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LEAH RIACH AND ETHA RIACH (DEFENDANTS) ..... APPELLANTS; *May 22, 23. *Oct. 2.

AND

DUNCAN FERRIS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Propounding for probate—Facts to be established—Allegation of fraud and undue influence—Onus of proof

If a party propounding a will for probate has satisfied the court that the testator executed it with due formalities, and that when he did so he was of sound and disposing mind and memory, had full knowledge and appreciation of its contents, and actually comprehended what he was doing, the party propounding has fulfilled the onus upon him; he does not have to go farther and disprove or negative the alleged exercise of undue influence or fraud; it is for the party impugning the will to satisfy the court of the exercise of undue influence or fraud.

Barry v. *Butlin*, 2 Moore P.C. 480, *Fulton* v. *Andrew*, L.R. 7 H.L. 448, *Tyrrell* v. *Painton*, [1894] P. 151, and other cases, reviewed and discussed.

As to the will in question, *held*, that, in view of the evidence of the attesting witnesses to the will and of certain physicians, which evidence appeared clearly to have been accepted without question by the trial judge, and there being nothing to cast any well-grounded suspicion upon that evidence, it must be taken that the testator was of sound and disposing mind and memory, and was fully aware of what he was doing, when he executed the will, and that the will was consequently entitled to probate, failing affirmative proof of the allegation that he was prevailed upon to execute it by fraud and undue influence; and that the evidence relied on to establish that allegation was wholly insufficient to warrant an affirmative finding.

Per Duff C.J.: Wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed (*Tyrrell* v. *Painton*, [1894] P. 151, at 159-160.)

APPEAL from the judgment of the Court of Appeal for Ontario.

The plaintiff (the present respondent) propounded for probate an alleged will of William Everton Wright, deceased, made on March 1, 1932. Objections were made to the granting of probate. The cause was removed from the Surrogate Court of the County of Essex into the Supreme Court of Ontario. The plaintiff sought to estab-

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

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lish the will. His action was dismissed by Raney J. The plaintiff appealed to the Court of Appeal for Ontario. That court made an order that the costs of the trial and appeal be taxed, and that, upon payment by the defendants (other than one Barbara Brown, who was the main beneficiary under the will and was, upon consent, made a party defendant by order of the Court of Appeal) to the plaintiff of the amount thereof within ten days after taxation, the judgment of Raney J. be set aside and a new trial be had, but, in default of such payment of costs being made, that the plaintiff's appeal be allowed and that it be declared that the will was well proved and ought to be established, and that probate be granted. From that judgment an appeal was brought to this Court.

The material facts of the case and the questions for determination are sufficiently stated in the judgment of Crocket J., now reported. The appeal to this Court was dismissed with costs.

S. L. Springsteen for the appellants.

J. M. Baird K.C. for the Official Guardian (representing the infant, Wilda Yager), supporting the appeal.

R. S. Rodd for the respondent.

DUFF C.J.—I entirely agree in the conclusions of my brother Crocket as well as in the reasons by which those conclusions are supported. My purpose in adding what I am now saying is merely to note that the law is well established and well known and that, as applicable to this appeal, it is best, as well as completely, stated in this passage from the judgment of Lord Davey (then Davey L.J.) in his judgment in *T'yrrell* v. *Painton* (1):

* * * the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.

CROCKET J. (Duff C.J., and Rinfret, Lamont, Cannon and Hughes JJ. concurring)—This appeal arises out of a petition presented by the respondent Ferris in the Surrogate Court of the County of Essex, Ontario, for the granting to him, as the sole executor named therein, of probate

(1) L.R. [1894] P. 151, at 159-160.

of the alleged last will and testament of William E. Wright, deceased, late of the city of Windsor. Wright died on April 8, 1932, without issue, leaving surviving him as his nearest of kin his brother George Wright and the latter's daughter Wilda, who had been legally adopted a few weeks after her birth by the testator and his wife but had left the testator's home in the autumn of 1930, seven or eight months after her adopted mother's death, to pursue a nurse's training course when sixteen or seventeen years of age, and later—in January, 1932—while employed as a domestic servant, married a young man named Yager in the State of Michigan. The will, of which the respondent sought probate, was executed on March 1, 1932, presumably when Wright was unaware of Wilda's marriage, and left or purported to leave all his real and personal estate, valued by the executor at $6,000 real and $330 personal property, to one Barbara Brown, of the City of Detroit, in the State of Michigan, described therein as the testator's cousin, subject to the payment of a legacy of $500 to his "adopted daughter Wilda Norena Wright, of Windsor, Ontario." On February 20, 1930, a few weeks after his wife's death, Wright executed a will leaving a duplex house and lot on Hall Ave., which was subject to a mortgage for $5,820, to two of his deceased wife's sisters, Leah Riach and Etha Riach, share and share alike, and the entire residue of his estate, real and personal, to his said adopted daughter, Wilda Norena Wright, provided she should live to attain the age of twenty-one years, and, in the event of her not doing so, leaving all to the said Leach Riach and Etha Riach in equal shares. On July 27, 1931, he made a second will, revoking that of February 20, 1930, and leaving his whole estate to Leah Riach and Etha Riach in equal shares, subject to the payment of a legacy to his adopted daughter of $200.

