1906

*April 2, 3.
*April 14.

RICHARD CONNELL AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

WILLIAM CONNELL AND MARTIN CONNELL (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will — Promoter — Evidence — Subsequent conduct of testator — Residuary devise—Trust.

In proceedings for probate by the executors of a will which was opposed on the ground that it was prepared by one of the executors who was also a beneficiary there was evidence, though contradictory, that before the will was executed it was read over to the testator who seemed to understand its provisions.

Held, Idington J. dissenting, that such evidence and the facts that the testator lived for several years after it was executed and on several occasions during that time spoke of having made his will and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the court that the testator knew and approved of its provisions.

Held, also, that where the testator's estate was worth some $50,000 and he had no children it was doubtful if a bequest to the propounder, his brother, of $1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of Mr. Justice Britton in favour of the defendants.

The proceedings in this case were instituted in the Surrogate Court for probate of the will of James Connell by the plaintiffs, his executors, and were resisted by his brothers and sisters, who claimed that the will

*PRESENT:—Sedgewick, Girouard, Davies, and Idington JJ.

was prepared by one of the plaintiffs, who took a benefit under it and that it was not executed in the manner required by law. The case was removed into the High Court by order.

The will was prepared by William Connell, one of the plaintiffs, at the testator's house where he was confined to his bed and apparently very ill. William Connell testified that it was signed by the testator in the presence of the two subscribing witnesses, both of whom, however, swore positively that it was not. The trial judge believed the latter and held that the will was not properly executed.

William Connell, who prepared the will, received a legacy of $1,000 and a large portion of the estate was left to Martin Connell, the other executor. The evidence was conflicting as to whether or not the will was read over to the testator before execution, but the Court of Appeal, which reversed the judgment at the trial as to the execution, held, also, that the fact of the testator living for sixteen years longer without revoking or altering it satisfied the onus on William Connell to establish that he knew and approved of its terms.

Watson K.C. for the appellants. This case turns almost entirely on the credit to be given to the respective statements of the witnesses concerning the circumstances attending the preparation and execution of the will. As to this the ruling of the judge at the trial should not have been disturbed. *Village of Granby* v. *Ménard*(1); *Kirkpatrick* v. *McNamee*(2); *Royal Electric Co.* v. *Paquette*(3); *Montgomerie & Co.* v. *Wallace-James*(4).

(1) 31 Can. S.C.R. 14.
(2) 36 Can. S.C.R. 152.
(3) 35 Can. S.C.R. 202.
(4) [1904] A.C. 73.

1906

CONNELL v. CONNELL.

Whiting K.C. and *Middleton* (*French K.C.* with them) for the respondents.

A. A. Fisher watched the case for the widow.

The judgment of the court was delivered by

DAVIES J.—I agree with the judgment of the Court of Appeal delivered by Mr. Justice Maclennan and would dismiss this appeal.

The two points argued at great length before us were, first, non-compliance in the execution of the will with the statutory requirements, and, secondly, that the substantial benefits alleged to be conferred upon William Connell, the draftsman of the will, raised an onus upon him of satisfying the court that the testator knew and approved of the contents of the instrument.

We have had occasion very lately to consider the latter question very fully in the case of *The British & Foreign Bible Society* v. *Tupper*(1), and there can be no doubt that the rule as contended for by Mr. Watson as laid down in *Barry* v. *Butlin*(2); *Fulton* v. *Andrew*(3); and *Tyrrell* v. *Painton*(4), is the correct rule. But I concur with the Court of Appeal in thinking that such onus, if applicable here, has been satisfied by the evidence given and the facts that the testator after executing his will recovered his usual health, lived for sixteen years afterwards, on several occasions spoke of having made his will and never revoked nor altered it.

I desire also to say that the benefit which gives rise to the onus embodied in the rule laid down by

(1) 37 Can. S.C.R. 100.
(2) 2 Moo. P.C. 480.
(3) L.R. 7 H.L. 448.
(4) [1894] P.D. 151.

