THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

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CASE AND COMMENT

PUBLIC POLICY — CONTRACTS — INSURANCE — DIVORCE — STATUTE INTERPRETATION.—Public policy as a ground of decision, suggests Professor Winfield, is "a principle of judicial legislation or interpretation founded on the current needs of the community";[1] to which we venture to add, "as those needs are understood by the judges". What Mr. Justice Cardozo has said about the judicial process should still those who would interpret the judicial function in terms of the rigid application of rules.[2] The eternal search in the discretionary sphere of public policy is for standards of limitation to regulate its use in solving legal problems. Case has followed case to bear testimony to the oft-repeated statement of Cave J. that "judges are more to be trusted as interpreters of the law than as expounders of what is called public policy".[3]

"In the realm of contract," says Professor Winfield, "some judges have expressed a decided disinclination to extend public policy any further in the direction of invalidating agreements."[4] "The general tendency of modern ideas," Pollock has said, "is

[1] *Public Policy in the English Common Law* (1928), 42 Harv. L. Rev. 76, 92.

[2] THE NATURE OF THE JUDICIAL PROCESS.

[3] *In Re Mirams*, [1891] 1 Q.B. 594, 595.

[4] *Supra*, note 1, at p. 96.

against the continuance of such a jurisdiction."[5] The jurisdiction was, nevertheless, exercised recently in *Beresford* v. *Royal Insurance Co., Ltd.*,[6] a case of first impression. Insured had taken out certain policies of life insurance in 1925 which contained a clause of avoidance, if he died by his own hand, whether sane or not, *within one year* from the commencement of the insurance. Insured committed suicide in 1934, a few minutes before the policies would have automatically expired for failure to pay premiums. A finding of sanity at the time of suicide was made. The Court of Appeal, reversing the trial Judge, upheld, on grounds of public policy, defendant's resistance to the suit to recover the insurance money. Suicide, while sane, is a crime by English law, Lord Wright declared, and "the present claim [was] equivalent technically to a claim brought by a murderer or his representative or assigns, on a policy effected by the murderer on the life of the murdered man".[7] "While the law remains unchanged, the Court must," he continued, "apply the general principle that it will not allow a criminal or his representative to reap, by the judgment of the Court, the fruits of his crime;"[8] and "the overrriding duty, or inherent power, of the Court to refuse its aid to enforce a promise to pay, in such circumstances, excludes its general duty to enforce performance of contracts."[9]

The decision is of unusual significance in the field of insurance. If it is to be followed, an express contract excluding suicide after a stated period as a ground of avoidance, will be ineffective to compel payment by insurance companies when the insured commits suicide, while sane, after the stated period.[10] It may be of interest to examine some American authorities on the problem, on the ground that, as stated in one of our leading Digests, "in the absence of English and Canadian authorities, it is well to have regard to American authorities in insurance cases".[11]

[5] PRINCIPLES OF CONTRACT (10th ed.) 350.

[6] [1937] 2 All E.R. 243.

[7] *Ibid.*, at p. 249. The resulting trust which would arise in such case in favour of deceased's estate, (*Cleaver* v. *Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147), could not, of course, arise here.

[8] *Ibid.*, at p. 254.

[9] *Ibid.*, at p. 258. *Cf. Haseldine* v. *Hosken*, [1933] 1 K.B. 822, per Greer L.J. at p. 837: "No person is allowed to insure himself against the commission of a crime."

[10] If insured were insane when he committed suicide, it would afford no defence to an insurance company, at least in the absence of express provision therefor.

[11] 6 C.E.D. (Ont.) 107. *Dominion Trust Co.* v. *New York Life Insurance Co.*, [1919] A.C. 254, is the only Canadian case the writer has discovered, in a cursory search, which raises the problem in the *Beresford Case*. The insured had taken out two policies of insurance in 1912 and another in 1916.

Williston in the first edition of his work on Contracts states:[12]

> It has generally been held that an insurance policy which makes no express condition excepting death by suicide, covers the case of such death even though the insured was sane. The Supreme Court of the United States, however, has not only held that in the absence of express words governing death by suicide while sane the insurance contract must be interpreted as excluding death by such a cause, but has added that even though the contract should in terms provide for payment in spite of the fact that the insured while sane committed suicide, such a provision would be opposed to public policy.

Support for the latter part of this statement is afforded by *Ritter* v. *Mutual Life Insurance Co.*,[13] cited by Laverty in his *Insurance Law of Canada* for the following proposition:[14]

> Where no question of insanity is raised, a man who commits suicide is guilty of such a fraud upon the insurers, that for that reason, and for reasons of public policy, the policy will be avoided, even though there be no such condition therein.

Laverty does not mention the qualification of the *Ritter Case* made in *Whitfield* v. *Aetna Life Insurance Co.*,[15] to the effect that only when the contract of insurance was silent on the question of suicide was there an implied exception of such a death to the liability of the insurer.[16]

Both of the above cases must now be read in the light of the American Supreme Court's decisions in *Northwestern Mutual Life Insurance Co.* v. *Johnson*, and *National Life Insurance Co.* v. *Miller*.[17] In the first of these cases, a policy payable to insured's wife contained a clause of avoidance if insured suicided, while sane or insane, within two years from the date of the policy. The policy in the second case contained a clause of incontestability after one year (providing, of course, the premiums were duly paid). Insured committed suicide after two years, it not

Each of the policies contained a clause excluding suicide as a risk if committed within two years of the coming into force of the policy. Insured committed suicide in 1916. The Privy Council, without discussing whether the two year avoidance clause prevented the insurer from setting up a defence in respect of the 1912 policies, ordered that the actions against the insurer be dismissed.

[12] Sec. 1750, p. 3055.

[13] (1897), 169 U.S. 139. It says that a contract of insurance on a man's life payable to his estate, and expressly covering suicide committed by him while sane, would be against public policy.

[14] 2nd ed., 1936, 181.

[15] (1906), 205 U.S. 489.

[16] This would support his statement at p. 181, that "it is implied in all contracts of insurance that the insured shall not hasten the risk against which he is insured, for the contract of insurance requires the utmost good faith throughout its existence," citing *Boulton* v. *Houlder*, [1904] 1 K.B. 784, 791.