The Misses Riach entered a caveat objecting to the probate of the will of March 1, 1932, on the ground of mental incapacity on the part of the testator and undue influence and fraud on the part of Barbara Brown. The usual citations having been issued, the proceedings were removed, on the respondent's application, from the Surrogate Court to the Supreme Court for trial. The removal order directed that the respondent be made plaintiff and

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the four appellants defendants in the action, but Miss Brown, the principal beneficiary, was omitted as a party.

The action was tried before the late Mr. Justice Raney, who refused to order the will to probate and dismissed the action with costs.

At the opening of the hearing before the Court of Appeal for Ontario of the plaintiff's appeal from the trial judgment, attention having been called to the omission of the principal beneficiary as a party to the action, the plaintiff's counsel stated that he appeared for her as well as for the executor, and consented that an order should be made adding Miss Brown as a party defendant as though she had originally been made a party by the removal order. The appeal was then argued, and, though the argument seems to have occupied three days, judgment was pronounced *instanter* at its conclusion, so that we have before us only the formal order of the court without any of the reasons therefor. By the formal order Miss Brown was directed to be added a party defendant as though she had been declared to be one originally in the removal order; the costs of the trial and of the appeal were directed to be taxed and upon payment thereof by the defendants, other than Miss Brown, to the plaintiff within ten days after taxation, the trial judgment was ordered to be set aside and a new trial held; otherwise the plaintiff's appeal was to be allowed and the will of March 1, 1932, declared to be well proved, with a direction to the proper court to grant probate thereof to the plaintiff as the executor named therein, with costs of the trial and of the appeal to be paid by the defendants, other than Miss Brown, to the plaintiff forthwith. From this judgment the appellants now appeal to this Court.

It is quite apparent from his written opinion that the learned trial judge's refusal to admit the impugned will to probate was entirely grounded upon the fact that the evidence for the defence had raised in his mind some suspicion as to the genuineness of the will and that the plaintiff had failed to discharge the onus which His Lordship held rested upon him to remove such suspicion under the authority of the two rules laid down by Baron Parke in *Barry* v. *Butlin* (1), as expounded in *Fulton* v. *Andrew*

(1) (1838) 2 Moore P.C. 480.

(1), and in *Tyrrell* v. *Painton* (2). Though he does not precisely state what this suspicion was, the last two paragraphs of his reasons for judgment clearly indicate that it entirely concerned the conduct of the beneficiary, Miss Brown, and the question of the exercise of undue influence and fraud by her, as alleged in the statement of defence. Notwithstanding His Lordship's statement that the question he was discussing was not the question of the proof of undue influence but the question of judicial suspicion, within the language of Lord Lindley, as quoted by him from *Tyrrell* v. *Painton* (3), he immediately adds:—

> Such a suspicion having been raised by the evidence for the defence, the onus was upon the plaintiff to remove it. The plaintiff did not discharge that onus.
>
> If Miss Brown had taken the witness stand she might have admitted the truth of all the items in the evidence which went to raise suspicion in the mind of the Court, and yet she might conceivably have convinced the Court that there was no fraud or coercion on her part within the definition of undue influence. She might, for instance, have convinced the Court that everything she did was within the limits of legitimate persuasion. But the executor Plaintiff—and I must assume Miss Brown concurring—preferred to leave the judicial suspicion where the evidence for the defence left it. They must take the consequences.

