entirely upon his own evidence, whereas there is a strong presumption against its correctness from all the circumstances of the case.

The learned president in that case held that where a beneficiary who had procured and subsequently propounded a will failed under those circumstances to satisfy the court by "*affirmative and conclusive evidence*" that the testator did in fact know and approve of the contents of the will, which he had actually executed, the court applying and acting upon the principles laid down by the House of Lords in *Fulton* v. *Andrew* (4), would refuse probate of the will with costs.

Now, applying these principles to the case before us let us look at the facts. I appreciate fully the grave

(1) 1 Hagg. Ecc. Rep. 388.
(2) 1 Phillim. 187.
(3) 2 Moo. P.C. 317.
(4) L.R. 7 H.L. 448.
(5) 63 L.T. 465.

importance of reaching the conclusion that there is no sufficient evidence to warrant us in finding that the testator had so changed his mind with regard to the residue and that he had so instructed his brother.

The evidence seems to me to shew beyond reasonable doubt that the great purpose he had in mind in making a new will was so to change the old one of the previous September as to meet the objections raised by his wife, and several times talked over with her by him, as to the impolicy of postponing the time when the residuary devise was to take effect so far as the Congregational Church was concerned. It is reasonably clear, however, that in doing so he decided to make still further changes, and amongst them to give his brother and sister each a farm and a lot of land, and also to alter the provisions he had made for his adopted daughter, and to a limited extent those made for his wife. These changes were more or less talked over and explained by Frederick Tupper with Mrs. Tupper, the testator's wife, the day the will was drawn, and though perhaps not fully explained or not fully understood by the wife and the adopted daughter, still I have reached the conclusion that the evidence taken as a whole is sufficient to establish that these changes were determined upon by the testator and were made.

Outside of the evidence, however, of Frederick Tupper himself there is not a scintilla of evidence to establish the faintest intention on the testator's part to change the beneficiaries of the residuary devise of his September will. The trial judge distinctly declines to accept the uncorroborated evidence of Frederick Tupper on this crucial point, and I am bound to say I concur in his conclusions. Much necessarily depended upon the credibility of the witnesses.

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

The trial judge distinctly states with respect to Mrs. Tupper's testimony that

> she convinced me of being a most conscientious and intelligent witness and I attach full weight and credit to her testimony.

She emphatically denies that Frederick Tupper either read to her, as he says he did, the whole will or that he ever intimated in any way that the residuary clause had been changed. She admits, however, that other portions of the will were read to her. I would gather from her evidence that substantially all of the will except the residuary devise was so read.

It is true that Frederick Tupper states that he received the instructions to make himself and his sister the residuary devisees and that he did read the will to the testator as it now appears. But the trial judge distinctly refuses to believe that statement, and I am bound to say that a careful perusal of the whole evidence satisfies me that his finding in this respect was in accordance with the weight of testimony.

The evidence of Mrs. Tanner, the adopted daughter, and Mrs. Tupper, is very strong that it could not have been read to the testator, at any rate not in the way and manner required by the law.

As to what is a sufficient reading of a will such as this making important changes in the will executed a few months before and substituting the draftsman of the second will and his sister as the residuary devisees instead of the former beneficiaries, the observations of Lord Cairns and Lord Hatherley in the case of *Fulton* v. *Andrew*(1) are most apposite and instructive. At pages 462, in commenting upon the law laid down by Lord Penzance to the jury in the case of *Atter* v. *Atkinson*(2), Lord Cairns says:

(1) L. R. 7 H.L. 448. (2) L.R. 1 P. & D. 665.

In the first place the jury must be satisfied that the will was read over, and in the second place must also be satisfied that there was no fraud in the case. Now, applying those observations to the present case, I will ask your Lordships to observe that we have no means of knowing what was the view which the jury, in the present case, took with regard to the reading over of the will. The only witnesses upon the subject were those witnesses who were themselves propounding the will. No person else was present—no person else knew anything upon the subject. It appears that these witnesses stated either that the will was read over to the testator, or that it had been left with him over night for the purpose of being read over. The jury may, or may not, have believed that statement, or may have thought, even if there had been some reading of the will, that *that reading had not taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effect of the residuary clause*—and it may well be that the jurors, finding a clear expression of the intention of the testator, or what they may have thought to be a clear expression of the intention of the testator, in the instructions for the will, were not satisfied that there was any such proper reading or explanation of the will as would apprise the testator of the change, if there was a change, between the instructions and the will.