Baron Parke in *Barry* v. *Butlin* (1) must be a substantial one and that a small bequest or one made to the draftsman in common with others of a class to which he belonged and which owing to his relationship to the testator he might naturally expect would not necessarily give rise to the onus mentioned in the rule. And so in this case having regard to the value of the testator's estate at the time he made the will, and to the fact that he had no children, I would greatly doubt that the $1,000 bequests to his brother William and to William's daughter by themselves would, considering the other bequests, give rise to the onus contended for.

So far as the residuary devise is concerned declaring that such residue

> should be placed in the hands of my executors hereinafter named and to be disposed of by them as they might think proper,

it is, I think, not an absolute gift to the executors as individuals, but one simply in trust and must fail because the trust is so indefinite. It does not contain any express words of gift, but simply a disposing power with directions to the executors as to such disposition which directions fail because of their indefiniteness, and for want of adequate expression of the trust intended. *Yeap Cheah Neo* v. *Ong Cheng Neo* (2). at pp. 390-2, seems to be conclusive on the point.

Then with respect to the execution of the will the only point upon which the evidence of the witnesses to the will and the two Connells, William and Martin, is at variance is the signing by the testator of the will in the manner they describe *in the actual presence* of the witnesses.

Of course such signing was not absolutely neces-

(1) 2 Moo. P.C. 480. (2) L.R. 6 P.C. 381.

1906

CONNELL v. CONNELL.

Davies J.

sary. A previous signing with an acknowledgment by the testator in the presence of the two witnesses would be sufficient. It seems to me that this was probably what took place, and if so it would go far to reconcile the apparently conflicting testimony. That the signature is that of the testator there is no question, and it is equally true that it was there signed when the witnesses signed their names. It may have been so signed by the testator in the manner William and Martin describe, but just before the witnesses entered the room, a theory quite consistent with every word Mr. McFadden, the witness, swore to and which would reconcile the conflicting evidence.

The crucial point would be then: Was James, the testator, fully conscious of what was being done at the time the attestation clause was read to the witnesses and when they signed and was this done at his request?

Looking at all the evidence I have no difficulty in agreeing that he was so conscious and that there was a legal acknowledgment by the testator in the presence of both witnesses of the signing of the will by him.

IDINGTON J. (dissenting)—The late James Connell died on or about the 30th day of May, 1903.

On the 9th day of January, 1887, he signed a document now propounded as his last will. The learned trial judge held that this was not executed in presence of two witnesses as required by law and therefore void. He also held that by reason of the executor, William Connell, who drew the will, being a beneficiary, and the other circumstances attendant upon the execution being such as to arouse suspicion, the executors had failed to satisfy the conscience of the

court as required in such cases by the rules laid down in *Barry* v. *Butlin*(1), and the application of the same principles as lie at the foundation of these rules as illustrated by the case of *Tyrrell* v. *Painton*(2).

I quoted in the recent case of *British and Foreign Bible Society* v. *Tupper*(3), decided in this court last term, the rules in *Barry* v. *Butlin* (1). In *Tyrrell* v. *Painton*(2), at page 157, Lindley L.J. says:

> The rule in *Barry* v. *Butlin*(1); *Fulton* v. *Andrew*(4); and *Brown* v. *Fisher*(5), is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court; and whenever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the documents, etc.

The deceased was a farmer who at the date of the document in question was worth from forty to fifty thousand dollars. He had six brothers and three sisters; his father, still living, a very aged man; and his wife, to whom he had been married and with whom he had lived happily for fifteen years, still living.

His will was not spoken of by deceased until, when very ill, suffering from pneumonia, the doctor in attendance advised the summoning of any relatives the now deceased might desire to see. Three of his brothers, Richard, William and Martin, in consequence of messages thus received visited the deceased on the evening in question. The daughter of Richard was also in attendance. The brothers, William and Martin, who are named as the executors of this alleged will, were with the deceased in his bed-room from

(1) 2 Moo. P.C. 480.
(2) [1894] P.D. 151.
(3) 37 Can. S.C.R. 100.
(4) L.R. 7 H.L. 448.
(5) 63 L.T. 465.

