Present : Bertram C.J. and Shaw J.

ANDRADO *v.* SILVA *et al.*

131—D. C. Colombo, 6,537.

Last will—Undue influence—Suspicious circumstances—Burden of proof—Observations as to the proper scope of medical evidence.—

Whenever a will is prepared and executed under circumstances which arouse the suspicion of the Court, it ought not to pronounce in favour of it, unless the party propounding it adduces evidence which would remove such suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument.

"The burden of proof of undue influence is on those who allege it. It cannot be presumed. The burden of proving mental competancy, on the other hand, lies on the propounders. They are not bound to show affirmatively that the testator's mind is free from any influence which the law considers 'undue' . . . . . I do not mean to say that the principle that it is the duty of the propounders to remove suspicions does not apply to undue influence. I think it does so apply in exactly the same manner as it applies to fraud . . . . . If the circumstances are such that a suspicion

arises that the apparent approval by the testator is not a real approval, that his act was not the expression of his own free will but of a will coerced or dominated by another, then it is for the propounders to remove the suspicion, and if they fail to do so their whole case fails, even though the suspicious circumstances do not constitute a *prima facie* case of undue influence, and even though on a review of the evidence on both sides it cannot be said that undue influence was positively established."

To amount to undue influence, the influence exercised must be something in the nature of coercion.

It is for the medical witness to describe the mental condition of the testator; it is for the Court to determine whether that condition was such as to impair his testamentary competency.

THE facts appear from the judgment.

H. J. C. Pereira (with him *Elliott, B. F. de Silva, Cooray*, and *C. W. Perera*), for appellants.

A. St. V. Jayawardene (with him *Drieberg, Bartholomeusz*, and *H. E. Garvin*), for respondent.

Cur. adv. vult.

July 20, 1920. BERTRAM C.J.—

I have had the advantage of reading the judgment of Shaw J. I concur in that judgment, and have only to add the following observations.

We were much pressed by Mr. Elliott, in his very able reply, to hold that this case was covered by the case of *Peries v. Silva*,[1] and to decide that as the Judge's finding was accompanied with a misgiving, the onus which lies upon the propounders of the will was not discharged. In the case on which Mr. Elliott relied, *Peries v. Silva*,[1] the Judge indicated that his judgment was founded upon a bare possibility. In this case it is based upon substantial reason, and upon a logical process, which seems to me unassailable.

With regard to testamentary competency, the grounds on which it is usually impeached are two, that is to say, either the existence of delusions, or the fact that the testator's mind was so enfeebled by physical conditions as to be incapable of mental concentration sufficient to enable him to envisage his affairs as a whole, and to take account at once of his obligation to his family and of the effect of his dispositions. It was the latter ground that was alleged in this case. On this point great weight is, no doubt, to be attached to the evidence of Dr. Paul. But such a condition as he describes, though one of progressive deterioration, would necessarily be one of a fluctuating character. A man in this condition may well be worse on one day than another, and Dr. Paul's evidence must be compared with that of other witnesses who had opportunities of observing the mental capacity of the testator at this time.

[1] *(1919) 7 C. W. R. 89.*

1920.

BERTRAM C.J.

Andrado v. Silva

I may add that I agree with the observations of Shaw J. as to the proper scope of medical evidence in such a case as this. It appears that passages were read to the medical witnesses from *Taylor's Medical Jurisprudence*, and that they were asked to give what was in effect a legal opinion, on the supposition that these passages correctly expressed the law. The principal passage, as a matter of fact, related to the case of a mind impaired by delusions, and not to the case of a mind whose power of concentration was supposed to be defective. This illustrates the danger of asking a medical expert to proceed on the basis of such a passage apart from the facts to which it relates. It is for the medical witness to describe the mental condition of the testator; it is for the Court to determine whether that condition was such as to impair his testamentary competency.

With regard to the duty of the propounders of a will to remove suspicions, and the application of this principle to undue influence, the position, as I understand it, is as follows. There is no question that the burden of proof of undue influence is on those who allege it. It cannot be presumed. (See the cases cited by Shaw J.) The burden of proving mental competency, on the other hand, lies on the propounders. But they are not bound to go further than this. They are not bound to show affirmatively that the testator's mind is free from any influence which the law considers "undue." It is true that there is a series of cases in which, where the Court is emphasizing the necessity of proof of testamentary competency, the word "free" has crept in alongside the word "competent." Mr. Elliott has pointed to an early and interesting case of this nature (*Ingram v. Wyatt*[1]), and it may well be, as he suggested, that in that case we have the origin of this collocation of expressions. But I cannot take these cases as laying down that wherever there are suspicious circumstances connected with the making of a will, it lies upon the propounders to establish that the testator's mind was "free" as well as competent.