[17] (1920), 254 U.S. 96 (decided together).

appearing he was insane at the time. Mr. Justice Holmes, delivering the judgment of the Court said:[18]

> We are of opinion that the provision in the first mentioned document avoiding the policy if the insured should die by his own hand within two years from the date is an inverted expression of the same general intent as that of the clause in the second making the policy incontestable after one year, and that both equally mean that *the suicide of the insured, insane or sane, after the specified time, shall not be a defence.*

The tendency in American policies of life insurance has been to include both a suicide and an incontestability clause. Where the periods limited are the same and insured suicides thereafter, or where he suicides after the longer period limited in the policy, the insurer would appear to have no defence. In other cases, there is a conflict of authority whether clauses limiting or excluding suicide as a risk and fixing a period of incontestability are independent or whether the incontestability clause prevails over the suicide clause. It has been held, on the one hand, that if suicide takes place within the period in which risk of suicide is excluded it can be interposed as a defence notwithstanding the operation of an incontestability clause. On the other hand, there is authority to the effect that the defence of suicide can not be set up after the time fixed by the incontestability clause; this construction in favour of the insured appears to be dictated, to some extent, by the fact that the insurance contract is usually drawn by the insurer.[19]

An interesting point remains in connection with the *Beresford Case*. Lord Wright clearly implies by his language that the decision might have been against the insurer if suicide were not an offence under English law.[20] As applied to Canada, this would indicate, that the Dominion Parliament, by withdrawing suicide from the category of criminal offences, could affect the civil right to recover on an insurance contract, at least where suicide occurred after the period within which such risk was excluded. Suicide, a common law crime, remains an offence under the terms of The Criminal Code,[21] although forfeiture has been abolished.[22] Mr. Justice Mignault in the Supreme Court of Canada has stated categorically:[23]

[18] *Ibid.*, at p. 102.

[19] See the conflicting authorities collected in 55 A.L.R. 549; 67 A.L.R. 1364.

[20] [1937] 2 All E.R. 243, 254.

[21] See s. 10, for example.

[22] Sec. 1033.

[23] *London Life Insurance Co.* v. *Trustee of the Property of the Lang Shirt Co., Ltd.*, [1929] S.C.R. 117 at p. 125. The policy of insurance in this case

> I think that there can be no doubt that, according to our criminal law, suicide is a crime. . . . . It is obvious, of course, that there can be no punishment under modern law when suicide is successful, except with regard to abettors of the crime.

An Ontario Court has spoken to the same effect.[24]

> The provisions of the Criminal Code regarding aiding or counselling suicide, sec. 269 and 270, do not in any way affect the crime itself. Apart from the relief afforded against forfeiture, the punishment here is, strictly speaking, the same as at common law, though no longer enforced.

By way of contrast with the *Beresford Case*, in which public policy proved superior to sanctity of contract, is the majority decision of the House of Lords in *Fender* v. *Mildmay*[25], also a case of first instance, in which an express contract overrode apprehensions based on considerations of public policy. The problem in this case was posed as follows: Is it contrary to public policy that a promise to marry, made between a decree nisi and decree absolute for divorce, should be enforceable? The trial Judge, two of three members of the Court of Appeal and two of five members of the House of Lords said yes. That the majority of the House of Lords thought otherwise lends weight to the statement of Greer L.J., dissenting in the Court of Appeal, that "it is clear that ideas of public policy with regard to matrimonial relations, as with regard to economic matters, have suffered very considerable changes from time to time."[26]

The story of *Fender* v. *Mildmay* is in the "dime novel" tradition. Defendant is the married man who tires of his wife and finds solace with plaintiff. Relations are established which marriage alone can endow with respectability. Divorce is the solution to the triangular mix-up. Defendant's wife brings the suit, naming plaintiff as co-respondent. Honour then plays its part, because defendant promises to marry plaintiff when the decree nisi of divorce becomes absolute. The affair is climaxed by defendant's fall from grace in marrying another woman after the final divorce decree. Plaintiff provides an anti-climax in resorting to the healing power of money damages to assuage her wounded pride.

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contained a clause of avoidance if the insured died within two years by his own hand, whether sane or not. The insured died within the two year period of carbon monoxide poisoning in his motor car garage. The death was found to be accidental.

[24] *Stone* v. *World Newspaper Co. Limited* (1918), 44 O.L.R. 33, per Latchford J. at p. 35. The right of coroners to direct the bodies of suicides to be buried in the highway still exists in Canada as a punishment for the crime, though, of course, it is no longer enforced.

[25] [1937] 3 All E.R. 402, reversing [1936] 1 K.B. 111.

[26] [1936] 1 K.B. 111, 120.

All the judges who sat in the case were agreed that promises by a married man to marry another woman after his wife's death tended to produce conduct contrary to the obligations of married life and consequently were unenforceable because of public policy.[27] But there was a difference of opinion whether a decree nisi effected such a change in marital status that a promise of marriage made thereafter could be said to have an immoral tendency. The majority in the Court of Appeal and the minority in the House of Lords believed it tended to prevent reconciliation. Lord Russell warned that marriage was "assuming the characteristics of a contract for a tenancy at will";[28] he was emphatic therefore, that "any contract the effect or tendency of which would be to create an obstacle or bar to the reconciliation of husband and wife must necessarily be a contract against public policy".[29] Implicit in this opinion was the view that a decree nisi did not put an end to the marriage bond, however it might affect some of its obligations. As Slesser L.J. put it:

> . . . . during the six months between the decree nisi and the application to make the decree absolute, the law allows the parties to take the proper steps to rescind the decree and so enables them to resume their full matrimonoal relation.[30] . . . . . the law has always favoured such a resumption of the matrimonial life notwithstanding that the parties have separated and one of them has taken proceedings in divorce.[31]

Because it was the *tendency* of the promise of marriage that was material to the issue of public policy,[32] the majority of the Court of Appeal rejected plaintiff's argument that the spouses could have prevented the promise from ever becoming operative.

The view that prevailed in the House of Lords was that as long as the decree nisi was in force, it relieved both parties from the obligations that married persons owed to one another. It put an end to the whole content of the marriage contract, leaving only the shell or technical bond.[33] Accordingly, it was pure fancy to speak of a promise of marriage after a decree nisi having a tendency to immorality or breach of matrimonial obligations.

[27] *Spiers* v. *Hunt*, [1908] 1 K.B. 720; *Wilson* v. *Carnley*, [1908] 1 K.B. 729; AMERICAN LAW INSTITUTE RESTATEMENT OF CONTRACTS, Vol. II, s. 588; *Moon* v. *Clarke*, (1879) 30 U.C.C.P. 417; *Sheehan* v. *Mercantile Trust Co.* (1920), 46 O.L.R. 581.

[28] [1937] 3 All E.R. 402, 422.

[29] *Ibid.*, at p. 421.

[30] [1936] 1 K.B. 111, 124.

[31] *Ibid.* The majority of the Court of Appeal dismissed the argument that since the promise to marry plaintiff was conditional on a decree absolute, there was power in the spouses to prevent its operation.