1906

CONNELL v. CONNELL.

Idington J.

some time between nine and ten o'clock in the evening until two o'clock next morning. Richard had been recommended to retire to rest about ten o'clock. No one came into the room during this period except deceased's wife, on one or more occasions, for the purpose of attending to her duties as his nurse. She was not told of a will being made. She was not consulted by either of the brothers. They received paper, pen and ink from some one in the house between nine and ten, and were using writing material when she passed into the room. When she entered conversation ceased. Being an intelligent woman she drew the inference that the business going on was the making of the will for her husband. Some time after midnight on one of the occasions of her going into the room the husband asked her whether she would like money or property, and she replied she would be satisfied with whatever he determined in that regard. Nothing more was said to her.

The document now propounded as the last will was the product of the labour of the four or five hours thus spent.

The wife was only given a lot of trifling value in Prescott, the household furniture, the privilege of keeping a portion of the dwelling house as long as she wished, and the sum of three hundred dollars annually in lieu of dower, as long as she remained a widow. The daughter, and I think the only child of William Connell, a girl about ten years of age, was to receive one thousand dollars; the daughter of Martin another one thousand dollars; a sister of deceased one thousand dollars; William himself one thousand dollars; the brother Richard, who was a labouring man, one hundred dollars a year during the term of his natural life; and the father was to be taken care of. Subject

to these charges all his real estate, except the Prescott lot, was devised together with chattels and farm implements to his brother Martin. And then, after making these provisions, the residuary bequest was made as follows:

It is also my will that the residue of my property, heretofore not disposed of, such as mortgages, notes, moneys or security for money, after paying my just debts out of the same, be placed in the hands of my executors hereinafter named, and to be disposed of by them as they may think fit and proper.

The real estate then consisted of 400 acres of lands worth, according to William Connell's very conservative estimate, $20,000. Making allowance for the narrowness of view such men as the deceased sometimes have upon such a subject, one cannot reconcile the provision made for the deceased's wife as in accord with the dictates of ordinary human feeling. It was not what the deceased a few months afterwards told his wife he had left her; she tells the story as follows:

What did he say? A. He said I left you a home here so long as you wish to stay, and all that was in the house, or all that is in the house, and the best horse and carriage that is on the place, and if I wished to live there, the best cow—and if I wished to leave there they were to build a good house for me on a lot that we owned in Prescott, they were to build a good house for me, and I was to go there, and I was to get my firewood and my provisions, such as butter, cheese, eggs, just what a farm would produce, pork and beef and all such things, just what a farm would produce, my provisions, what I needed off the place, and $300 a year, and he said—I may not have it all—I wanted to leave you more, but Will. said that was plenty for you, and he says anyway I did not will my money at all. Then he told me three different parties that he was going to leave money to, but there is no need of mentioning their names. He told me three different ones, and he said anyway that will is no good, and he says now I will destroy that will or have it destroyed—destroy that will—that is what he said at that time, and I don't know whether he said at that time that he never would make a will—whether it was at that time or whether it was another time. It may have been that time and it may not.

1906

CONNELL v. CONNELL.

Idington J.

We are asked by these brothers Martin and William to believe that the deceased not only was a meaner man than this statement of his understanding of the supposed will would lead us to believe him, but they also ask us to suppose that he wilfully misstated to his wife what the will contained. Is that possible? Is it probable? I certainly do not think so. It would do more honour to the name of Connell, of which and the perpetuating of it we have heard so much, to refuse to impute to the deceased all that we are asked thus to impute.

If he understood, when he heard the will read, what was read he could not imagine that it contained all the additional provisions this statement of the wife shews. If he did not understand the reading of the will then the plaintiffs are not entitled to have this document established as his will. The very suspicions that the principles governing such a case require to be removed have not been removed, and therefore plaintiffs' case must fail.

