COMMENT

UNDUE INFLUENCE IN WILLS IN ILLINOIS

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ROBERT LOUIS STEVENSON, in his Essay on Style, has pointed out that the human ear delights in expressions which repeat with slight variations the same or similar sounds. Sometimes such phrases form catchwords and we repeat them almost oblivious of their significance. The tripping of the tongue lulls the intellect like an opiate. Who does not relish speaking the words "parallelepiped," "estoppel in pais," "territorial integrity," "corporate entity," or "trespass on the case"? Another such phrase is "undue influence." The repetition of the nasal "n" combines with the "und*oo*—infl*oo*" effect of the vowels to form a captivating catchword.

"He undue-influenced me," declared an old lady client in explaining why she had signed certain deeds at the request of her estranged husband. She spoke with the pleased air of a child who expects to be applauded for the intellectual feat of uttering the word "papa" to identify a man. She spoke as though it were only necessary to enunciate the words to end her difficulties. Patiently I asked her what her husband had done to induce her to sign the deeds, but she would only repeat "he undue-influenced me." I started to explain to her what the words "undue influence" meant, but my explanation became lame and halting and finally degenerated into examples—none of which fitted her case in the remotest fashion.

A few years later I was under the necessity of reading all of the cases in Illinois on undue influence. I found that the Supreme Court has been patiently explaining for years to the members of the Bar that the words "undue influence" do not mean what counsel think they mean. They are not an "open sesame" to broken wills and cancelled deeds. Out of one hundred and sixty cases in this State which I have examined, there are only eleven cases where a decree for contestants in a will contest on the ground of undue influence has been affirmed.[1] And even in most of these

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[1] Moyer v. Swygart, 125 Ill. 262, 17 N.E. 450 (1888); Hill v. Bahrns, 158 Ill. 314, 41 N.E. 912 (1895); Orchardson v. Cofield, 171 Ill. 14, 49 N.E. 197 (1898); Smith v. Henline, 174 Ill. 184, 51 N.E. 227 (1898); England v. Fawbush, 204 Ill. 384, 68 N.E. 526 (1903); Piper v. Andricks, 209 Ill. 564, 71 N.E. 18 (1904); Leonard v. Burtle, 226 Ill. 422, 80 N.E. 992 (1907);

eleven cases the emphasis is quite as much on testamentary incapacity as on undue influence.

But first let us get our ancient history. While the union of the words "undue" and "influence" is of comparatively modern origin, the essential concept of coerced volition is old. Henry Swinburne, a civil lawyer, writing in 1590, makes it appear that even before the passage of the Wills Act in 1540, testaments produced by fear, fraud or possibly by immoderate importunity, were void.[2] Shepard's Touchstone of Common Assurances (1648)[3] after stating two examples of wills, perhaps invalid because produced by importunity, states:

"But as touching these two last things, *Quare*, how they shall avail in the Wills of land which are not regulated so much by the Civill Law."

The last sentence makes it clear that the idea of invalidity of a will through importunity is of civil law origin.[4]

Godolphin's "Orphan's Legacy" first published in 1674, discusses[5] at some length the effect of fear, fraud or excessive importunity on wills and testaments.

But the cliché "undue influence" is not used by Swinburne, Shepard or Godolphin. Not until the nineteenth century did those words come into general use in respect to wills. Holdsworth[6] states that the courts of equity in the latter half of the seventeenth century relieved against fraud "and also undue influence." This is, of course, true, but the case which he cites[7] does not use the term "undue influence." Kerly[8] indicates that the principles of the law of undue influence were first applied in the eighteenth century. He states, however, that "The principle on which relief would be given was not settled till *Huguenin v. Baseley*[9] came before Lord Eldon in 1807." Lord Eldon uses the term "undue influence" in that case in setting aside a voluntary settlement made by a widow upon a clergyman who had obtained great influence over her. Eldon cites *Bridgeman v.*

Dowie v. Sutton, 227 Ill. 183, 81 N.E. 395 (1907); Gum v. Reep, 275 Ill. 503, 114 N.E. 271 (1916); Blackhurst v. James, 304 Ill. 586, 136 N.E. 754 (1922); Peters v. Fekete, 329 Ill. 268, 160 N.E. 594 (1928). Perhaps this statement gives a false emphasis. There are other cases where a decree for proponents was reversed, but there is nothing to indicate in such cases that a new trial did not result in another verdict for proponents.