I do not mean to say that the principle that it is the duty of the propounders to remove suspicions does not apply to undue influence. I think it does so apply in exactly the same manner as it applies to fraud. But it is necessary that the Court should ask itself, what are the nature of the suspicions which are said to be excited. The only material suspicions are suspicions which affect issues the proof of which is on the propounders. It lies upon the propounders to prove (1) the fact of execution, (2) the mental competency of the testator, (3) his knowledge and approval of the contents of the will. If the circumstances are such that a suspicion arises affecting one of these matters, it is for the propounders to remove it. The Court is required under these circumstances to watch the evidence tendered with special vigilance, and not to declare that the onus of proof is

[1] (*1828*) *1 Hagg. 384.*

discharged unless the suspicion is removed. The suspicion may point to fraud. The onus of fraud is ordinarily on those who allege it. But in the case of a will there may be a suspicion of fraud affecting either the fact of execution, or the mental condition of the testator at the moment of execution, or his knowledge and approval of the document or part of the document. In such a case it is for the propounders to remove the suspicion, and if this is not done the will must be rejected, even though the suspicious circumstances do not amount to a *primâ facie* case of fraud, and even though it cannot be said, on a review of the evidence on both sides, that fraud has been established. Undue influence, as it seems to me, is on the same footing as fraud, and I observe that in *Tyrrell v. Painton*[1] Davey L.J. speaks of them together:—"If the circumstances are such that a suspicion arises that the apparent approval by the testator is not a real approval, that his act was not the expression of his own free will, but of a will coerced or dominated by another, then I take it that it is for the propounders to remove the suspicion, and that if they fail to do so their whole case fails, even though the suspicious circumstances do not constitute a *primâ facie* case of undue influence, and even though, on a review of the evidence on both sides, it cannot be said that undue influence has been positively established." I take this to be the meaning of Wood-Renton J. in his observations in the case of *Pieris v. Pieris*.[2]

But the suspicions must for this purpose be suspicions pointing to "undue influence" in the sense which these words bear in law. In this case I cannot feel that there are any suspicions which can really be considered suspicions of this nature. That the will was the effect of the exercise of influence is, indeed, patent. That the influence was unjust and unconscientious there is every reason to suspect. I cannot believe that a testator who had shown such a tender and constant affection for his absent nephew would have so heartlessly cut him out of his will and left him in the distressing situation in which he was left, if advantage had not been taken of his feeble health and vacillating will by those in whose domestic circle he was living, and whose interest it was to bring persuasion to bear upon him. But though there was ample opportunity for searching out the matter in cross-examination, there is not a scintilla of evidence to suggest that in this domestic circle there was any exercise upon the mind of the testator either of coercion or of that mental ascendency which is equivalent to coercion. The fact that Mr. Andrado wrote out in his own hand the instructions for the will; that he accompanied the testator on his visits to the notary; that he avoided using the services of the notary who was acquainted with the family circumstances, and who might, therefore, remonstrate with the testator; and that he finally declined to go into the box and give the very material evidence, which he

[1] *(1894) P. D. 151.*

[2] *(1907) 9 N. L. R., on page 23.*

1920.

BERTRAM C.J.

Andrado v. Silva

alone could give, are all very suspicious circumstances. But what is it they cause one to suspect ? They cause one to suspect that he took a very active interest in procuring the will; that the part he played did him little credit; and that he was conscious that he would not figure to advantage as a witness. They do not cause one to suspect that the will of the testator was either coerced or dominated. I cannot say, therefore, that there was any suspicion of coercion or domination affecting the testator's approval of the will, which it was incumbent on those propounding the will to remove.

Under the circumstances I am of opinion that the appeal should be dismissed, but that, in the circumstances of the case, the costs of the appeal should be paid out of the estate.

SHAW J.—

This is an appeal from an order of the District Judge of Colombo admitting to probate a document purporting to be the will of Anthony Nicolas de Silva dated October 8, 1918.

The will was contested by the appellants, two nephews of the deceased, who themselves propounded an earlier will dated January 23, 1916, under which they largely benefited.

The issues for trial were (1) due execution, (2) mental competency, (3) knowledge and approval of the contents of the documents, and (4) whether the execution was procured by the petitioner, T. H. de Andrado, by the exercise of undue influence.

The District Judge has, in a somewhat hesitating manner, found in favour of the validity of the will, and the diffidence he expresses as to the correctness of his own judgment constitutes the principal difficulty on the appeal. The contention on behalf of the appellants is that the petitioner has not sufficiently discharged the onus of proof of issues (2) and (3), and that certain circumstances of suspicion attaching to the will have not been sufficiently removed either with regard to these issues or to that of undue influence.

I do not think it is necessary to go in detail into the facts of the case, which are fully set out in the judgment of the District Judge.

