

MacGregor v. Ryan, [1965] S.C.R. 757

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Commentary

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WILLS

MacGregor v. Ryan, [1965] S.C.R. 757.

WILLS — VALIDITY — ALLEGATION THAT TESTATRIX LACKED TESTAMENTARY CAPACITY — ALTERNATIVE ALLEGATION OF UNDUE INFLUENCE — WHETHER SUSPICION RAISED BY CIRCUMSTANCES SURROUNDING EXECUTION OF WILL DISPELLED — ONUS OF PROOF.

In the recent case of *MacGregor v. Ryan*¹ the Supreme Court of Canada was afforded an opportunity of authoritatively settling several contentious issues in the law of wills. An appeal had been taken by the caveator from the Ontario Court of Appeal judgment dismissing an appeal from the order of the Surrogate Judge admitting the will to probate. The caveator attacked the validity of the will on the traditional grounds that the will was not duly executed, the testatrix did not possess the requisite testamentary capacity, and the will was procured by undue influence.

In the Supreme Court of Canada the first of these grounds was abandoned, leaving the issues of testamentary capacity and undue influence,² but the case is significant from a jurisprudential point of view for its discussion of burdens and standards of proof.

The facts, as found by the learned trial judge and confirmed by the Court of Appeal, were that the testatrix, aged ninety-one, and confined in the hospital, told her sole remaining executor, on the

¹⁹ Louis L. Jaffe, *Judicial Review—Questions of Law* (1955-56), 69 *Harv. L. R.* 239, at p. 240n, quoting from Dickinson, *Administrative Justice and the Supremacy of Law* (1927), p. 55.

²⁰ *Ibid.*, p. 243.

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¹ [1965] S.C.R. 757, (1966), 53 D.L.R. (2d) 126.

² Judson, J. (dissenting) views the argument of the appellant as confined to the issue of testamentary capacity (p. 128); Ritchie, J. (for the majority) interprets the appellant's argument as being primarily directed to the issue of undue influence (p. 132).

occasion of a hospital visit, that she wished to change her will so as to leave her entire estate to her sister, the wife of the executor, and that he was "to take care of things" for her. The executor went immediately to a local lawyer, known to the testatrix, and related to him the testatrix's instructions. The solicitor at once prepared a will incorporating these instructions and, still accompanied by the executor, travelled directly to the hospital, where, after some discussion between the solicitor and the testatrix as to the contents and effect of the will, the testatrix executed the new will. The executor, though in the room at the time, took no part in the discussion or execution of the will.

Mr. Justice Ritchie,³ to dispose of the appellant's allegation of undue influence, embarked on a learned analysis of the English and Canadian law on this subject, and in particular on the nature of the evidence required and the burden of proof to be discharged in establishing a case of undue influence. The caveator had argued that in view of the suspicious circumstances surrounding the execution, there was a heavy burden resting on the proponents of the will to prove affirmatively the righteousness of the transaction.⁴

In order to appreciate Mr. Justice Ritchie's disposition of this argument, it is vital to grasp the different sense in which the term "burden of proof" may be used. J. B. Thayer described these two meanings as follows:

- (i) The peculiar duty of him who has the risk of any given proposition on which the parties are at issue,—who will lose the case if he does not make his proposition out, when all has been said and done;
- (ii) The duty of going forward in argument or in producing evidence, whether at the beginning of a case, or at any later moment throughout the trial or discussion.⁵

Thayer did not employ any descriptive terminology to characterize the two burdens to which he referred, but this has been contributed in profusion by his successors. The first mentioned onus, which is the burden fixed by the substantive or procedural law of establishing a proposition of fact in order to succeed in the case, has been termed the legal⁶ or persuasive⁷ burden, the burden of proof on the pleadings⁸ the risk of nonpersuasion⁹ and the primary burden of proof, fixed at the beginning and never shifting.¹⁰ If, when

³ With whom Cartwright, Martland, and Spence, JJ. concurred.

⁴ *Supra*, footnote 1, at p. 132 (D.L.R.).