[2] Swinburne on Wills (7th ed. 1793), seventh part, §§ 2, 3, 4.

[3] c. 23, p. 406.

[4] See Reppy and Tompkins, History of Wills (1928), 21, 22.

[5] Part 1, c. 17; part 3, c. 25, pars. 7, 8, 9.

[6] 6 History of English Law (3d ed. 1923), 660.

[7] Vere Essex v. Muschamp, 1 Vern. 237 (1684).

[8] History of Equity (1890), 242, 243.

[9] 2 W. and T. Eq. Cas. 600, 14 Ver. 273 (1807).

Green.[10] Lord Wilmot refers to "undue influence" in that case in setting aside gifts made by a man to his valet apparently as the result of improper relations between them. Lord Hardwicke utters the phrase once in *Bennet v. Vade*[11] in setting aside certain deeds, but "fraud and imposition" seem to be his favorite words in that case. There may have been isolated cases of the use of the term prior to that case, but, if so, I cannot find them.

Certainly "undue influence" was not in general use as a subdivision of the law of wills until almost a hundred years thereafter. This is made clear by an examination of the treatises. Loveless on Wills, Tenth Edition, 1809, and Roberts on Wills, Third Edition, 1826, discuss the invalidity of wills due to fraud or importunity, but never refer to "undue influence."[12] The first edition of Williams on Executors, published in 1832 (first American edition, 1833), while it contains a discussion several pages in length on the effect of fraud, fear or over-importunity in the law of wills, uses the term "undue influence" only once, and that quite casually at the end of the discussion.[13] The third edition of Powell on Devises, published in 1827 and edited by Thomas Jarman, refers to "restraint, duress, menace" and "over-importuning," and never mentions "undue influence,"[14] but the first edition of Jarman on Wills, by the same author, published eighteen years later (1844) does use the term.[15]

In the modern text books the words "undue influence" are used as a rubric or caption to refer to a whole body of law which has grown up around them. The quick, rank growth of this field of law is due, in my opinion, to the captivating character of the words "undue influence," and to the vagueness of the term. It is interesting to compare the body of law surrounding these words after a hundred years with the much smaller and less developed body of law surrounding the word "duress" in the law of contracts after five hundred years of use.[16]

The Supreme Court of Illinois did not begin to use the words "undue influence" until 1866 in *Dickie v. Carter*.[17] It is striking to compare the

[10] 2 Ves. Sr. 627, Wilm. 58 (1755).

[11] 2 Atk. 324 (1742).

[12] Loveless, Wills (10th ed. 1809), 146, 147; 1 Roberts, Wills (3d ed. 1826), 41.

[13] Williams, Executors (1st Am. ed. 1833), 33–37.

[14] See p. 139.

[15] 1 Jarman, Wills (1st Am. ed. 1845), 30. It is significant that Jarman uses the term in reporting the case of Mountain v. Bennett (1787), 1 Cox Eq. Cas. 353, and that the expression is not used in the case itself.

[16] See 3 Williston, Contracts (1920), c. XLIII, "Duress."

[17] 42 Ill. 376 (1866).

use of the term there with its modern use. It is not used in that case as a rubric or caption.[18] The words "undue influence" do not appear in the instructions to the jury. Even the syllabus does not use the words, but refers instead to "improper influence." The Supreme Court held that even if the will had been made at the instance of the principal devisee, it would not be invalid "in the absence of all proof of fraud, compulsion or other improper conduct or of improper means." Quite casually the court remarked that the record did not show any "illegal interference, improper conduct, or undue influence."