Passing from that to the other provisions of the will, we find no reason for leaving entirely out of his consideration his other brothers and sisters, save in the case of his brothers Thomas and John, with whom he, it is said, had had differences, the effect of which may not possibly have been removed. Can it be said that the explanations given with regard to the absence from home for such a length of time and the supposition that the others were amply provided for removed all suspicion that one may have in regard to their not sharing in his large estate?

Then let us consider the residuary bequest. We find that the bequest implies a trust.

By reason of the uncertainty of the trust as expressed it is void. The law implies another trust and

that is that the executors as such receiving property in this manner must hold it for the benefit of those who under the statute of distributions would be entitled to share therein.

The executor who drew the will as a result of this accident or design had thus given to him a share in the testator's estate that has in law the effect of making him in addition to his bequest of one thousand dollars, a very substantial legatee. The duty is, therefore, still more imperative than the first bequest would have made it to make clear that the testator understood what he was doing in this regard.

We find from the following evidence of Martin Connell that what the deceased desired to have done was to provide that the residue should be divided amongst the most needy ones of the family.

> Q. Then when you were examined before you did not recollect anything about leaving it to the discretion of you and your brother to divide. Your words were "He said for us to divide it amongst the most needy ones of the family." A. That is all right.
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> Q. That is the only thing you said? A. That is all right.
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> * * * * * *
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> Q. You are asked here as to what had occurred and you say the way you understood it, he said for us to divide it amongst the most needy ones of the family, that is the way I understood it. A. That is the way I understood it at the time after I asked him the question.
>
> Q. Was that the way you understood it at the time of your examination? A. Yes.

This statement he alleges was made whilst William, after receiving instructions, had retired to an adjoining room, to extend his draft notes and complete the preparation of the will. Both are agreed that after the document had been finished it was read over carefully to the deceased. It is quite clear that it did not purport to carry out any such intention as was thus expressed. Had it been

1906

CONNELL v. CONNELL.

Idington J.

expressed in these very words it might or might not have been any more effective in executing the purpose of the deceased than as it stands.

It might, however, have been then held as honestly written. That is what concerns us here. So written and so read it might have been in accord with the testator's purpose and be held as known and approved by him.

If any intelligent effort had been made to express the clear purpose of the deceased these executors (the most prosperous instead of the most needy of the family) would have been excluded from the possibility of hoping to share in the benefits of the residuary bequest. Now they stand to secure a share of the residue in addition to other benefits if this is upheld as the will of deceased.

But did the testator not tell William as well as Martin of what his purpose was? It took four or five hours to prepare this short document. What were these three brothers discussing during that time? We are left to speculate. Martin persistently says he did not express any opinion upon any subject relative to dispositions to be made in this proposed will. William, on the other hand, states that on two or three occasions during the discussion Martin did venture an opinion, but he fails to enlighten us upon what points such opinions were expressed.

If Martin were the almost dumb man that his evidence would lead us, if implicitly believed, to say he was, during all this time, there would seem to be more need for explanation of what consumed the time. The deceased was not likely in his then condition to have taken up much time with the comparatively simple matters involved in the provisions of this will, except those for the wife and those in the residuary bequest.

Only these exceptions involved the necessity of prolonged discussion.

William Connell was an experienced draftsman; he was a ready penman; he was an intelligent man and one of quick apprehension.

The two subject matters that required a good deal of consideration are those that give rise to much suspicion. If we are to believe William's story, that regarding the provisions for the wife did not give rise to prolonged, if any, discussion. This residuary bequest involved the disposition of ten to fifteen thousand dollars worth of personal property, and according to the wife possibly twenty thousand dollars of personal property. She knew his affairs. She was an honest witness. She placed his personal estate at from fifteen to twenty thousand dollars. Making every allowance for possible mistake or bias on her part, no matter how honest, I think we are quite safe in saying that the estimate just made of from ten to fifteen thousand dollars would be a fair one to act upon. Counsel in the argument did not seriously gainsay this estimate. It seems to me almost incredible that neither in regard to the amount nor the mode of distributing this amount should there have escaped any remark or discussion when such ample opportunity existed for mention thereof in William's presence. It was almost impossible he could accept such a trust without asking how the proposed testator might desire it to be executed.