⁵ Preliminary Treatise on Evidence at the Common Law, p. 355. Judicially noted by Harrison J. in *Re Barter Estate; Corbett v. Wall* (1939), 13 M.P.R. 359 (N.B. C.A.); and by Duff J. in *Koop v. Smith* (1915), 51 S.C.R. 554, at p. 558 and in *Smith v. Nevins*, [1925] S.C.R. 619, at p. 638.

⁶ Lord Denning, *Presumptions and Burdens* (1945), 61 L.Q.R. 379.

⁷ Dr. Glanville Williams, *Criminal Law (The General Part)*, 2nd ed. s. 23.

⁸ Phipson, *Law of Evidence* (9th ed.), p. 32.

⁹ IX Wigmore, paras. 2485-9.

¹⁰ *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 (P.C.). See also Bridge, *Presumptions and Burdens* (1949), 12 Mod. Law Rev. 274; *Smith v. Nevins*, [1925] S.C.R. 619, at p. 638; *Ont. Equitable Life & Acc. Ins. Co. v. Baker*, [1926] S.C.R. 297, at p. 308; *Dillon v. Toronto Millstock Co.*, [1943] S.C.R. 268.

all the evidence is in, there is still some doubt in the mind of the tribunal, the party who bears this onus must fail.¹¹

The accepted principle in the law of wills is that the *onus probandi*—the primary onus of proving the will—rests in every case on the propounders of the will.¹² In order to obtain probate of the will, the executors must demonstrate that the testator was of sound mind, memory and understanding,¹³ i.e., that he understood the nature of his act and its effects, the extent of the property of which he disposed, and the nature of the claims of others whom, by his will, he excluded from participation.¹⁴

This principle is clearly set out by Baron Parke in the leading case of *Barry v. Butlin*¹⁵ in the first of two rules quoted by Ritchie J. in his judgment:

[1] . . . the *onus probandi* lies in every case upon the party propounding the 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.¹⁶

The second sense in which burden of proof is used by Thayer, subsequently called the evidential burden,¹⁷ the burden of adducing evidence,¹⁸ or the secondary burden of proof, is the burden of introducing sufficient evidence to raise a particular issue.¹⁹ This burden

¹¹ *Robins v. National Trust Co.*, [1927] A.C. 515 (P.C.), at p. 520, *per* Lord Dunedin, as well as cases cited under footnote 10, *supra*.

¹² A difficult problem for the Ontario courts has been whether the burden of proof rests on the propounders of the will after the will has been proved in common form. In England, the case law is clear that before and after proof in common form the onus is on the propounders to establish testamentary capacity. See the vacillation of the Ontario rule in *Badeneck v. Inglis* (1913), 29 O.L.R. 165 (C.A.); *Larocque v. Landry* (1922), 52 O.L.R. 479 (C.A.); *Robins v. National Trust*, [1927] A.C. 515 (P.C.); and *Re Mackenzie*, [1944] 2 D.L.R. 79 (Ont. H.C.), where it was finally established that the Ontario rule was different from the English rule. The Ontario rule is not followed in other provinces: *Odynek v. Feschuk*, [1928] 1 D.L.R. 423 (Alta. C.A.); *Re Kowalski*, [1952] 4 D.L.R. 117 (Man. C.A.).

¹³ Lord Alverstone M.R. in *Re Cheadle, Bishop and Holt*, [1900] 2 Ch. 620 (C.A.), at p. 623; *Leger v. Poirier*, [1944] 3 D.L.R. 1 (S.C.C.), at pp. 11-12.

¹⁴ *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, at p. 565, followed by the S.C.C. in *O'Neil et al. v. Royal Trust and McClure*, [1946] 4 D.L.R. 545, at p. 554; [1946] S.C.R. 622. See also the statement of Lord Cranworth L.C. in *Boyse v. Rossborough* (1857), 6 H.L.C. 2, at p. 45: "The difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine." See also *Murphier v. Lamphier*, 31 O.L.R. 287 (Ont. H.C.); *Lamb v. Brown* (1923), 54 O.L.R. 443 (Ont. H.C.), at p. 448; *Re Davis*, [1963] 2 O.R. 666 (C.A.); *Re McPhee* (1966), 52 D.L.R. (2d) 520 (B.C.S.C.).