But in the next case, *Brownfield v. Brownfield*,[19] the words "undue influence" are on almost every page of the opinion. An avalanche of litigation then started. Before 1870 there were three more cases; in the decade from 1870 to 1880 there were seven cases; from 1880 to 1890 eight cases; from 1890 to 1900 twenty-two cases; from 1900 to 1910 thirty-three cases; from 1910 to 1920 thirty-nine cases, and the same number from 1920 to 1930.[20]

It soon became obvious that many lawyers and juries put quite a different interpretation on the words "undue influence" than did the Supreme Court. And why not? The word "undue" is in daily use in a different sense than it has in the expression "undue influence." In writing letters we may appropriately warn our correspondents not to attach "undue" importance to our views, or hope that they are not subjected to "undue" annoyance by our failure to write them. We state that we have an "undue" regard for coffee or sweets; that we arrived home last evening at an "undue" hour, and that our wives and children have an "undue" partiality for us. In short, the word "undue" is in daily use as the mildest sort of an epithet. It does not connote the grossest compulsion and coercion as it does in the legal term "undue influence."

Early in the history of undue influence in Illinois the Supreme Court, while protesting that "undue influence is a species of constructive fraud which the court will not undertake to define by any fixed words" laid down the following definition:

[18] The Supreme Court of Illinois was late in its cognizance of this rubric. The second edition of Miller's Probate Practice (Irish) published in 1866, has a ten page chapter under the caption "Of the Plea of Undue Influence." See c. 14, 183–193.

[19] 43 Ill. 147 (1867).

[20] This enumeration includes all cases where the Supreme Court considered the subject of undue influence in connection with a will. It does not include a large group of will contests where only the subject of testamentary capacity was considered by the court nor does it include the cases where undue influence was considered in connection with deeds.

"Undue influence is 'any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do, or would do if left to act freely.' "[21]

This definition indicates how the rubric or caption of "undue influence" has swallowed up the old concept of a will procured by fraud discussed by Swinburne and Godolphin as well as by the other text writers prior to the general introduction of the term "undue influence." The phrase "undue influence" may be an entirely proper term to convey the idea of constraint through over-importunity.[22] But the modern authorities deplore the confusion of fraud or deception with compulsion by importunity under the caption of undue influence.[23]

It is true that if importunity amounting to coercion is present, fraud or deceit is also usually present, but it is confusing not to distinguish the two things. They are essentially different. It is submitted that if our Supreme Court would discard this time-worn definition of undue influence and make clear the distinction between a will produced by deceit and a will produced by importunity, a great service would be done for future generations. The present definition serves only to confuse the jury. To jurymen the definition is an invitation to set aside wills on any pretext that may occur to them.

Ever since the case of *Smith v. Henline*[24] the Supreme Court has been engaged in limiting the effect of this definition. Instead of clarifying it they have (1) added further vague phraseology to it, (2) built up a highly technical law of evidence in reversing cases decided under it, (3) made acute distinctions on the language of the instructions given in such trials, (4) raised high standards of proof which the contestant must scale to permit his case to be submitted to a jury, (5) raised the standard of particularity of pleading by the contestant, and (6) shifted the burden of going forward with the evidence to militate against the contestant.

[21] Smith v. Henline, 174 Ill. 184, 51 N.E. 227 (1898), quoting from first edition of American and English Encyclopaedia of Law. It is to be noted that the definition was abandoned in the second edition of the work published in 1904. Nevertheless it still prevails in Illinois, Biggerstaff v. Wicks, 348 Ill. 129, 135, 180 N.E. 840 (1932), and the jury are so instructed in practically every will contest.

[22] "If a Man make his Will in his Sickness, by the over importunity of his Wife, to the end that he may be quiet, this shall be said to be a will made by constraint, and shall not be a good Will."—Roll, C. J. in Hacker v. Newborn, 82 Eng. Rep. 834 (1654).