Not only does His Lordship here distinctly state that the suspicion he entertained had been raised by the evidence for the defence, but he quite as distinctly says that had Miss Brown taken the witness stand she might have admitted the truth of all the items in that evidence which went to raise that suspicion and yet have convinced him that everything she did was within the limits of legitimate persuasion, but that the plaintiff and Miss Brown had chosen to leave that suspicion where the evidence for the defence left it and that they must therefore take the consequences. No finding is made one way or the other, either upon the issue as to Wright's testamentary capacity at the time of the execution of the will or as to the question of his having actually comprehended what he was doing when he did execute it. Neither is any finding made one way or the other as to the question of the testator having executed the will with full knowledge and appreciation of its contents and effect but as the result of the

(1) (1875) L.R. 7 H.L. 448. (2) L.R. [1894] P. 151.
(3) L.R. [1894] P. 151, at 157.

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exercise upon him of undue influence or fraud by or in behalf of Miss Brown.

The soundness, therefore, of the trial judgment turns entirely upon the question of the *onus probandi* and the validity of the learned trial judge's obvious assumption that under the three cases above cited the burden lay upon the plaintiff, not only to prove that Wright was of sound and disposing mind and memory and actually comprehended what he was doing when he executed the will, but to prove, as well, that he was not induced to execute it by undue influence or fraud.

After reviewing what he regarded as the salient facts of the case and stating that the facts as found by him brought the case within the principle of the rules laid down by Baron Parke in *Barry* v. *Butlin* (1), His Lordship quotes these rules as follows:—

> (1) 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, and
>
> (2) 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.

Then he quotes the dictum of Lord Hatherley, regarding Baron Parke's second rule, from *Fulton* v. *Andrew* (2) as follows:—

> There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, * * * and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. * * * But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.

and adds that these

> rules of law have since been observed in a line of cases of the highest authority. And under later cases there has been a further expansion, so that, as pointed out by Lord Justice Lindley in *Tyrrell v. Painton* (3), "The rule in *Barry* v. *Butlin* (4) is not confined to the single case in which a will is prepared by or on the instructions of the person taking large

(1) (1838) 2 Moore P.C. 480.
(2) (1875) L.R. 7 H.L. 448, at 471-2.
(3) L.R. [1894] P. 151, at 157.
(4) (1838) 2 Moore P.C. 480.

benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist and whatever their nature may be it is for those who propound the will to remove such suspicion."

It will be observed that in neither of Baron Parke's two rules nor in neither of the respective dicta of Lord Hatherley and Lindley, L.J., as quoted, is there any specific mention of the question of procuring the execution of a will by fraud or misrepresentation or undue influence of any kind, and that, apart from Lord Hatherley's statement regarding the throwing upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will, the onus of shewing the righteousness of the transaction, the only expressions which can be relied upon to support the proposition that the onus resting upon a party propounding a will includes the negativing of undue influence, in a case where circumstances exist which create suspicion, are the expressions "that the instrument so propounded is the *last will of a free and capable testator,*" and "that the paper propounded does *express the true will of the deceased.*" Both these expressions no doubt imply, not only that the testator was of sound and disposing mind and memory at the time he executed the will, but that he actually comprehended what he was doing when he executed it. Though it may be that they on their face comprise freedom from fraud and duress, we do not think that the three cases from which His Lordship quoted can properly be said to establish the principle that the *onus probandi* resting upon a party propounding a will for probate extends in all cases, where circumstances of suspicion are disclosed, to the disproof or negativing of an allegation or suspicion of undue influence or fraud. For instance, Baron Parke himself says in *Barry* v. *Butlin* (1):

> The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases the *onus* is imposed on the party propounding a will. It is in general discharged by proof of capacity and the fact of execution, *from which the knowledge of and assent to the contents of the instrument* are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee is in

(1) (1838) 2 Moore P.C. 480, at 484, 485, 491.

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every case and under all circumstances to create a contrary presumption and to call upon the Court to pronounce against the will unless additional evidence is produced *to prove the knowledge of its contents by the deceased.*

And, again:—

All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction *that the instrument did express the real intentions of the deceased.*

And, after reviewing the salient facts:—

We think, therefore, on the whole, that the evidence of the *factum,* coupled with the strong probabilities of the case, is sufficient to remove the suspicions which naturally belong to the case of all wills prepared by persons in their own favour, especially when made by persons of weak capacity. The undue influence and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility, *are insinuated but not proved.*

Whitehead's [one of the beneficiaries] authority and power over his master [the testator] is, no doubt, sufficiently established; but that such authority and power were in any way exercised to procure this will to be made *is only conjecture;* and there *is nothing like proof* of authority or control of any kind on the part of Butlin or Percy [the other two beneficiaries].