¹⁵ (1838), 2 Moo. P.C. 480, 12 E.R. 1089. As well see *Harwood v. Baker* (1840), 3 Moo. P.C. 282, 13 E.R. 117; *Smith v. Nevins*, [1925] S.C.R. 619, at p. 640.

¹⁶ At pp. 482-483.

¹⁷ Nigel Bridge and Glanville Williams, *supra*, footnotes 10 and 7 respectively.

¹⁸ Phipson, *supra*, footnote 8.

¹⁹ "A distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence." *Dillon v. Toronto Millstock Co.*, [1943] S.C.R. 268.

may or may not be borne by the same party who must bear the primary burden.

The evidenciary burden is best illustrated in the law of wills by the case of *Sutton v. Saddler*,²⁰ unfortunately not mentioned in the Supreme Court of Canada decision. In this case the heir-at-law sought to attack the will by impeaching the mental competency of the testator. The learned trial judge directed the jury that the heir-at-law was entitled to recover if he established incompetency. The full Court of Common Pleas held that this was a misdirection and that the heir-at-law need only put the matter in issue. The primary burden of proving the testator's sanity remained with the propounder of the will—the devisee. The principle in *Sutton v. Saddler* is often referred to as the presumption of sanity in a probate case, but "presumption" like "burden of proof" is a word admitting of many meanings. It is clear that the effect of the presumption is to push onto the party opposing the will the evidenciary burden of adducing evidence on the question of sanity to put the matter in issue. But the presumption does not affect the primary burden of proof, and if there is doubt as to the sanity of the testator at the end of the case, the proponents of the will must lose.²¹

The difficulty arises when there is an allegation of undue influence. On whom is the burden of proof in regard to this issue, and what kind of burden is it? There is support²² for the proposition that the attackers of the will need only adduce some evidence of undue influence and thus bear only a secondary burden of proof. If doubt remains at the end of the trial, then the proponents of the will must fail, as in *Sutton v. Saddler*. The second rule in *Barry v. Butlin* may be construed as lending some weight to this contention.

However, the better view is that the attackers of a will bear the primary burden of affirmatively establishing undue influence.²³ Mr. Justice Ritchie has authoritatively held this to be the position in Canada, where he states:

There is a distinction to be borne in mind between producing sufficient evidence to satisfy the Court that a suspicion raised by the circumstances surrounding the execution of the will have (*sic*) been dispelled and producing the evidence necessary to establish an allegation of undue in-

²⁰ (1857), 3 C.B. (N.S.) 87.

²¹ See J. Desmond Morton's discussion of primary and secondary burdens of proof in (1955) Law Society of Upper Canada Special Lectures 137.

²² *Smith v. Nevins*, [1925] S.C.R. 619, at 639, quoting *Baker v. Batt* (1838), 2 Moo. P.C. 317, at 319-20. *Tyrrell v. Paimton*, [1844] P. 151, at p. 159-160; ". . . 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 the suspicion is removed."

²³ *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462, at p. 471: "The defendant is bound to prove the issue he raised and it was necessary for him to establish affirmatively by such evidence as the jury could reasonably act upon, that the residuary clause of this will was obtained by the coercion of the plaintiff." See also *Craig v. Lamoureux*, [1920] A.C. 349 (P.C.), at p. 356; *Robins v. National Trust Co.*, [1927] A.C. 515 (P.C.), at p. 522; *Kaulbach v. Archbold* (1901), 31 S.C.R. 387.

fluence. The former task lies on the proponents of the will, the latter is a burden which is assumed by those who are attacking the will and can only be discharged by proof of the existence of an influence acting upon the mind of the testator of the kind described by Viscount Haldane in *Craig v. Lamoureux*.²⁴