[32] *Egerton* v. *Brownlow* (1853), 4 H. L. C. 1.

[33] See [1936] 1 K.B. 111, 117, per Greer L.J. dissenting. See *B.* v. *B.*, [1935] 2 D.L.R. 798 (Man. C.A.).

As for preventing reconciliation, it was common knowledge that reconciliation was a rarity once a degree nisi had been obtained. Since it was not contrary to public policy for married persons to obtain a divorce or for either of them to remarry after the final decree,[34] it could not offend public policy to enforce a promise of marriage made after the whole substance of a previous marriage had been cut away by a decree nisi of divorce. In fact, "morality, decency and public policy"[35] were in favour of the respondent regularizing his relations. A final note was sounded by Lord Atkin; he said :

> I attach importance to repelling the attack upon such contracts, for I seem to detect a resurgence of ecclesiastical principles as expressed in ecclesiastical law, which at one time found favour with common law judges, and certainly with equity judges, where they had to deal with separation agreements, and which were finally repressed more than 100 years ago.[36]

Caulfield v. *Arnold (No. 1)*,[37] provides an interesting comparison with *Fender* v. *Mildmay*. Plaintiff, being married, and defendant lived in adultery. Plaintiff petitioned the Senate for divorce. In the interval between the hearing of the petition and the passage of the divorce bill, defendant promised to marry plaintiff. The promise was ruled unenforceable because of public policy. Nothing seemed to turn on the fact that plaintiff, a guilty party, petitioned for divorce. Morrison J., recognizing that in the circumstances of this case "there [was] nothing in the nature of an intermediate decree or act equivalent in its character to a decree nisi of the Courts"[38] held that, "assuming the plaintiff were properly entitled to a divorce, yet any promise of marriage to be performed contingently upon a divorce being obtained [was] against public policy."[39]

The decision in *Fender* v. *Mildmay* appears to be consistent with Pollock's statement that agreements are directly immoral if they provide for or tend to illicit cohabitation, or if they tend to disturb or prejudice the status of lawful marriage.[40] The promise of marriage had no immoral tendency because, though it was conditional on a decree absolute of divorce, it looked towards regularizing the relations of plaintiff and defendant.

[34] *Cf. Bradley* v. *Bradley* (1909), 19 O.L.R. 525, holding that a contract by a widower not to marry again was contrary to public policy.
[35] [1936] 1 K.B. 111, 118, per Greer L.J., dissenting.
[36] [1937] 3 All E.R. 402, 411.
[37] [1925] 1 D.L.R. 296 (B.C.)
[38] *Ibid.*, at p. 297.
[39] *Ibid.*
[40] PRINCIPLES OF CONTRACT, 10th ed., 340.

Secondly, having been given when all that remained of the marriage was its technical bond, it offered no prejudice to marital status.

The profound importance of *Fender* v. *Mildmay* is in the declaration that a decree nisi destroys the substance of the marriage bond. Several problems suggest themselves, as a result. A obtains a decree nisi of divorce from B. The next day A dies intestate. What are B's rights? Or, B dies intestate the day after the decree nisi. What are A's rights? Should the guilty party be penalized by being denied a share in deceased's estate? Should the petitioner be denied a share in the estate of deceased, the guilty party, because in obtaining the decree nisi, the petitioner has indicated a desire for complete dissociation from the respondent? Suppose either party dies the day before the decree of divorce becomes absolute? Should different results follow than where death occurs shortly after the decree nisi, because in the latter case reconciliation may have been effected within the six month period had not death intervened? If so, where is the line to be drawn? Amendments to the legislation governing intestate succession to deal with these questions should be forthcoming.

A similar set of problems arises in respect of the right of an insured to deal with a preferred beneficiary policy of insurance after a decree nisi of divorce by or from the preferred beneficiary. Should the result depend on whether it is the insured or the preferred beneficiary that obtains the decree nisi? The situation here is one that likewise calls for legislative intervention.[41]

The influence of *Fender* v. *Mildmay* is perhaps seen in *Davies* v. *Elmslie*.[42] This was a decision on a preliminary issue of law raised by defendant, and accordingly, all the facts set out in the statement of claim had to be taken as correct. The statement of claim alleged that plaintiff and defendant agreed that "in consideration of the plaintiff persuading her husband to go to New Zealand and/or consenting to forgo the consortium of her said husband, the defendant promised to pay to the plaintiff an allowance at the rate of £4 per week, until either the defendant should pay the plaintiff's passage to join her said husband in New

[41] *Cf.* Secs. 161 and 162 of the Insurance Act, R.S.O. 1937, c. 256, providing for cases where a divorce has been granted, and where husband and wife are living apart in circumstances disentitling the wife to alimony or the husband to an order for restitution of conjugal rights. These provisions do not meet the problem here presented. *Re Armstrong and Mutual Life Insurance Co. of N.Y.* (1937), 4 I.L.R. 347 (Ont.) decided that what is now s. 162 is inappl cable where the policy of insurance designating the wife as (preferred) beneficiary has matured.

[42] [1937] 4 All E.R. 68, affirmed 471.

Zealand or the defendant should pay her said husband's passage back to England."[43] The Court was confined to what was recited in the record. From this it appeared that plaintiff's husband had gone to New Zealand, that defendant had, for a time, paid what he agreed, but after ceasing to pay the weekly allowance he failed to pay the passage of plaintiff or her husband to re-unite the spouses. Defendant was apparently no relation of either of the spouses, no separation deed existed between plaintiff and her husband and she was ready and willing to join him in New Zealand.

The fact that the Court could not inquire into the motives and circumstances of the agreement makes the case unsatisfactory.[44] It is of interest, however, by reason of the trial Judge's intimation that he was prepared to modify the established principle that contractual provisions contemplating the future separation of husband and wife were unenforceable.[45] He put the hypothetical case of a young married woman whose husband was faced with the problem whether he ought to accept a contract of employment in a part of the world unsuitable for white women. The job is necessary; he cannot take his wife and, on the other hand, he is unable to keep two establishments. His wife's father offers to make an allowance for her maintenance. While this offer contemplates the future separation of husband and wife, it would be paying too high a price in devotion to legal principles to consider it contrary to public policy.

In upholding the validity of the contract, the Court relied on Lord Thankerton's conclusion in *Fender* v. *Mildmay*,[46] that "there is no general principle of public policy that no contract is enforceable which is inconsistent with maintenance of the obligations of the marriage tie, or, to phrase it otherwise, with loyalty to the other spouse." The conclusion was that :

> . . . . . in a case like the present where the defendant is setting up that the agreement is void because of illegal consideration, and where the Court is in entire ignorance as to the circumstances, or whether there was anything immoral in the contract . . . . the defendant has got to satisfy the Court, if there be no general principle of public policy involved, that the particular contract is a contract which is contrary to public policy.[47]

[43] *Ibid.*, at p. 69.