And again at page 465:

It was suggested that, when once the jurors had before them uncontroverted evidence that the will was read over to the testator, any verdict on their part that the residuary clause was not known to the testator would be opposed to their finding upon the issue that he was of sound and disposing mind. I say that that again was a question for the jurymen, and it might well be that they would not believe the evidence with regard to the reading over of the will. Upon these grounds, endeavouring to place myself in the position in which the court of probate was placed when it had to deal with this rule *nisi*, I feel myself obliged to say that there was nothing which could be alleged against this verdict of the jury which required the court to direct a new trial. It was eminently a question for the jury, and I see no reason whatever to be dissatisfied with the verdict.

And Lord Hatherley at page 468 says:

A matter which appears to me deserving of some remark, and upon which the Lord Chancellor has already fully commented, is the supposed existence of a rigid rule by which, when you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it, all further inquiry is shut out. No doubt those circumstances afford very grave and strong

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

presumption that the will has been duly and properly executed by the testator; still circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory, and also having had read over to him that which had been prepared for him, and which he executed as his will. It is impossible, as it appears to me, in the cases where the ingredient of fraud enters, to lay down any clear and unyielding rule like this.

And again at page 473:

The case is a singular one in its character, and without wishing to shake the force of the observations made by the learned judge of the probate court, as to the danger (which is a real danger) of holding that any man of sound mind who has put his hand to an instrument after having had that instrument read over to him, can have meant otherwise than what he said; admitting all that, yet I do say that at least the jury should be satisfied that it was read over to him, *and not only that it was read over to him, but that it was read over in such a manner as that the discrepancy between the instructions and the will was brought before the consideration of the testator.* It appears to me that in this case there is nothing to induce us to say that the jurors were not warranted in their conclusion.

Adopting these legal conclusions of these eminent jurists it seems to be impossible on the evidence in this case to reverse the findings of the trial judge or to hold that this will was ever read over to the testator so as to convey to his mind a due appreciation of the contents and effect of the residuary devise, and that he was taking away from the Bible Society and the Congregational Church all that he had devised to them by the will of September and substituting the draftsman and his sister for the society and the church.

Mrs. Fulton, one of the residuary devisees herself, who was present with testator a great part of the day the will was drawn, admits that she never gathered from the testator any idea of an intention to make Frederick and herself or either of them residuary legatees. She says that no mention ever was made of the residue nor that he intended to give Frederick

or herself any portion of it, and further that when the testator told her it was his intention to give Frederick the farm and her the Layton lot that he (the testator) also said that Frederick would like the Layton lot too, but *that the farm was enough for him.* This was within a few hours or so of the execution of the will.

This by itself would, of course, be far from conclusive, but Mrs. Tanner, the adopted daughter, who was present in and out of the room most of the time when the testator was giving the instructions about the will, states what took place on the point I am discussing as follows:

Q. Did he say anything to the deceased while you were there? A. The first question I heard him ask papa was, "Newcombe, when Harriet is done with this, what do you want done with it?" He asked him that question once, and papa's answer was, "I want it collected and put in the bank for Harriet's use." Fred then said, "Newcombe, when Harriet is done with this—when she is dead—what do you want done with this?" and he said again, "I want it collected and put in the bank for Harriet's use," and Fred rose and said, "That is not what I asked you. I want you to pay attention to what I say. Don't think about anything else. When Harriet's done with this money, what do you want done with it?" and papa said, "I want it collected and put in the bank for Harriet's use," and before he had done speaking Fred left the room impatiently. When he left the room he went into the dining room. When he left the room I went to the bedside and applied a cooling lotion to the patient's forehead. He said, "Where has Fred gone?" I pointed to the dining room door and he said, "He has gone to judgment." Shortly after that I went out into the kitchen for some nourishment. Fred Tupper returned to the sick room as soon as I left. I came back in two minutes and he left the room as soon as I came in. I remained for some time and then went out for some stimulant, and he came in when I went out again. I don't know whether any writing was going on. He had left some notes on the dining room table, and the second time I came out I looked over the notes.

Q. Were these notes completed then? (witness shewn notes). A. It seems to me that the paper I saw was written on both sides. I could not be positive, but I think the papers I then saw were written on both sides. There were two half sheets lying on the table, and I am quite sure I read both sides.

Q. Was this in the notes that you read—that the balance left

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

of his estate after the death of his wife was to go to Fred Tupper and Mrs. Fulton; was that in the notes you read? A. No.

Q. When was it you first saw the provision about giving the residue of the estate to Fred Tupper and Mrs. Fulton? A. It was later in the evening. I saw it in the completed will.