It is therefore necessary to reconsider the second rule in *Barry v. Butlin* from the point of view of *degree* or *standard* of proof, as opposed to *burden* of proof. For a party who has a primary burden of proof to succeed, he must, as a general rule, adduce evidence of a greater weight than that adduced by his adversary. The extent of the excess is referred to as the standard of proof. The law recognizes at least two standards of proof: proof on a preponderance of probabilities, the standard appropriate for civil cases,²⁵ and proof beyond a reasonable doubt, the appropriate standard in criminal cases.²⁶

While there has been considerable scepticism as to whether there is any difference between these two standards of proof, there has also been extensive discussion as to whether there are not more than two standards of proof. Though in theory the standard of proof in a civil case is always proof on a balance of probabilities, in practice,

. . . there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established.²⁷

This problem of the different standards of proof has been a most vexatious one in matrimonial causes.²⁸

The second rule in *Barry v. Butlin*, therefore, may be considered as indicating that there may be a slightly more onerous burden of proof in certain circumstances:

[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.²⁹

This is emphasized even more clearly by Davey L.J. in *Tyrrell v. Painton*:

²⁴ *Supra*, footnote 1, at p. 138.

²⁵ For an early case, see *Cooper v. Slade* (1858), 6 H.L.C. 746, at p. 772.

²⁶ For an early case, see *R. v. Winsor* (1865), 4 F. & F. 363. See Lord Denning's now famous statement in *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372 (K.B.), at pp. 373-374.

²⁷ Per Denning L.J. in *Bater v. Bater*, [1951] P. 35 (C.A.), at p. 37; [1950] 2 All E.R. 458, at p. 459. See also Morris L.J., in *Hornal v. Neuberger Products, Ltd.*, [1956] 3 All E.R. 970 (C.A.), at p. 978.

²⁸ *Churchman v. Churchman*, [1945] 2 All E.R. 190: "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called." *Ginesi v. Ginesi*, [1948] 1 All E.R. 373 (C.A.); *Preston-Jones v. Preston-Jones*, [1951] 1 All E.R. 124 (H.L.); *George v. George and Logie*, [1950] O.R. 787 (C.A.); *Smith v. Smith*, [1952] S.C.R. 312; *Boykowych v. Boykowych*, [1955] S.C.R. 151; Fridman, *Standards of Proof* (1955), 33 Can. Bar Rev. 665.

²⁹ Cited by Ritchie J., *supra*, footnote 1, at p. 133.

. . . 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 the suspicion is removed.³⁰

The above citations support the view that there is a standard of proof intermediary between proof on a preponderance of probability and proof beyond reasonable doubt. But a common sense approach leads rather to the conclusion that different degrees of persuasion may be demanded by the circumstances of particular cases. For example, as a practical matter, a magistrate trying a petty theft charge will be more readily persuaded, and by evidence of a different quality and quantity, than a judge trying a capital murder case.

Mr. Justice Ritchie accepts this approach, stating it in this way:

Counsel for the appellant contended that in all cases where the circumstances surrounding the preparation of execution of the will give rise to a suspicion, the burden lying on the proponents of that will to show that it was the testator's free act is an unusually heavy one, but it would be a mistake, in my view, to treat all such cases as if they called for the meeting of some standard of proof of a more than onerous character. The extent of the proof required is proportionate to the gravity of the suspicion and the degree of the suspicion varies with the circumstances of each case.³¹

It is submitted that Mr. Justice Ritchie has authoritatively stated that the proper approach to be followed in wills cases where undue influence is alleged, namely, that the court should distinguish the primary onus of proving testamentary capacity,³² which is fixed on the proponents throughout the trial but which may require a higher degree of persuasion where there are suspicious circumstances,³³ and the primary onus of alleging and proving undue influence, which is fixed on the attackers of the will.³⁴

Unfortunately, Ritchie J. found it unnecessary to discuss the nature of undue influence, holding that the presence of undue influence was a question of fact decided by the learned trial judge and affirmed by the Court of Appeal. It is submitted with respect that the question of undue influence is always a mixed question of fact and law

³⁰ [1894] p. 151, at pp. 159-160, adopted by Sir Lyman Duff C.J.C. in *Riach et al. v. Ferris*, [1935] 1 D.L.R. 118, at p. 122. See also *Fulton v. Andrew* (1875), L.R. 7 H.L. 448; *Brown v. Fisher* (1890), 63 L.T. 465 (P.); *Finney v. Govett* (1909), 25 T.L.R. 186 (C.A.); *Re Begley*, [1939] I.R. 479.