[23] See 1 Page, Wills (2d ed. 1928), 21, 22; Rood, Wills (2d ed. 1926), § 175; Reppy and Tompkins, History of Wills (1928), 21, 22; Gifford, Will or no Will? The Effect of Fraud and Undue Influence on Testamentary Instruments, 20 Col. L. Rev. 862 (1920); Warren, Fraud, Undue Influence and Mistake in Wills, 41 Harv. L. Rev. 309 (1928).

[24] 174 Ill. 184 (1898).

Additions to the Definition

The following remark has been repeated by the Supreme Court in practically every case:

"The undue influence which will void a will must be directly connected with the execution of the instrument and operate at the time it is made."

It is hard to tell what the court means by this. A very good argument may be made from the cases that this rule requires that the persons charged with undue influence be shown to have been physically present at the execution of the will.

The constant repetition of the rule is in the exact language as given above, coupled with the frequent comment by the court that no showing was made that the persons charged with undue influence were present at the execution of the will, indicate that this is what the Supreme Court has in mind when it uses these words.[25] As applied to importunity this is perhaps sound. Importunity amounting to compulsion probably could not exist unless the persons charged with it were present at the execution of the instrument. But, as applied to threats, deceit or fraud, such a rule is folly. Iago was not present when Othello strangled Desdemona. Obviously the grossest fraud or deceit could exist without the physical presence at the execution of the will of the persons guilty of the fraud. However, the Supreme Court of this State makes no such distinction. It merely repeats: "Undue influence must be directly connected with the execution of the will, *and* operate at the time it is made."

Another addition which our Supreme Court has made to its definition is:

"The influence must be such as to destroy the freedom of the testator's will and render the instrument obviously more the offspring of the will of others than of his own."

[25] See Schmidt v. Schmidt, 201 Ill. 191, 66 N.E. 371 (1903): "It is clear that the will was not and could not have been made as the result of the undue influence of Frederick W. and his mother over the testator as the evidence is uncontradicted that neither of them were present when the will was executed or had anything to do with bringing about its execution." Woodman v. Illinois Trust and Savings Bank, 211 Ill. 578, 71 N.E. 1099 (1904): "Here there is no testimony whatever tending to show that either of the parties charged with having unduly influenced the making of the will said or did anything whatever *at the time of the execution of it*, in any way calculated to influence the testator to make any of the devises or bequests therein mentioned." Baker v. Baker, 202 Ill. 595, 67 N.E. 410 (1903); Cunniff v. Cunniff, 255 Ill. 407, 99 N.E. 654 (1912); Moriarity v. Palmer, 286 Ill. 96, 121 N.E. 219 (1918), where in affirming decrees for proponents the court noted particularly that none of the persons alleged to have exercised undue influence were present when the will was executed. Miller v. Blumenshine, 343 Ill. 531, 175 N.E. 814 (1931), where the persons alleged to have exercised undue influence were in the corridor of the hospital outside testator's room when the will was prepared and executed and the court noted particularly that none of them were actually in the room when the will was executed.

This remark in this form appears in almost every opinion on the subject, and the jury are usually so instructed. The instruction is ordinarily coupled with the statement that "mere persuasion or advice or the influence of affection is not an improper influence." In other words, advice or persuasion is proper provided it does not "destroy the freedom of the testator's will." Free will, indeed! What testator has a free will? A hobo might approximate it, but a testator under the law must have the capacity to recall "the *natural* objects of his bounty." The fact that there are "natural objects of his bounty" surely implies some limitation on his free will. And every word of advice tends *pro tanto* to "destroy the freedom of the testator's will." What is probably meant is that advice or persuasion must not grow so importunate that it overcomes his will without convincing his judgment, so that the testator yields to it for the sake of peace and quiet. But the jury are hopelessly confused by these instructions, if they listen to them at all.[26]

The Law of Evidence in Undue Influence

In the course of the years the Supreme Court of Illinois has built up a great body of law on the exclusion of evidence in will contest cases. A trial chancellor recently remarked to me, that in a will contest, contestants could offer no evidence on the subject of undue influence but what proponents would be able to cite Illinois cases to the effect that the evidence was inadmissible.