[44] *Re Moore, Trafford* v. *Maconochie* (1888), 39 Ch. D. 116, was distinguished because there was evidence of the intentions and motives of a testator who provided a weekly allowance for a married woman during such time as she may live apart from her huspand.

[45] AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONTRACTS, Vol. II, sec. 584.

[46] [1937] 3 All E.R. 402, 415.

[47] [1937] 4 All E.R. 68, 74.

In the circumstances, defendant could not but fail. The Court of Appeal, in affirming the trial Court's decision, declared that the agreement was in no sense a separation agreement, and conjugal rights were not impaired save by such a physical separation as economic necessity or the necessity of a man serving the state may impose on every husband.[48] The clause in the statement of claim which spoke of plaintiff's "consenting to forgo the consortium of her husband" was explained by Slesser L.J. as being "no more than the pleader's description of what he said was the agreement";[49] that is, "an agreement of physical separation for a period [which] contemplates that the parties will remain as husband and wife and actually provides for the financial means of their once more coming together."[50]

Howard v. *Odhams Press, Ltd.*,[51] is illustrative of the principle that a contract that has for its consideration the non-disclosure of discreditable facts is illegal.[52] Plaintiff had been a sorter in the competition department of defendant company, proprietor of two newspapers which conducted cross-word puzzle competitions. The company suspected that cheating with respect to the competitions was going on among the sorters. Plaintiff made a written statement to the company, in consideration of its being kept secret from third parties and not used to plaintiff's detriment, implicating himself in a competition fraud on a newspaper (not defendant's) on which he had previously worked, and disclosing an arrangement to perpetrate similar frauds on defendant. The company became dissatisfied with plaintiff's assistance in uncovering the fraudulent scheming and gave a copy of plaintiff's statement to the secretary of the trade union to which plaintiff belonged. He was expelled from the union.

The principal question in plaintiff's suit for damages was whether the bargain he made with defendant was consistent with public policy. The trial Judge considered the agreement would benefit the company in respect of its provision for non-disclosure, would prevent further frauds and so serve the public interest. Though he held the agreement enforceable, he gave only nominal damages because plaintiff's wrongful act was the *causa causans* of his damage.[53] On appeal, the contract was invalidated, so that it became unnecessary to discuss the question of causation in determining damages.

[48] [1937] 4 All E.R. 471, 473-4.
[49] *Ibid.*, at p. 474.
[50] *Ibid.*, at p. 473.
[51] [1937] 2 All E.R. 509.
[52] See AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONTRACTS, Vol. II, sec. 557.
[53] *Weld-Blundell* v. *Stephens*, [1920] A.C. 956.

Because there was a general principle of public policy involved here, the motives of the parties were irrelevant, thus distinguishing this case from *Davies* v. *Elmslie* where no general principle of public policy was held to be involved. "The crucial matter," said Greene L.J., "is the tendency of the contract itself—will it, if carried out according to its terms, operate to the public detriment?"[54]

Slesser L.J. viewed the agreement not as one to take precautions to prevent a man committing a crime, but rather as an agreement to prevent the public knowing what crimes had been, or would be, committed. The concealment of facts in defendant's interest was like paying for the non-disclusure of a crime. Greene L.J. (with whom Greer L.J. agreed on the issue of public policy) construed the agreement as imposing an obligation not to disclose the contents of the statement to the police, although its primary object was to conceal them from plaintiff's trade union. Defendant also precluded itself from using any of the information in the statement in connection with any prosecution of plaintiff or other guilty parties.[55] So far as defendant alone was concerned, there was a good deal to be said in upholding the agreement as containing a precaution against the commission of fraud. Greene L.J. indicated as much in his judgment.[56] But the fact that other interests were involved proved decisive. He concluded :[57]

> I do not, however, think that such a promise ought to be held to be valid where it extends to frauds committed and contemplated against others, to whom the communication of the information obtained would be of use in preventing the commission of such fraud.

In short, as a condition of protecting itself, defendant was leaving others exposed to criminal activities, which the disclosure of plaintiff's statement might bring to an end.

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Problems of "public policy" are frequently involved in the interpretation of statutes although it is seldom that the Courts clearly state the issue in that way. The most recent case to come to our notice is *Re Rex* v. *Burdick*,[58] involving the contravention of a barbering schedule established under the Ontario

[54] [1937] 2 All E.R. 509, 519.
[55] It was pointed out, however, that the agreement would be no shield to defendant where it was compellable to testify or to produce the document under process of law.
[56] [1937] 2 All E.R. 509, 519.
[57] *Ibid.*, at p. 520.
[58] [1938] O.W.N. 11.

Industrial Standards Act.[59] Accused was the sole proprietor of a barber shop, employing no help. His breach of the law was established, but the magistrate acquitted him on the ground that he was not an employer within the terms of the statute. The finding was plainly erroneous because the Industrial Standards Act specifically provided that every person in any way engaged in any industry who "is the proprietor of a shop or business either alone or in partnership with another person [shall] be deemed an employer".[60] The Judge on appeal recognized this, but he based his dismissal of the appeal by the Crown from acquittal on the ground that no penalty had been provided in the particular case with which he was confronted. The Industrial Standards Act, in providing fines for employers violating any schedule applicable to them, said further, that an employer "in every case, upon conviction, shall be ordered to pay . . . . as an additional penalty the full amount of the wages then found to be unpaid to any employee under the provisions of the schedule".[61] From this provision the learned Judge deduced that only those employers were to be penalized who engaged employees to whom they did not pay the established wage. Accordingly, it could not apply to an employer within the statute who employed no one else, and who personally performed the work in the industry in which he was engaged. (In this latter aspect, he could also be considered an employee within the statute.)[62] Accused's default was, however, not in respect of wages; that was impossible in the circumstances. It was in charging less than the established price for adult hair cuts. A fine might very well have been imposed on accused without too great concern over being unable to order also the payment of unpaid wages, because, obviously, there could be no finding that wages were unpaid. Ordinary canons of statutory interpretation would dictate that a statute be applied so far as possible, (especially where no one but a law-breaker would be affected) rather than be rendered totally ineffective.[63] The Judge's decision did less violence, perhaps, to the words of the Industrial Standards Act than to its policy. It is a serious matter if courts

[59] Now, R.S.O. 1937, c. 191.
[60] 1937, Statutes of Ontario, c. 32, s. 9; now R.S.O. 1937, c. 191, s. 11.
[61] 1935, Statutes of Ontario, c. 28, as amended by 1936, c. 29, s. 9 and 1937, c. 32, s. 12 (1); now R.S.O. 1937, c. 191, s. 15.
[62] *Supra*, note 60.
[63] MAXWELL, INTERPRETATION OF STATUTES (8th ed. 1937), 61, 101, 240.

cannot or will not consider the motivating considerations of public statutes designed to effect some order in employer-employee relations in industry.[64]

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WILLS—TESTAMENTARY CAPACITY—"SUSPICIOUS CIRCUMSTANCES"—BURDEN OF PROOF.—Two recent decisions dealing with litigation concerning the proof of a deceased's last will and testament, one English,[1] and the other of the Ontario Court of Appeal,[2] are of interest not only because of their holdings, which in some respects are unusual, but because they cast light on the judicial approach to what are essentially questions of policy involved in either supporting or refusing to support wills of deceased testators. In both cases, a testamentary document was admitted to probate with a clause invalidated.