Can we say that the evidence given has removed all ground for suspicion that something of the kind was said or referred to, and that the deceased did not in this regard know or understand the contents of this document? As if it were not suspicious enough already upon the bare statement of the purpose and

1906

CONNELL v. CONNELL.

Idington J.

effect of the kind of clause which should have been in the will as contrasted with that which is there, we find Martin Connell when giving his evidence on the trial attempting to put a new gloss upon the statement made by the deceased to him in William's absence.

He says:

> Q. Then did he say that was to be intended for you yourselves? A. Well, while William was writing the will in the dining-room I asked him when I found out I was to be an executor—asked, for my own information says I, after your just debts are paid, what is your wish to be done with the residue of your property, and he said to give it to the most needy ones of the family, or do with it as you see fit.
>
> Q. What did he say again? A. He said to give it to the most needy ones of the family, or do with it as you see fit, to dispose of it rather, he said, as you see fit.

He repeats twice over, immediately after the evidence just quoted, the same expression of dividing money amongst the most needy ones of the family or do with it what you see fit, and it is only when a little later he is reminded of what he had sworn to in his examination for discovery that he gives the evidence I have first quoted. Why did he change the statement? Which is the true version? Can there be any doubt upon the whole of this evidence that the purpose and intention of the testator was as Martin Connell first stated it? Can any one believe that he failed for two hours or more of giving instructions, as William's evidence suggests, to give utterance to so simple a thought?

Can we be quite free from the suspicion that instead of having such a provision appear on the face of this document, it was excluded, not by the intended testator, but by the mind and hand of William Connell? Can we doubt that if the will had gone un-

challenged William would have given himself a share and that share not the smallest?

Let us see so far as his prevaricating evidence will enable us to see what he did think.

Q. Did you think that was intended for your benefit and his benefit as your own property? A. No, sir, I did not.

Q. Did you know that it was not? A. Well, I supposed that if I took a share of it, I did not think there would be much fault found with me.

Q. Did you know from what he told you that that was not intended for you yourselves? A. No, I did not know, because I believed that he intended part of that for me.

Q. You believed he intended part of it for you? A. Yes.

Q. How much? A. A share.

Q. With whom? A. With the rest, the rest of the family.

Q. Is that what he told you? A. Yes.

Q. Then, why didn't you draw the will that way? A. He did not tell it that way. I drew it as he told me.

Q. But you say you knew from what he told you that he intended that to be divided equally amongst the brothers and sisters? A. He never told me what he intended.

Q. You said he did? A. No, I did not tell you.

Q. But at all events you knew at that time that he intended that to be divided equally amongst the brothers and sisters? A. I intended it at any rate if it came into my hands.

Q. Did he intend it? That is another question. I cannot answer you.

Q. Did you ask him? A. I did not ask him, but I told you.

Q. Did you have any idea of what he wished about that? A. I had no idea any more than my own view. I never asked him, but I can tell you who did, if you like me to tell you.

Q. Who did ask him? A. My brother, when I was writing that document, he asked him, not in my presence; I did not know he asked him; you ask him. He will come to the stand.

HIS LORDSHIP:—You do not know what he asked him? A. Only what he told me.

Q. You were outside writing? A. I was outside writing, and my brother, I understood, asked him this question, but I never asked him.

MR. WATSON:—But you understood that when you went in again? A. No, I did not understand it at any time; I never understood it.

Q. Not from your brother? When did your brother tell you? A. Here since this row commenced.

Q. You were examined about this? A. Yes.

1906

CONNELL v. CONNELL.

Idington J.

Q. What did you say? A. I don't remember. I said before just about as I said now, as near as I can remember.

Q. See if this is true, "He did not, I think, intend the property in the residuary clause for myself and my brother Martin or either of us?" A. Not altogether.