From the time Fred Tupper finished the will to the time the witnesses came, the will was not read over to Mr. Tupper to my knowledge. I had an opportunity of knowing. I was attending and taking charge of the patient. I was not out of hearing long enough for the will to have been read over to him.

She was severely cross-examined on the point, but persisted in her evidence, saying:

I did not hear the will read. I don't think it was read. There was no chance for it to be read without my hearing it.

An attempt was made to discredit her evidence on this point because she said at one place in her cross-examination that she did not hear any conversation they had about the residue. There was no discussion with the testator in my presence as to "what should be done with it when Mrs. Tupper was done with it." But in a few moments afterwards she explains that she understood the question of counsel to refer "to discussions between Fred Tupper and Mr. Tupper" in her hearing, and that in the answer above quoted she was "referring to discussions between Fred Tupper and Mrs. Tupper."

Mrs. Tupper is equally, if not more, emphatic about the reading of the will. She swears first that Fred Tupper professed to read the will over to her, but never read the part referring to the gift of the residue to himself and his sister. Again and again she repeats this over, and declares that she never knew anything about it until she learned of it after the will was signed from Mrs. Tanner. She is equally emphatic in stating that the will could not have been read over by Fred Tupper to her husband after the

former had done writing it, and declares that before it was signed she said to Fred Tupper that the will should be read over to her husband and that he replied either "it has" or "I did," and did not read it then as she desired him to do.

A careful study and analysis of the whole evidence has convinced me that there is sufficient to uphold the second will of the 20th February, 1902, except the residuary clause; that the only evidence in support of this clause is that of Fred Tupper, the draftsman of the will and joint beneficiary with his sister under this clause; that there is no corroborative evidence of any kind whatever either as to the testator entertaining or expressing any intention of changing the residuary legatees under the previous will or of his having instructed Fred Tupper to make the change; that the only proper conclusion which should be drawn from the evidence as a whole is that while the other parts of the will may have been read over to the testator the residuary devise certainly was not read or was not at any rate so read that the testator might have understood or did understand it; that at the time of the giving of the instructions for the drawing of the will the testator may be held to have been of sound disposing mind and memory and capable of making a valid testamentary disposition of his estate; that he was not in such a condition at the time of the actual execution of the will and, therefore, there will not, from the mere proof of execution in the light of his then capacity, arise any presumption of knowledge of the contents of the will. But on this question of presumption the law as laid down in *Fulton* v. *Andrew* (1), by Lord Cairns is that even where there is affirmative evidence of knowledge by reason

(1) L.R. 7 H.L. 448.

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

of the will having been read over to a testator competent in mind before execution there is no unyielding rule of law shutting out all further inquiry.

Then, if so, what is the law with respect to the residuary devise appearing in the will and yet found not to be the will of the testator? Must the entire will be set aside and probate refused, or may the part proved be accepted and the part not proved rejected? And in the latter case is there an intestacy as to the residue, or in cases where there is no express revocation of previous wills may the parts of the previous will not inconsistent with the later one be accepted and probate granted with respect to them?

There have been doubts in former times upon the point, but the later cases seem to have removed those doubts and placed the law upon the basis of right and common sense. In *Allen* v. *McPherson*(1) all the distinguished jurists who there delivered judgments, but especially Lord Lyndhurst, at page 209, and Lord Campbell, at page 233, expressed themselves in terms which leave no doubt that the ecclesiastical courts formerly could and the Court of Probate can now admit part of an instrument to probate and refuse it as to the rest.

The present law is well summarized on pages 87-88 of Powles and Oakley on Probate (ed. of 1892). It reads as follows:

> What is now the law on this point has been very clearly and simply laid down by Lord Penzance in the case of *Lemage* v. *Goodban*(2). His Lordship says:—"The case of *Plenty* v. *West*(3), so far as it supports the doctrine that the use of the words 'last will' in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto* v. *Gilbert*(4), and *Stoddard* v. *Grant*(5). * * * Cases of the present character are properly

(1) 1 H.L. Cas. 191.
(2) L.R. 1 P. & D. 57.
(3) 1 Rob. E. 264.
(4) 9 Moo. P.C. 131.
(5) 1 Macq. 163, 171.

questions of construction, and in deciding on the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction." The principle applicable is well expressed in Mr. Justice Williams' book on Executors (9 ed.), pp. 139-140. He says:—"The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former or the two be incapable of standing together; for though it be a maxim, as Swinborne says above, 'that no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form there may be, (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only where they are inconsistent." This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document.