In the English case of *In the Estate of Bohrmann, Caesar and Whatmough* v. *Bohrmann*,[3] Langton J., in an action in which probate of a will was contested on the grounds of lack of testamentary capacity, admitted the document to probate with the exception of one clause which he deleted on the ground that it was affected by testamentary incapacity. The learned judge admitted that he knew of no precedent in which such a course had been followed, and the decision, therefore, if correct, marks a new departure in the law of testamentary capacity.

The Ontario case, *Re Souch*,[4] involved proceedings to establish a testamentary document executed by a woman of very advanced age, who had suffered an epileptic stroke, and who was deprived of the power of speaking and writing. The part of the will in question (which was a fourth codicil, there being no serious dispute as to the will and the first three codicils) contained substantial gifts to the person who had drawn the will. Serious questions arose concerning the capacity of the testator to execute the codicil, but the majority of the Court of Appeal, while finding that the testatrix had testamentary capacity and also finding that the person who drew the codicil had carried out instructions of the testatrix, nevertheless held that the codicil should be

[64] *Cf.* Davies, *The Interpretation of Statutes in the Light of Their Policy by the English Courts* (1935), 35 Col. L. Rev. 519.

[1] *In the Estate of Bohrmann, Caesar and Whatmough* v. *Bohrmann*, [1938] 1 All E.R. 271.

[2] *Re Souch*, [1938] O.R. 48.

[3] [1938] 1 All E.R. 271.

[4] [1938] O.R. 48.

admitted to probate with the clauses benefitting the draftsman invalidated. Fisher J. A. dissented on the ground that the testatrix was incapable of making a will and therefore the entire codicil should be refused probate.

In the English case the pleadings were precise and the only question considered was the extent to which lack of testamentary capacity must affect either the whole of a testamentary document or part only. In the Ontario case it is more difficult to determine the exact question in issue and it becomes necessary to consider the legal basis for refusing probate of the will of a competent testator, because, to use the expression current in cases of that kind, of a "suspicion" which has not been removed. The phrase "suspicious circumstance" has been used in countless cases since the leading decision of *Barry* v. *Butlin*,[5] to describe a situation where the person who draws the will is himself a beneficiary. The question remains, however, a suspicion of what?

Although superficially simple, problems involved in litigation concerning the establishment of a deceased person's will against attacks of lack of testamentary capacity, fraud and undue influence, are, in the writer's opinion, second to none in difficulty. While the Chief Justice of Canada has recently said in an appeal involving these questions that "the law is well established and well known",[6] the fact remains that judgments dealing with litigation of this kind abound in language that is hazy, obscure, and extremely difficult to reconcile. While paragraphs can be taken from judgments setting out in convenient form an exposition of the existing law, it is an altogether different matter to apply that law to a given set of facts. Fundamentally, the difficulty in these cases depends, in the writer's opinion, on the attitude of courts towards a broader problem.

This problem, and the difference in judicial attitude thereto, can be best illustrated by considering two statements of English judges. In *In the Estate of Bohrmann*, Langton J. stated:[7]

> Of course, it will be remembered that the English law is, and always has been, very strongly in favour of any will or a codicil, which in terms is not unreasonable and shows no sign of mental deficiency.

One can understand that with an approach of this nature a court would strive to support a will, even in the face of evidence of incapacity such as was present in the *Bohrmann Case*. That the learned judge believed that the testator was, to some extent

[5] (1838), 2 Moo. P.C. 480.
[6] *Riach* v. *Ferris*, [1938] 1 D.L.R. 118 at p. 119.
[7] [1938] 1 All E.R. 271 at p. 274.

at least, incapable of making a will, is shown by his judgment deleting part of the will. But if the testator is *ex hypothesi* incapable of forming a rational disposition of his property as a whole, why should the court endeavour to uphold part of the will? In this connection it is interesting to compare the language of Lord Brougham in *Panton* v. *Williams*:[8]

> The course of administration directed by the law is to prevail against him who cannot satisfy the Court that he has established a will. There is no duty cast upon the Court to strain after probate. The burden of proof eminently lies on him who sets up a will.

The attitude here expressed seems to be contrary to that indicated by Langton J. It is the writer's opinion that the law, in testamentary matters of this kind, has in the main followed the view expressed by Lord Brougham. It is further submitted that this attitude has found expression in the law under the guise of "presumptions" and "burden of proof", both of which, while innocuous looking in themselves, can be used to effect a complete change in legal result[9]. While the cases have not always been consistent, it is perhaps worth while to examine the fundamental proposition here suggested, as it has manifested itself in the case law.

As Cockburn C.J. stated in *Banks* v. *Goodfellow*:[10]

> The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or

[8] 2 N.C. Supp. xxi, cited by Warren J. in *Hegarty* v. *King* (1880), L.R. Ir. 5 Ch. 249 at p. 250.

[9] An interesting case on this point is *Re McGuire*, [1935] 3 D.L.R. 734, a decision of the New Brunswick Court of Appeal. On an application for probate of a will evidence was given which certainly raised the gravest suspicions of the testator's sanity. On this evidence the Probate Judge held he was not satisfied that the deceased was competent to make a will. He therefore rejected the will. A majority of the Court of Appeal reversed this. Baxter C. J. used the following language: ". . . I do not think it is for the Court to conjecture as to what constitutes insanity. . . Not one of the witnesses. . go so far as to say definitely that he was insane." But if the Court doubts the normality of a testator should it support a will? In the course of his judgment Baxter C. J. stated that "had a witness been called who could have expressed a scientific opinion and had he said that judging from the facts in evidence the testor was insane that would have been an end of the case for the will."