³¹ *Supra*, footnote 1, at p. 139. See also the recent case of *Re Davis*, [1963] 2 O.R. 666 (C.A.), at p. 683 where it was held that the burden of proof lying on the proponents of a will to prove testamentary capacity is considerably increased in certain circumstances, e.g., where the will is a marked departure from all previous wills and where there is a history of progressive impairment of the mental faculties.

³² The first rule in *Barry v. Butlin*.

³³ The second rule in *Barry v. Butlin*.

³⁴ The interaction of these three separate problems—the primary onus of proof, the secondary onus of proof, and the standard of proof necessary to discharge the primary onus of proof where there are suspicious circumstances—is evident in the Privy Council decision of *Harmes v. Hinkson*, [1946] 3 D.L.R. 497; (1946), 62 T.L.R. 445.

and that some reference to the legal nature of undue influence was desirable.³⁵

The dissent of Mr. Justice Judson rests not so much on a different interpretation of the law as on a different view of the facts. He also cites the statement of Duff C.J.C. taken from *Tyrrell v. Painton* quoted above, but he is more ready to find suspicious circumstances in the facts. As examples, he notes that the executor never took the stand to give evidence, and that there was no evidence adduced to explain the "sudden, precipitated revocation of a previous will which had been twice confirmed by the testatrix when she was undoubtedly of sound mind".³⁶ In addition, the testatrix did not instruct the solicitor personally, but only through an intermediary, the executor, who did not testify.³⁷ Judson J. also questions whether, on the facts, the solicitor discharged his duty of making an independent inquiry to ascertain the testamentary capacity of the testatrix, citing the leading Ontario case of *Murphy v. Lamphier*.³⁸ Considering all these factors, he concludes that the primary onus on the propounder of the will to establish capacity has not been discharged, but this holding does not subtract from the authoritative statement of the legal principles found in the majority decision.

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³⁵ For a discussion of the legal nature of undue influence as requiring fraud or coercion in relation to the will see: *Boyse v. Rossborough* (1857), 6 H.L. 2; *Hall v. Hall* (1868), 1 P. & D. 481; *Wingrove v. Wingrove* (1886), 11 P.D. 81; *Hampson v. Guy* (1891), 64 L.T. 778 (C.A.); *Baudains v. Richardson*, [1906] A.C. 169 (P.C.). There is no presumption of undue influence in testamentary matters: *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462. For Canadian case law see *Crompton v. Williams*, [1938] O.R. 543, and cases cited in footnote 23, *supra*. Cf. the presumption regarding undue influence and *inter vivos* gifts.

³⁶ *Supra*, footnote 1, at p. 129. This brings to mind the statement of Knight Bruce, L.J., in *Hart v. Tulk* (1852), 2 De G.M. & G. 300, at 313: "Testators have a right to be eccentric, capricious, arbitrary, and, so far as the term may be used, unjust; nor does it seldom, I believe, happen that they have reasons known to themselves, though not to those who expound their wills, for dispositions seemingly strange and unreasonable. Testators are not bound to have good or any reasons for what they do, or when they have reasons to state them."

³⁷ See *Batton Singh v. Amirchand*, [1948] A.C. 161 (P.C.).

³⁸ (1914), 31 O.L.R. 287; *aff'd* (1914), 20 D.L.R. 906, 32 O.L.R. 19 (C.A.). See also the recent Ontario case of *Re Davis*, [1963] 2 O.R. 666 (C.A.), at p. 673.

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