Apart from the indirect evidence called on behalf of the opponents of the petition, I can see nothing in the evidence to throw any serious doubt on the mental capacity of the testator. He was an old man, who had for some five or six years prior to his death suffered from an affliction of the arteries common to old age, the effect of which was to render him liable to paralytic seizures and to impair not only his bodily health but also his mental vigour. There is nothing, however, in the evidence as to his conduct that in any way appears to me to point to any dementia or insane condition of the mind. No doubt he was, for some time shortly before his death, not the same man either bodily or mentally that he had been in

earlier years, but the facts that his memory had become defective that he sometimes called the children by the wrong names; that he allowed himself to be induced to give an order for glasses to a travelling touting optician that he knew nothing about, which glasses he subsequently refused to accept; that he was in danger of walking off the end of the verandah unless watched; and other small incidents which have been pressed upon us on behalf of the appellants, although they may show some deterioration of the mental faculties of the testator, fail altogether to impress me with the idea that he could not transact his ordinary business or was deficient in capacity to make a will. Against such evidence of incompetency as these incidents afford there is the testimony of several witnesses who saw and conversed with the testator at about the time the will was executed that seems to show that he was quite rational and capable of transacting ordinary business, and that his state of mind was such as to render him quite competent to make a will. Mr. Wille, the notary who prepared the will in dispute, saw him on four occasions concerning the matter. Two of these occasions must have been fairly long interviews. At that of October 7 Mr. Wille went through the old will with the testator clause by clause with the paper of instructions so as to get his instructions clear for the new will, and at the interview on the morning of October 8 he went through the draft of the new will clause by clause with the testator to make sure that it carried out his intentions.

The District Judge accepts the *bona fides* of Mr. Wille. Indeed, he could not do otherwise. Mr. Wille is a member of a well known and respected firm of proctors, and he has no interest whatever in the matter. The Judge, however, thinks that Mr. Wille's evidence that the testator was of mental competency and knew and approved the contents of the document must be received with caution, and cannot be treated as in any way conclusive of these matters, because Mr. Wille did not know much about the history of the testator's condition or his domestic affairs, and had no reason to have any suspicion as to the testator's state of mind or as to his approval of the dispositions directed by the papers of instructions. It seems to me, however, that the very fact of no suspicion having been aroused in Mr. Wille's mind at these interviews is very strong evidence to show the actual competency of the testator.

Then there is the evidence of Mr. Namasivayam of his interview with the testator shortly before the will was executed, when the testator asked him to become executor. Not only is this gentleman's evidence very strong to show mental competency, but it clearly shows, as the Judge has held, that the testator knew and approved of the most important thing effected by the will, namely, the disinheritance of the appellants, and the leaving of the testator's property to others.

1920.

SHAW J.

Andrado v. Silva

There is also the evidence of Mr. Abeywardena, who went with the testator about three weeks before his death, and, therefore, after the will was executed, to look at a house which the testator thought of buying. His evidence also seems to show that the testator quite knew what he was about and was quite capable of transacting business.

The evidence of Dr. de Silva, who saw and conversed with the testator on October 16 and 21, when he was attending other members of his family, also seems to point to a perfectly competent state of mind at that date. The only real doubt that appears to me to be cast on the competency of the deceased and on his knowledge and approval of the contents of the will arises from the medical evidence given on behalf of the respondents to the petition. I myself attach no great importance to the evidence of Dr. Parsons. He never saw the testator, and his evidence is only that of an expert. Having had put to him by counsel all the acts of the testator which were relied on as showing mental incapacity and none of the evidence showing the contrary, the witness expressed an opinion that the testator was wanting in testamentary capacity.

An expression of opinion so obtained has very little value, and it is quite possible that had Dr. Parsons had the conversation of the testator with Mr. Namasivayam and the details of the interview with Mr. Wille put to him he might have expressed an entirely contrary opinion.

The evidence of Dr. Paul is, however, entitled to much weight. This witness examined the testator professionally a fortnight before the will was executed. He found him suffering from degenerating changes of the brain, consequent on his physical condition; he found that he was silent and depressed and suffered from impairment of memory, and had a difficulty in collecting his thoughts. As a result of the examination made by him, he is of opinion that the mind of the testator was not, at the time he examined him, capable of giving instructions for a will of the kind now before the Court. It will be noticed, however, that the witness does not say that he does not think the testator was incapable of making any will disposing of his property, and the opinion he expresses is on a matter that is more a question to be decided by the Court than by a witness. Dr. Paul, however, admitted in cross-examination that had the testator in fact had the conversation with Mr. Namasivayam deposed to by that witness, he would consider it a sufficient indication of his testamentary capacity.