With this language compare the decision of Langton J. in *In re Bohrmann*, [1938] 1 All E.R. 271. There Langton J. refused to follow the evidence of medical men although he stated he had the fullest confidence in them. Both these decisions show a decided tendency to uphold wills of persons who were, to say the least, peculiar persons to be entrusted with the post-mortem disposition of accumulated wealth. Unlimited testamentary disposition has never yet been logically or theoretically justified. Why should the courts lend their assistance to supporting dispositions of persons devoid of social instincts?

[10] (1870), L.R. 5 Q.B. 549 at p. 564.

> sinster influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

At the same time nothing is clearer in the English cases than the proposition stated in *Barry* v. *Butlin*,[11] that "the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator". It is worth noting at this stage the use of the term "free" testator. One would have thought that this meant freedom from coercion of every kind and that, therefore, the voluntariness of a testator's actions was part of the proponent's case. As will subsequently appear, the decisions on this point have become highly confused. In any event, there seems no question that a person propounding a will must show that the testator was possessed of those qualities of mind which, theoretically at least, qualified him as a person fitted to make a better disposition of his property than the law would make on an intestate succession. Of course, persons attacking a will must first bring in issue the question of lack of capacity supported by some evidence. But if at the close of the case, there is doubt on the question whether the testator had or had not capacity to make a will it seems that the will should be declared invalid.[12]

At one time it was believed that if a man suffered from any delusion whatsoever he could not make a valid will, since the mind being diseased in part, and the mind being one and indivisible, the entire mind was deemed unsound and testamentary incapacity was a necessary consequence.[13] While the law as stated in this dogmatic manner was held to be incorrect in *Banks* v. *Goodfellow*, and a distinction taken between delusions which might affect the testator in making his will and delusions which had no connection with the making of a will, the manner in which delusions were treated in subsequent cases in England is of importance. When cases of this type were more frequently tried by jury than they are today, the manner in which the the question of fact and the burden of proof was left to the jury

[11] *Supra*.

[12] See this view of burden of proof discussed by Lord Dunedin in *Robins* v. *National Trust Co.*, [1927] A.C. 515. See also Duff J. in *Smith* v. *Nevins*, [1926] S.C.R. 619 at pp. 638 *ff*.

[13] *Waring* v. *Waring*, 6 Moo. P.C. 341; *Smith* v. *Tibbitt*, L.R. 1 P. & M. 398.

shows the difficult position of a person who propounded a will when there were doubts raised by the evidence as to capacity in any form. Thus, for example, the following excerpt from a charge to a jury by Sir James Hannen—who had few equals in the grasp of this topic—is illuminating:[14]

> The burden of proof rests upon those who set up the will, and, *a fortiori*, when it has already appeared that there was in some particular undoubtedly unsoundness of mind, that burden is considerably increased. You have, therefore, to be satisfied. . . that the delusions under which the deceased laboured were of such a character that they could not reasonably be supposed to affect the disposition of his property.
>
> . . .Unless your minds are satisfied that there is no reasonable connection between the delusion and the bequests in the will, those who propound the will have not discharged the burdens cast upon them and your verdict must be against them.

It is submitted, with respect, that on a proper construction of the burden of proof which lies on the proponent of a will to prove capacity, such an approach is correct. On the other hand Riddell J. in *McIntee* v. *McIntee*[15] used the following language:

> Whatever may be the law elsewhere, I think I am bound by authority to go into the question—not, could the "delusions" possibly have an influence on a disposition to be made by the testatrix by will?—but, did the "delusions" influence or affect the disposition actually made?

The writer has difficulty in understanding this statement in light of the fact that all the cases place the burden of establishing capacity on the proponent of the will. If the burden is on such proponent, then surely if there is doubt as to a delusion affecting the will, the will should be declared against. Certainly this is the theory of the English cases at least, and it is on this theory that the decision of Langton J. becomes difficult to follow. The evidence in that case, particularly the medical evidence which Langton J. accepted, was to the effect that the deceased testator was a paranoid psychopath and hence was mentally abnormal, insofar as he was deficient in human affections and the common instincts of mankind. Further evidence showed that the deceased suffered a specific delusion regarding members of the London County Council and that threee of the deceased's uncles and aunts had been certified as insane and were kept under restraint. Regarding the medical evidence Langton J. said that outside

[14] *Smee* v. *Smee* (1879), 5 P.D. 84.

[15] (1910), 22 O.L.R. 241. This statement was based on the decision in *Skinner* v. *Farquharson* (1901), 32 S.C.R. 58, but while Sedgewick J. dissented in that case and stated the English rule regarding delusions *likely* to affect a will, it is submitted that the majority of the court who supported the will did not make any change in the English law. They found that the dispositions made in the will were inconsistent with the existence of the alleged delusion.

of the specific delusion, he would not hold that lack of human instincts was sufficient to deprive a man of testamentary capacity and that the medical evidence, while showing abnormality, did not show insanity.[16] But if a man is admittedly abnormal in the sense that he has none of the common instincts of mankind, it is difficult to understand why he should be intrusted with the power of disposing of property after his death.

If lack of testamentary capacity had been left to a jury in the form stated by Sir James Hannen, can there be any doubt that the jury would have returned a verdict against the will? Langton J., however, disregarding medical evidence concerning abnormality, concentrated on the specific delusion in the following manner. A clause in the deceased's will hadleft considerable money to charities in England. In the codicil he stated that this clause should be read and construed as if the word "England" were deleted therefrom and the words "United States of America" were substituted for the word "England". Taking the view that this change was made because of the testator's delusion regarding the London County Council, Langton J. held that this clause only was affected by this delusion. He therefore ordered it deleted. Such reasoning seems, with respect, exceedingly strange. The learned judge said he found it "difficult to put any reasonable interpretation upon this particular declaration" in the codicil. Of course it is possible that because he disliked the London County Council he disliked all English charities. But if, instead of leaving his money to American charities because of such dislike he had left it to his relatives, what would Langton J. have done? Surely a court is not going to speculate as to the desirability of one gift over another. It is one thing to declare that the testator was not such a person as the law would intrust with the disposal of large sums of money after his death. It is quite another for the court to single out items which it thinks unreasonable and, in effect, make a new will. It is submitted that the testator either had capacity or that he did not have it and that there is no midway ground. In other words lack of capacity deprives *a person* of testamentary *power* to make a will. If the power is absent the foundation of the document in its entirety is gone.