Q. Is that answer true or not? A. It is if it is put in a little fuller.

Q. It is not true without a qualification? A. It just wants a little qualification.

Q. Then this answer as it reads here is not correct? A. It is correct so far as it goes.

Q. The one I read was, "He did not, I think, intend the property in the residuary clause for myself and my brother Martin, or either of us?" A. I consider I deserve part of this as much as any man.

These two brothers chose to put themselves in the position they are of having no one to corroborate them.

They have not given such evidence as to my mind should enable us to say either were so absolutely honest as to constrain us to accept as undoubted fact all that they have said. Their evidence is of the most unsatisfactory character. They were discredited as witnesses by the learned trial judge, and reading the evidence impresses me with the correctness of his judgment with regard to the unreliability of them as witnesses.

I am driven to conclude that the suspicions still exist which the rules and principles I have adverted to required these executors to remove.

If that memory for detail, evinced by them in relation to the execution of this document, had been as serviceable in regard to everything connected with its preparation, suspicion might have been dispelled. Conviction might have been substituted for suspicion, but that conviction might still have supported the results the learned trial judge arrived at.

The Court of Appeal does not seem to have enter-

tained the opinion that if James Connell had died at the time the document in question was prepared it could have been upheld upon such testimony.

The judgment of that court seems rather to be that the onus is satisfied by the fact that the testator soon recovered his usual health and lived for sixteen years afterwards and allowed his will to stand without taking any steps to alter or revoke it. I am, with the greatest respect, entirely unable to accept this conclusion. I am unable after giving the matter the very greatest consideration to comprehend that mere lapse of time can dispel the suspicions that surround this transaction. The will, so called, remained with William Connell, and never was seen nor read nor any of its contents, in relation to its vulnerable points, mentioned directly or indirectly during all these sixteen years to the testator.

The Court of Appeal gives no reason why mere lapse of time should operate as they find.

Counsel for respondents were unable to give any reason in support of such a view, save this, that a testator or any one who had been defrauded when once free was entitled to rescind the bargain induced by fraud or to revoke a will which did not represent what its maker intended. I know of no law that restrains a man after the lapse of many years from complaining of a fraud immediately he has discovered it, if there be a reasonable explanation of why, by concealment or otherwise, he was prevented from sooner asserting his right. I apply the same doctrine to this will. The testator assumed, as his wife's evidence shews, that the provisions for her were entirely different from what they are. As he put them in telling her, they are just such provisions as men like him are apt to make. First, they provide a home; then the

1906
CONNELL
v.
CONNELL.
Idington J.

provisions for daily food and maintenance, without going into the market to buy it, and then the annuity to provide for clothing, medical attendance and general expenses.

Assume that deceased believed what he was saying he had provided, he would with his narrow views of life and regard for a woman's position, possibly be content to leave her in that way. He might not feel urged to reconsider that. Had he been told, however, that the provision was of the character it really was and stands in this will it is inconceivable that either he or his wife would have let the matter rest there. The same is true in regard to the residuary bequest. If the testator believed, as I have no doubt he believed, that his residuary estate would go amongst the most needy ones of the family as he expressly desired, then I might conceive him being satisfied. But had he been told that the residuary bequest was in an entirely different sense so that William Connell and Martin Connell would share therein and the brothers with whom the deceased had differed and who were also wealthy, would share therein equally with the most needy, he would undoubtedly have taken steps to see the will. All this assuming that the will had in his mind any existence as a will.

Possibly his inconsistent statements in that regard related to the failure to name those whom he thought most needy.

It is unnecessary in the view I adopt of the case to express any opinion upon the issue regarding the execution and attestation of this document, but I would in any such case be disposed to abide by the judgment of the trial judge on such a point.

I think the appeal should be allowed with costs.

Appeal dismissed with costs.

1906

CONNELL v. CONNELL.

Solicitors for the appellants: *Maxwell & Maxwell.*

Solicitor for the respondents: *J. T. French.*