That this conversation took place has been found as a fact by the Judge; the evidence of Dr. Parsons, therefore, is by no means altogether opposed to the validity of the will. There are, no doubt, circumstances in the case which throw a certain amount of suspicion on the will propounded. The physical and mental conditions

of the testator, the fact that he was disinheriting two relations in whose favour previous wills had been made, for one of whom, at any rate, he had up to shortly before the will been on terms of the greatest affection, and whom he continued to support in England up to the time of his death, and the fact that the paper containing directions for the will is in the handwriting of the petitioner, whose family benefit by the will to the exclusion of the former beneficiaries, are all points that should make the Court jealously scan the evidence in support of the will.

The law on the subject is that whenever a will is prepared and executed under the circumstances which arouse the suspicion of the Court, it ought not to pronounce in favour of it, unless the party propounding it adduces evidence which would remove such suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument. I need not refer to the authorities for this principle, which are fully set out and considered in two recent judgments of the Chief Justice in the *Alim Will Case* [1] and *Peries v. Silva.*[2]

It would have been no doubt more satisfactory if the petitioner himself had given evidence of the condition of the testator and of the circumstances under which the will was prepared, and also if the two doctors, who have been the regular medical attendants of the testator during recent years, had been called, but there is no rule of law to the effect that a person propounding a will to which suspicion attached should himself give evidence, or should produce any particular witnesses or class of evidence so long as the evidence is sufficient to remove the suspicion attaching to it. (*Vide* Wood Renton J. in *Pieris v. Pieris.*[3])

In the present case the evidence before the Court, especially that of Mr. Namasivayam and Mr. Wille, appears to me to sufficiently remove the suspicion upon the will, and to sufficiently establish the competency of the testator and his knowledge and approval of the contents of the document. The reasons given by the testator to Mr. Namasivayam for leaving nothing to the first opponent are quite intelligible, and although we may think that the testator behaved with scant justice to him after the expectations he had allowed him to entertain, and although we may consider the reasons given by him insufficient for the course he took, it is not part of the duty of the Court to see that a testator makes a just distribution of his property so long as he properly appreciates what he is doing.

With regard to the omission of the other opponent from the benefits of the will, I think the testator had quite sufficient grounds for his action, as he had well provided for him since the date of the earlier wills.

[1] (*1919*) *20 N. L. R. 48.* [2] (*1919*) *7 C. W. R. 89.*
[3] (*1907*) *9 N. L. R. 14.*

1920.

SHAW J.

Andrado v. Silva

In my opinion the judgment of the District Judge is right, and that the mental competency of the testator and his knowledge and approval of the contents of the will in dispute have been sufficiently established.

It was also contended on behalf of the opponents that when suspicions had been cast on a will is the duty of the person propounding the will to satisfy the Court that the will is the act of a free as well as a capable testator, and that it must, therefore be shown that the testator has not been induced to make the will by undue influence, and that as the petitioner has not gone into the witness box, he has not sufficiently discharged this burden that lay upon him.

It is well established that the burden of proof of undue influence in an ordinary case lies upon the person alleging it. (*Vide Boyce v. Rossborough*[1] and *Craig v. Lamoureux.*[2]) I do not think that by the use of the words " free as well as a capable testator " in some of the cases where suspicion has attached to a will it is intended that the usual burden of proof is to be shifted, unless, indeed, the grounds of suspicion are such as to amount to *primâ facie* evidence of undue influence. In *Tyrrell v. Painton,*[3] one of the cases in which those words are used, the fact that the onus of proof of undue influence still lies on those who oppose the will is recognized. On page 157 Lindley L.J. says: " 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 document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will." In the present case I can see no evidence that raises any sufficient suspicion of undue influence to throw any burden of proof on the petitioner.

The only facts that can be pointed to are that the petitioner, whose family principally benefit by the will, was living with the testator; that the paper containing the instructions for the will, although signed by the testator, is in the handwriting of the petitioner; and that he accompanied the testator on the occasions of his visits to the notary to give instructions for the will to be prepared.

These circumstances seem to me to be quite insufficient to raise any sufficient suspicion of undue influence on his part, or, indeed, to raise any presumption of even legitimate influence. To amount to undue influence, the influence exercised must be something in the nature of coercion. *Boyce v. Rossborough*[1] and *Bondains v. Richardson.*[4]

[1] (*1856*) *6 H. L. C. 2.*
[2] (*1919*) *P. C. 122 L. T. 208.*
[3] (*1894*) *P. D. 151.*
[4] (*1906*) *A. C. 169.*

There is nothing in the present case to support that in any way. On the contrary, the evidence of Mr. Wille is to the effect that the petitioner took no part in the instructions for the will, and the only evidence of the conduct of the petitioner to the testator is that it was that of a servant.

In my opinion the petitioner has sufficiently discharged the onus of proof upon him that the will was the will of a competent testator, who knew and approved of the contents of the will, and the judgment of the District Judge is correct, and the appeal should, consequently, be dismissed. Under all the circumstances I would direct that the costs of the appeal should come out of the estate.

Appeal dismissed.