Langton J. in reaching his conclusion relied on the cases where courts have deleted something from testamentary docu-

[16] But what is insanity other than a variation from the normal? If medical men use the word insane (abolished, by the way, from the Ontario statutes) rather than abnormal does that affect the court's decision? See Baxter C. J. in *Re McGuire, supra* note 9.

ments on the ground that the testator had no knowledge and approval of the same. Such a jurisdiction is well established. The trial judge, therefore, said that the deceased had no knowledge and approval "as a sane balanced man" of these provisions. While this is probably true, the cases have always differentiated knowledge and approval from capacity. The former goes to a valid exercise of a legal power; the latter, to the existence of a power itself.

This distinction becomes important in an approach to such a case as *Re Souch*.[17] In that case the majority of the Ontario Court of Appeal found that the testatrix was of testamentary capacity, therefore the invalidating of the clause benefitting the person who drew the will cannot be based on incapacity of the testator. What then is the true reason for such invalidation? Middleton J.A. stated that "the reason for the invalidity of the bequest of Mrs. Scobell, arises from her personal relationship to the transaction". He further stated that the case fell within the fourth rule laid down by Sir J. P. Wilde in *Guardhouse* v. *Blackburn*.[18] The fourth rule in *Guardhouse* v. *Blackburn* reads as follows:

> 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.

Reading that rule into the judgment in *Re Souch*, we have a finding of testamentary capacity on the part of the testatrix, and in addition a finding that she knew and approved the contents,[19] but that because Mrs. Scobell drafted the will, the latter must be deemed to have exercised fraud, in procuring her bequest. Stated in this way, the decision is definitely contrary to binding authority although it must be admitted that the manner in which similar cases have been dealt with is far from satisfactory.

One of the difficulties in many actions dealing with the establishment of wills, is the absence of strict pleadings and a looseness of forming issues. In actions to establish a will, it might appear, as some writers have contended, that the sole

[17] [1938] O.R. 48.

[18] (1866), L.R. 1 P. & D. 109.

[19] When Middleton J. A. stated that "I think that Mrs. Scobell has truthfully stated that the codicil was an embodiment of her instructions" (p. 53), does this not mean, on the basis of cases like *Parker* v. *Felgate* (1883), 8 P.D. 171; *Perera* v. *Perera*, [1901] A.C. 354, that the testatrix "knew and approved"? Compare Sir James Hannen in *Morrell* v. *Morrell* (1882), 7 P.D. 68, as to approval of words inserted in a will by a draftsman in pursuance of instructions.

issue is "will or no will", and that the ultimate burden of establishing all elements necessary for a valid will must lie on the proponent.[20] On this view a proponent, provided of course that some foundation in the evidence was laid, should prove due execution, testamentary capacity, knowledge and approval of contents, freedom from coercion, and freedom from fraudulent persuasion. There is much to be said for this view. Certainly however, fraud, in the sense of fraudulently procuring another person to express his intention in a certain way, would seem to be more in the nature of an affirmative defence, rather than a negation of an element in the proponent's case, and the burden of proving fraud is doubtless upon him who sets it up.[21] In fact, in England unless fraud is specifically pleaded by those attacking the will, it cannot be considered by the court at all.[22] As the first rule in *Barry* v. *Butlin* requires the proponent to prove the will that of a "*free* and capable" testator, it would seem to follow that the burden of proving freedom from coercion should be on the proponent. Apparently, however, the English courts have taken a different view and have treated undue influence as an affirmative defence, similar in operation to fraud.[23] English courts have also pointed out that proof of some confidential relationship between a beneficiary and the testator is not sufficient to raise any presumption of undue influence, as in the *inter vivos* cases.[24] So much appears to be clear, and the result is that in the ordinary case the proponent of the will must bear the burden of establishing due execution, knowledge and approval of contents, and testamentary capacity.

What then is the position when a beneficiary is instrumental in drawing the will of the testator? As stated in *Barry* v. *Butlin* this is a suspicious circumstance which ought to excite the suspicion of the court and call upon it to be vigilant in examining the evidence in support of the instrument. In a long series of cases in the Supreme Court of Canada this was taken to mean, as put in one case, that the will being made in favour of the person who has prepared it or procured it to be written, is *prima facie* evidence of fraud which must be displaced

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[20] Gifford, *Will or No Will?* (1920), 20 Col. L.R. 862.

[21] See the question of fraud, little canvassed the English books, discussed in Warren, *Fraud, Undue Influence, and Mistake in Wills* (1928), 41 Harv. L.R. 309.

[22] *White* v. *White* (1862), 2 Sw. & Tr. 504.

[23] *Boyse* v. *Rossborough* (1856), 6 H.L.C. 2; *Craig* v. *Lamoureux*, [1920] A.C. 349; *Lidstone* v. *Williams*, [1931] 3 D. L.R. 455 (Sup. Ct. of Can.); *Riach* v. *Ferris*, [1935] 1 D.L.R. 118 (Sup. Ct. of Can.).

[24] *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462.

to the satisfaction of the tribunal.[25] This same view was expressed by Brodeur J. in *Lamoreux* v. *Craig*[26] in the following language:

> This Court has laid down the same principle in the case of *Mayrand* v. *Dussault*, 38 Can. S.C.R. 460: "That as the promoter of the will by which he took a bounty, had failed to discharge the onus of proof cast upon him to show that the testator had acted freely and without undue influence in the revocation of the former will, the second will was invalid and should be set aside."

The Privy Council in an appeal from the Supreme Court of Canada in the same case,[27] held that this interpretation of the situation where a person drafting a will took a bounty, was erroneous in presuming undue influence or fraud. The Privy Council stated that the mere relationship between the parties was not sufficient to raise any presumption of undue influence, once it was proved that a will was executed by "a person of competent understanding and apparently a free agent".

Just what is meant by "apparently a free agent" is difficult to understand. As suggested previously, it is the writer's opinion, that voluntariness of action by the testator should always be part of the proponent's case, but that even as in the capacity cases, there should be no necessity of going into it unless some evidence has been led by persons attacking the will. It is difficult to make the distinction which the Privy Council purported to do in the *Lamoreux Case*, as has been proved by subsequent decisions. One of the latest of these in the Supreme Court of Canada is *Riach* v. *Ferris*.[28] In that case application was made for proof of a will and the will was attacked on the ground of incapacity and undue influence of a person named as a substantial beneficiary who was instrumental in drawing the will. The trial judge refused to admit the will to probate because the promoter-beneficiary had not given any evidence at all which might have removed the "suspicion" of the court. The Supreme Court of Canada held that as no finding of testamentary incapacity had been made by the trial judge, nor had he made any finding against the testator's actual comprehension of what he was doing,

[25] Gwynne J. in *Adams* v. *McBeath* (1897), 27 S.C.R. 13 at p. 25. See also *Kaulbach* v. *Archbold* (1901), 31 S.C.R. 387; *British and Foreign Bible Society* v. *Tupper* (1905), 37 S.C.R. 100. See also Walton J. in *Wilson* v. *Bassil*, [1903] P. 239 at p. 242, who spoke of "a presumption against the will" which the proponents had to displace by showing that the will "was not obtained by fraud or undue influence". See comments on this case by Sir Gorrell Barnes in *Spiers* v. *English*, [1907] P. 121 at p. 124.