In the notes of this paragraph cited from the tenth edition of Sir E. V. Williams' book on Executors, page 120, many of the later cases are cited. In *In the Goods of Petchell*(1) Sir James Hannen acted upon the rule laid down in the text of Williams, and admitted the two instruments together to probate as together containing the will of the deceased. The case is one very much in point, for the part of the first will in that case admitted to probate was the residuary devise, which, as in this case, was held not to have been revoked. See the remarks of the President, Sir James Hannen, pp. 156-157. See also *In the Goods of Sir J. E. Boehm*(2), where it was held that probate of a will omitting or striking out the name of Georgiana in the second clause of gift might be granted to executors. *Morrell* v. *Morrell*(3).

(1) L.R. 3 P. & D. 153. (2) [1891] P.D. 247.
(3) 7 P.D. 68.

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

The cases are not all uniform and the true rule to be adopted seems to be that followed by Sir James Hannen in *Dempsey* v. *Lawson*(1), where after reviewing the cases that learned judge concludes that the use of phrases such as "my last will" does not necessarily import a revocation of a previous will, and that not even the presence or absence of a general revocating clause is conclusive. That in the alternate result it must come down to a question of intention to be gathered from a comparison of both wills. He adopted as a proper rule that laid down by Lord Penzance in *Lemage* v. *Goodban*(2):

> The intention of the testator in the matter is the sole guide and control. But the intention to be sought and discovered relates to the disposition of the testator's property and not to the form of his will. What dispositions did he intend, not which or what number of papers did he desire or expect to be admitted to probate, is the true question.

This no doubt must be the true rule. As Sir J. Nicoll says in *Methuen* v. *Methuen*(3):

> In the Court of Probate the whole question is one of intention; the *animus testandi* and the *animus revocandi* are completely open to investigation in this court.

The late case of *Townsend* v. *Moore*(4) is most instructive on the point I am discussing. Part of the head note to the report of that case reads:

> But when the provisions of two testamentary documents, the priority of which is uncertain and in neither of which there are expressed words of revocation, are apparently inconsistent, the court will endeavour so to construe the words that if possible the two documents may stand together and may both be admitted to probate as expressing together the whole testamentary intention of the testator.

The Appeal Court in this case reviewed most of the authorities to which I have referred and approves and

(1) 2 P.D. 98.
(2) L.R. 1 P. & D. 57.
(3) 2 Phillim 416, at p. 426.
(4) (1905) P.D. 66.

adopts the paragraph from Williams on Executors which I have above quoted. It also reviews and approves of the decisions in the case of *Lemage* v. *Goodban*(1), and *In the Goods of Petchell*(2), and Vaughan Williams L.J. quotes extensively from the judgment of Sir James Wilde in the former case and also from that of Sir James Hannen in the latter. In the quotation from the latter judgment is the following:

> The law thus laid down was acted upon by my predecessor, Lord Penzance, in *Lemage* v. *Goodban*(1). In that case there were two instruments, both purporting to be the last will and testament of the deceased. In each will there was a residuary clause, but in the latter it was perfectly unintelligible and it was impossible to give effect to it. The court held it was justified in granting probate of both instruments, because the earlier contained a residuary clause which it was thought it was not the intention of the testator to revoke. That precedent I am entitled to act upon in this case. * * * Acting on the decision to which I have referred, I have come to the conclusion that I am justified in holding that the testatrix intended that the residuary bequest, which is found in the first will, but not in the later, should form part of her will, and that by varying in the second instrument the dispositions of the former she did not intend to revoke the residuary clause contained in the earlier paper.

The conclusion reached by the L.J. is stated at page 83 as follows:

> Upon the authorities I come to the conclusion that, if on any reasonable construction the two documents can stand together, it is the duty of the court of probate to admit both documents to probate.

Romer L.J., at page 84, states the law to be:

> But when there are two testamentary documents, and the court is able to gather that one was not intended wholly to revoke the other, but that both were intended to be effective, at any rate to some extent, then I think, on authority and on principle, that the two documents must be admitted to probate, so that effect may be given to them, so far at any rate as circumstances will permit. How

(1) L.R. 1 P. & D. 57-62. (2) L.R. 3 P. & D. 163-156.

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Davies J.

far that could be done would be left to a great extent to a court of construction to determine. The authorities to which my brother Vaughan Williams has referred shew, I think, that this is the correct view of the law, and I need not further dwell upon them.

In the present case I am of opinion that the intention of the testator to be gathered from the dispositions of the two wills, omitting the residuary devise from the latter which I reject for the reasons before stated, is that the two wills should stand together and rather than that an intention to create an intestacy with regard to the residue should be presumed the residuary devise in the first will, which is not in any way inconsistent with the proved portions of the second will, and is not, therefore, revoked by it, should together be taken and held to constitute the true will of the deceased and the two instruments ought to be admitted to probate as in *In the Goods of Petchell*(1) as together containing the will of the deceased.