Fulton v. *Andrew* (1), notwithstanding the oft quoted dictum of Lord Hatherley, will be found to be of practically the same effect when the complete exposition of that case by Lord Chancellor Cairns and the other law lords taking part is closely examined. That was a case, where a jury had found that the testator knew and approved of the contents of the will generally, but that he did not know and approve of the contents of the residuary clause, by which, after a number of bequests to relatives and friends, the residue was left to the two executors, both of whom had been instrumental in the framing of the will, and with reference to which there was a discrepancy between the instructions for the will and the will itself. It was contended that the learned trial judge misdirected the jury upon the latter issue in telling them that they were to take this discrepancy into consideration and,

(1) (1875) L.R. 7 H.L. 448.

having done so, to determine whether the testator had known and understood the residuary clause; that he ought to have told them that they ought to consider simply whether the testator at the time of executing his will was unconscious of and did not approve of the residuary clause owing to mental prostration as alleged in the defendant's particulars. The Judge of the Court of Probate, who had directed that the two questions of fact indicated and others, which are not now relevant, should be tried by a jury at the Assizes, made absolute a rule to enter the verdict for the propounders of the will, and granted probate of the whole will. It was ordered, on appeal to the House of Lords, that probate of the will should be recalled and another order made granting fresh probate of the will, omitting the residuary clause. The decision turned entirely on two questions: 1st, whether, where a will is read over to or by a testator of sound and disposing mind and memory, and he duly executes it, it must be taken that he knew and approved of its contents; and, 2nd, whether with respect to the finding on the residuary clause it was contrary to the evidence. It had been contended that an absolute and fixed rule of law had been established by a series of cases that proof of the reading of a will by or to a competent testator and his execution thereof was always conclusive of knowledge and approval of its contents, and that no evidence against that presumption could be received. Lord Cairns said, as to this, that he thought

> it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, * * * unless the Legislature has, in the shape of an Act of Parliament, distinctly imposed that rule.

After citing Baron Parke's dictum containing the two rules above set forth, he quoted from Lord Penzance's charges to the jury in *Atter* v. *Atkinson* (1), and *Guardhouse* v. *Blackburn* (2). In the first of these cases Lord Penzance said to the jury:—

> Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, *and the question whether he knew and approved of* the contents is answered.

(1) (1869) L.R. 1 P. & D. 665. (2) (1866) L.R. 1 P. & D. 109.

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Commenting upon Lord Penzance's qualification that there must be no fraud, Lord Cairns says:—

> If Your Lordships find a case in which persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared, for their own benefit, a will disposing in their favour of a large portion of the property of the testator; and if you submit that case to a jury, it may well be that the jury may consider that there was a want, on the part of those who propounded the will, of the execution of the duty which lay upon them, *to bring home to the mind of the testator the effect of his testamentary act;* and that that failure in performing the duty which lay upon them, amounted to a greater or less degree of fraud on their part. The qualification of Lord Penzance in the charge I have read may entirely apply to such a case.

Among the statements quoted from the charge in *Guardhouse* v. *Blackburn* (1) are the following:—

> Although the testator knew and approved the contents, the paper may still be rejected *on proof establishing beyond all possibility of mistake* that he did not intend the paper to operate as a will.
>
> Although the testator did know and approve the contents, the paper may be refused probate *if it be proved that any fraud has been purposely practised* on the testator in obtaining his execution thereof.
>
> Subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof.

Regarding these directions Lord Cairns says:—

> It appears to me that, consistently with the rules mentioned by Lord Penzance, the jurors here *may not have been satisfied* that there was a proper reading of the will to the testator, *or may have been satisfied,* after hearing all the facts submitted to him by Mr. Justice Mellor, that there was on the part of those who propounded the will such a dereliction of duty, such a failure of duty on their part, as amounted to that degree of fraud to which Lord Penzance refers in the rules I have mentioned.

Lords Chelmsford, Hatherley and O'Hagan all entirely agreed with the Lord Chancellor's observations. Nothing, apart from the dictum of Lord Hatherley, is to be found in the entire report of this case to support the proposition that any further onus lies upon a party propounding a will for probate, than to satisfy the court that the testator was of sound and disposing mind and memory and that he knew and approved of its contents when executing it. There is no suggestion anywhere in the Lord Chancellor's speech that, once it appears that a competent testator formally executed a will with full knowledge of its con-

(1) (1866) L.R. 1 P. & D. 109, at 116.

tents, the party propounding it must also prove that he was not induced to execute it by any undue influence or fraud. The whole report of the case points quite the other way. Lord Hatherley himself, who fully concurred, as stated, in all the Lord Chancellor had said, added the following observation:—

> One is strongly impressed with the consideration that, according to the natural habits and conduct of men in general, if a man signs any instrument, he being competent to understand that instrument, and having had it read over to him, there is a very strong presumption that it has been duly executed, and that very strong evidence is required in opposition to it in order to set aside any instrument so executed.