[26] (1914), 49 S.C.R. 305 at p. 340.

[27] *Craig* v. *Lamoureux*, [1920] A.C. 349.

[28] [1935] 1 D.L.R. 118.

this interpretation of the rule regarding suspicious circumstances and burden of proof in such cases was not sufficient to justify a finding against the will. The court held that there was no obligation on a promoter-beneficiary to give evidence, so long as the court was satisfied that the testator was of capacity and that he knew and approved the contents. In other words, the fact that a beneficiary is instrumental in drawing a will is relevant only to knowledge and approval of the contents. Once grant that a testator is of capacity, that he did know and approve the contents, it would seem that to invalidate a will there must be a positive finding, based on affirmative evidence of either fraud or undue influence. This seems to be the effect of the *Lamoreux Case* and subsequent decisions in the Supreme Court of Canada.[29]

The judgment in *Re Souch* seems, in language at least, to support the very position discredited by the *Lamoureux Case* and *Riach* v. *Ferris*. It is submitted that under the existing authorities (whatever the writer may think as to their correctness) it is not right to invalidate a will, or part of it, on the ground merely of "personal relationship". The court must make a finding that it is not satisfied either as to capacity of the testator or as to his knowledge and approval of the contents of a given document, "approval" in this instance being understood as understanding of "an apparently free agent". It is submitted that to make a finding of capacity and a finding that a capable testator has instructed a beneficiary what to put in a will, and that such instructions were carried out, prove both of these items, and on these findings, in accordance with the decisions, unless there is some evidence of undue influence or fraud, the will should have been supported in its entirety.

It would seem from the facts in *Re Souch*, that there was much to be said for the view that the testatrix was not shown to have understood completely what she was doing. If that be so, one is again faced with the problem whether the entire codicil should not have been struck out, as the dissenting judge, Fisher J.A., thought, or whether part only should be deleted. If a testator is unaware that a certain clause is in a will, it can, as indicated before, be deleted by a court. If, on the other hand, the fact of a beneficiary being instrumental in drawing a will leads to doubts on the part of the court whether the testator understood the general scheme of the will, the entire document

[29] *Lidstone* v. *Williams*, [1931] 3 D.L.R. 455; *Riach* v. *Ferris*, [1935] 1 D.L.R. 118.

should be struck out. It is interesting in this respect to compare the decision of a Victoria court, *In re Breen*,[30] in which Irvine CJ. refused to probate a will with a clause making a gift to a promoter-beneficiary excluded, the course adopted in *Re Souch*. Such a course had been followed by an Irish court in *Hegarty* v. *King*,[31] but Irvine CJ. refused to follow that case, as he said, for two reasons: "First because I have been unable to find any other authority for such a course, of the legality of which I have grave doubts; secondly, because in this case the suspicion extends to the question of capacity."

It may be considered merely cavilling to ask that when suspicion is spoken of in cases like the present, the subject of suspicion should also be dealt with. If one could say that a court should declare against a will whenever it was not satisfied that the testator was free from coercion, or incapable of understanding his own acts, there could be no object to a judgment which merely stated that the court was still suspicious that all was not well. On the view that courts should not strain after probate, as Lord Brougham indicated, the writer would agree. The difficulty is, however, that high authority has said a will must not be rejected on mere suspicion of coercion or fraud. It is therefore of the utmost importance that courts should make clear just what their suspicion is concerned with. If the case were tried by a jury, these matters would be more clearly defined. The decision in *Re Souch* is an excellent illustration of the difficulties that inhere in the topic, since looking at the facts, it is extremely difficult to justify probating the document at all, whereas looking at the court's findings of capacity and, apparently, of knowledge and approval of the contents, it would seem impossible to reject any part of the will because of a suspicion of fraud or undue influence. It may be said that the court did not find the testatrix "approved" of this clause. Just what is implied in the term "approved" is difficult to estimate. One would have thought it included "freedom of volition" since one can approve only when free to do so. If that be so then such freedom seems brought in issue by the mere fact of a beneficiary drawing a will. With such a view the writer has every sympathy, and yet if the fact that a beneficiary draws a will is evidence of the absence of freedom is it not in effect evidence of coercion—the definition of undue influence?[32] This, we are told in *Craig* v. *Lamoureux*,

[30] [1927] V.L.R. 164.
[31] (1880), L.R.Ir. 5 Ch. 249.
[32] *Wingrove* v. *Wingrove* (1885), 11 P.D. 81.

it cannot be, although even in that case the Privy Council speaks of a proponent proving knowledge and approval of "an apparently free agent". Perhaps we are asking too much to have these mysteries explained. Certainly the courts do not seem to be at all perturbed by the difficulties. The writer would, therefore, be content to accept the accusation of "academic speculations" were it not for the fact that he knows many a a practitioner who feels as impotent as himself to attack or defend a case based on "suspicions" without being able to state to what the suspicions are directed.

That Middleton J.A. had in mind some influence of the beneficiary over the testatrix, whether of a coercive or fraudulent nature, seems clear from his citation of *Guardhouse* v. *Blackburn*,[33] and the decision of the House of Lords in *Allan* v. *M'Pherson*,[34] a decision which was expressly dealing with fraud in the sense of fraudulent representations bringing about an expression of the testator's own will. If a person fraudulently persuades a testator to leave him his property, it is clear that the testator had a testamentary intention towards the defrauding party and knew and approved of the clause. A court with probate jurisdiction which strikes out a clause of this kind is, as has been pointed out elsewhere,[35] in reality exercising an equitable jurisdiction to set aside part of the testator's will in the same way as contracts induced by fraud are set aside. Such a plea must be proved by persons attacking a will, and not left to mere suspicion. If suspicion cannot relate to either fraud or a coercive (undue) influence, it must either raise the question whether a testator knew a clause was in the will at all, or the question of his ability to understand what he was doing at the time. If he knows the clause is there, the suspicion must go to capacity. This seems to be the problem in *Re Souch*. If so, then the same objections to striking out part may be raised as were considered in connection with the decision of Langton J.

C. A. W.

[33] *Supra*.
[34] (1847), 1 H.L.C. 191.
[35] Warren, *Fraud, Undue Influence and Mistake in Wills* (1928), 41 Harv. L.R. 309.