On the question of the addition of another executor by the second will, see *In the Goods of Matthew Leese*(2), where Sir C. Creswell held, page 443:

> The executors of the second will are entitled to ask for probate of the first as well as the second will.

I think the cases of *Lemage* v. *Goodban* (3), in 1865, and *In the Goods of Petchell*(1), (1874), and *Townsend* v. *Moore*(4), conclusive as to the right of the court to admit to probate both instruments as containing the will of the deceased.

I am, therefore, of the opinion that the appeal should be allowed, the judgment of the Supreme Court of Nova Scotia reversed, and the record remitted to the court of probate for the County of Colchester with directions to admit the two instruments of the

(1) L.R. 3 P. & D. 153.
(2) 2 Sw. & Tr. 442.
(3) L.R. 1 P. & D. 57.
(4) [1905] P.D. 66.

dates of 4th September, 1901, and the 20th February, 1902, to probate as containing together the true will of the testator, viz., the unrevoked residuary clause of the first will and the second will omitting its unproved and rejected residuary clause.

With respect to costs I think the costs of all the parties so far as the probate court is concerned should be paid out of the estate, but that the costs of this appeal and that to the Supreme Court of Nova Scotia should be allowed to appellant as against Fred Tupper one of the respondents. The other respondent joining as one of the executors for the sake of conformity not having costs against him.

IDINGTON J.—In the case of *Barry* v. *Butlin*(1) Baron Parke delivering the judgment of the court said:

> The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two; the first that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.
>
> The second is that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

These rules have been observed ever since in a line of cases of the highest authority and express what undoubtedly is the law that ought to govern our decision here.

Have the respondents satisfied all the require-

(1) 2 Moo. P.C. 480.

1905

BRITISH AND FOREIGN BIBLE SOCIETY v. TUPPER.

Idington J.

ments of these rules by the evidence put before the Court of Probate in which the alleged will now in question was propounded?

The learned trial judge seems to have correctly apprehended the law that must govern him. He had to deal with much conflicting evidence given by witnesses in his presence and has not only failed to find, after an exhaustive analysis of the evidence, that the alleged will can be held proven, but has also referred to Mrs. Tupper as being

> a most candid, frank, conscientious and intelligent witness (and that he) attached full weight and credit to her testimony.

I have read all of the evidence in the case and much of it more than once, and its perusal impresses me that what the learned trial judge thus says of Mrs. Tupper is absolutely correct.

If she is thus to be relied upon and her evidence accepted in its entirety it is impossible to uphold the alleged will.

I need not for the purposes of disposing of this case go further. I had written at length an analysis of the whole evidence, and it became apparent to my mind that in the statement of facts in his very able judgment the learned trial judge had in no particular overstated the case against the will.

In some particulars, needless to enlarge upon here, the facts seemed to me more strongly against the position of the respondent, Fred. Tupper, than the learned judge saw fit to present them.

I do not see any good purpose to be served by giving here at length the analysis I made, but content myself with adopting the judgment of the learned trial judge which I think should be restored.

The appeal must be allowed and the judgment of the trial judge restored.

I think the respondent, Fred. Tupper, should pay the general costs of both appeals. He is entitled to costs out of the estate as given by the trial judge.

But when he ventured beyond that, he was doing more than his duty as a trustee required, and ought, I think, to abide by the usual result of such a venture.

MACLENNAN J.—After a very careful study of the evidence in this case I have come to the same conclusion as the learned trial judge. It would serve no useful purpose to state the impressions made upon my mind by the evidence of the various witnesses, as was so elaborately done by both the trial judge and by Mr. Justice Graham who delivered the opinion of the Supreme Court. Suffice it to say, that I think the respondent, Frederick Tupper, who prepared the will, has not discharged the onus which rested upon him, as a comparatively large beneficiary under the will, as required by the cases of *Fulton* v. *Andrew*(1); *Tyrrell* v. *Painton*(2), and *Adams* v. *McBeath*(3). Nor am I satisfied that the deceased was, during the preparation and at the time of the execution of the will, of sufficient testamentary capacity to enable us to uphold it as valid.

Appeal allowed with costs.

Solicitor for the appellants: *W. B. A. Ritchie.*

Solicitor for the respondents: *R. F. Laurence.*

(1) L.R. 7 H.L. 448, 571. (2) (1894) P.D. 151.
(3) 27 Can. S.C.R. 13.