That portion of Lord Justice Lindley's dictum in *Tyrrell* v. *Painton* (1), which is above quoted, may perhaps well bear the construction, which the learned trial judge has placed upon it. When, however, it is considered in the light of the language immediately following, it will be seen that what this eminent Lord Justice of Appeal had in his mind, when he spoke of the onus lying upon those who propounded the will "to remove such suspicion," was the suspicion that the testator did not know and approve the contents of the will. His words are:—

> 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.

Clearly there is no suggestion in this dictum, when considered in its entirety, that any further onus lies upon a party propounding a will than to prove the testamentary capacity of the deceased and that when the testator executed the instrument he fully realized what he was doing. The dictum, of course, assumes that all the formalities required by law have been duly complied with. Indeed, it is as positively stated as it could well be that, once it is affirmatively proved that the testator, being, of course, of sound and disposing mind and memory, did know and approve of the contents of the will, the onus is placed on those who oppose its admission to probate to prove that, notwithstanding the fact that the testator fully knew and appreciated what he was doing when he executed the will, he was induced to do so by some fraud or undue

(1) L.R. [1894] P. 151, at 157.

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influence having been practised upon him. Moreover, in another passage of his reported opinion he says:—

> Now, in my opinion, this will of the 9th [which the defendants were propounding in their counter-claim as the true last will of the deceased] was executed under such suspicious circumstances that he [the President of the Probate, Divorce and Admiralty Division of the High Court, before whom the trial took place] ought to have said: "Do the defendants affirmatively establish to my satisfaction that the testatrix *knew what she was doing when she executed this will?*

The President, he pointed out, had only addressed himself to the question of fraud and held that the burden of proving that lay on the plaintiff (the party opposing the will) and that he had not discharged himself of that burden, so that in that case, as in the case at bar, there was no finding as to whether the testatrix knew what she was doing when she executed the will, though in the case cited the trial judge held that fraud had not been proved, while in the present case the trial judge, as already pointed out, makes no finding one way or the other upon either question. Had the *Tyrrell* case been tried by a jury, Lord Justice Lindley adds:—

> The question for the jury would be, did the testatrix know and approve of that will, and the jury should be told that it was for J. Painton [the defendant who sought its admission to probate] to prove that she did.

Assuming that in the case in behalf of a plaintiff seeking to establish the validity of a will, there may be such circumstances of apparent coercion or fraud disclosed as, coupled with the testator's physical and mental debility, raise a well-grounded suspicion in the mind of the court that the testator did not really comprehend what he was doing when he executed the will, and that in such a case it is for the plaintiff to remove that suspicion by affirmatively proving that the testator did in truth appreciate the effect of what he was doing, there is no question that, once this latter fact is proved, the onus entirely lies upon those impugning the will to affirmatively prove that its execution was procured by the practice of some undue influence or fraud upon the testator. This, it seems to me, is the real effect of the three cases upon which the learned trial judge relied, and is precisely the principle stated by Lord

Chancellor Cranworth in *Boyse* v. *Rosborough* (1), and distinctly approved by the Judicial Committee of the Privy Council in *Craig* v. *Lamoureux* (2), in which latter case the judgment of the majority of this Court (Fitzpatrick, C.J., dissenting) (3), in which *Barry* v. *Butlin* (4), *Fulton* v. *Andrew* (5) and *Tyrrell* v. *Painton* (6) were all considered, was reversed. The exact language of the Lord Chancellor in stating this principle in *Boyse* v. *Rosborough* (1) is set out in the syllabus of the Privy Council's decision in *Craig* v. *Lamoureux* (2) as follows:—

> When once it is proved that a will has been executed with due solemnities by a person of competent understanding, and *apparently* a free agent, the burden of proving that it was executed under undue influence rests on the person who so alleges.

This point Lord Cranworth, in *Boyse* v. *Rosborough* (1), said was beyond dispute, notwithstanding he had suggested that a will, which had been executed under coercion or the influence of fear or in consequence of impressions created in the testator's mind by fraudulent representations, could not in contemplation of law, though it might with strict metaphysical accuracy, be properly described as a true expression of the testator's will. It should perhaps be added that, in that case as in the present, undue influence was the point on which the defendants really relied on the trial and on the appeal, and that the deceased's alleged mental infirmity was put forward rather as tending to shew the probability that such influence might have been successfully exercised than as being such as would of itself invalidate the will.

While the trial judge in the present case, as pointed out, made no specific finding that the testator did know what he was doing when he executed the will, it is perfectly clear from his review of the facts that he accepted without question the testimony of both the subscribing witnesses to the will—Miss Burns and Mr. Taylor. Miss Burns was a stenographer who had been employed for 15 years in the office of Mr. Baker, a Windsor conveyancer, who did Wright's conveyancing business and who, it seems, had prepared his previous wills of February 20, 1930, and July 27, 1931. Wright, who had suffered for some months from

(1) (1857) 6 H.L.C. 1, at 49.
(2) [1920] A.C. 349, at 356.
(3) 49 Can. S.C.R. 305.
(4) (1838) 2 Moore P.C. 480.
(5) (1875) L.R. 7 H.L. 448.
(6) L.R. [1894] P. 151.

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high blood pressure and Bright's disease, became seriously ill late in December, 1931, and was confined to bed and under the care of Mrs. McLaughlin, a practical nurse, for five or six weeks until February 8. According to Mrs. McLaughlin's testimony, which the trial judge accepted, he had experienced frequent and various illusions during this period, and the learned trial judge found that his mental condition, when he was under Mrs. McLaughlin's care, was one of intermittent dementia. He recovered, however, from this acute illness and was able to be up and about more or less from the time Mrs. McLaughlin left until a day or two before his death. It appears that some time before Mrs. McLaughlin's employment Wright had consulted Baker about changing his will and communicated to him some instructions therefor, but that Baker had himself died while Wright was confined to bed. After his recovery from the illness referred to, some time in February, he went to Baker's office where Miss Burns was still employed, and requested her to draw a new will. Although after some hesitation she promised to do so, she decided, apparently after Wright had left her, to have the will drawn by a barrister, and arranged with Mr. Taylor, a practising barrister in Windsor, to draw it for him. She sent to him a written memorandum with the instructions she had taken from Wright. Mr. Taylor accordingly drafted the will for her and when it was ready brought it to her office for execution by Wright. He swore that he read the will over to Wright, whom he had not previously known, and that he seemed to understand it thoroughly—as thoroughly as any testator that he ever drew a will for, and that he had not any idea at all that the man was ill; that he shewed no appearance whatever of any mental incapacity; that he was standing up all the time he was in the office and seemed absolutely intelligent; and that he had no hesitation whatever in saying he knew exactly what he was talking about. Miss Burns corroborated Mr. Taylor's statement as to the reading over of the will and as to the filling in by Mr. Taylor in her and Wright's presence of a blank which had been left in the typewritten copy as prepared by Mr. Taylor for the name of the executor. An examination of the original will itself confirms Miss Burns' testimony as to the latter fact.

In addition to the evidence of the two subscribing witnesses to the will, two physicians, who had attended Wright at different times, not only during the period when he was confined to bed in January and the early part of February, but afterwards, testified in the plaintiff's case that in their opinion Wright at all times when they saw him was of sound and disposing mind and memory—fully capable of making a will. A local alienist, who had been called in to examine Wright at Mrs. McLaughlin's suggestion, after consultation with his attending physician and with a brother of the Misses Riach, and who had talked with Wright for over an hour, also testified that in his opinion Wright was perfectly sane.

The evidence of both attesting witnesses to the will and of these physicians having been accepted without question by the learned trial judge and there being nothing discoverable in the entire case to cast any well-grounded suspicion upon it, we are of opinion that it must be taken that Wright was of sound and disposing mind and memory when he executed the will of March 1st, and that he was fully aware of what he was doing when he did execute it, and that that will was consequently entitled to be admitted to probate, failing affirmative proof of the defendants' allegation that he was prevailed upon by fraud and undue influence on the part of Miss Brown to execute it.

As to this allegation we think that the evidence upon which the defendants relied to establish it is wholly insufficient to warrant an affirmative finding.

For these reasons the appeal from the judgment of the Court of Appeal reversing the judgment of the learned trial judge must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Benjamin H. Yuffy.*

The Official Guardian, representing the infant, Wilda Yager.

Solicitor for the respondent: *J. E. Taylor.*