The contestants themselves cannot testify because they are incompetent witnesses under the statute.[27]

The testator's statement, oral or written, that he was unduly influenced, or his statements tending so to show, are not admissible as they are in derogation of the will.[28] But his statements tending to show that he has

[26] It is interesting to compare these usual instructions in Illinois with the instruction, to the jury, of Sir J. P. Wilde in Hall v. Hall, L.R. 1 P. & D. 481, 482 (1868): "Importunity or threats, such as the testator has not the courage to resist, moral command, asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened."

[27] Ill. Cahill's Rev. Stat. (1933), c. 51, § 2.

[28] Dickie v. Carter, 42 Ill. 376 (1866); Rutherford v. Morris, 77 Ill. 397 (1875); Moyer v. Swygart, 125 Ill. 262, 17 N.E. 450 (1888); Hill v. Bahrns, 158 Ill. 314, 41 N.E. 912 (1895); Kaenders v. Montague, 180 Ill. 300, 54 N.E. 321 (1899); Wombacher v. Barthelme, 194 Ill. 425, 62 N.E. 800 (1902); England v. Fawbush, 204 Ill. 384, 68 N.E. 526 (1903); Yorty v. Webster, 205 Ill. 630, 68 N.E. 1068 (1903); Compher v. Browning, 219 Ill. 429, 76 N.E. 678 (1906); Floto v. Floto, 233 Ill. 605, 84 N.E. 712 (1908); Norton v. Clark, 253 Ill. 557, 97 N.E. 1079 (1912); Martin v. Beatty, 254 Ill. 615, 98 N.E. 996 (1912); Abbott v. Church, 288 Ill. 91, 123 N.E. 273 (1919); McCune v. Reynolds, 288 Ill. 188, 123 N.E. 317 (1919); Teter v. Spooner,

not been unduly influenced may be put in evidence by the proponents.[29]

The admission of a legatee tending to show that undue influence was exercised is not admissible against his codefendants and hence not admissible at all unless the legatee making the admission is the sole legatee or has a joint interest with the other legatees as distinguished from a common interest.[30]

Evidence of influence upon the testator in any other matters than the execution of the will is not admissible.[31]

Testimony that the testator was easily influenced or was susceptible to influence is excluded as a conclusion of the witness.[32]

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305 Ill. 198, 137 N.E. 129 (1922); Gregory v. Richey, 307 Ill. 219, 138 N.E. 669 (1923); Munz v. Bort, 307 Ill. 412, 138 N.E. 644 (1923); Prinz v. Schmidt, 334 Ill. 576, 166 N.E. 112 (1929). But see Reynolds v. Adams, 90 Ill. 134 (1878), that statements of the testator indicating a mind wearied by importunities may be admitted; and see Blackhurst v. James, 304 Ill. 586, 136 N.E. 754 (1922), that revoked wills (ordinarily excluded by the above rule) may be admitted where misspelled words in such wills prove (by the fact that the same words are misspelled in the will at issue) that the persons alleged to have exercised undue influence prepared the will in issue.

[29] Harp v. Parr, 168 Ill. 459, 48 N.E. 113 (1897); Baker v. Baker, 202 Ill. 595, 67 N.E. 410 (1903); Waters v. Waters, 222 Ill. 26, 78 N.E. 1 (1906); Cheney v. Goldy, 225 Ill. 394, 80 N.E. 289 (1907); Freund v. Becker, 235 Ill. 513, 85 N.E. 610 (1908); Pilstrand v. Swedish Methodist Church, 275 Ill. 46, 113 N.E. 958 (1916).

[30] McMillan v. McDill, 110 Ill. 47 (1884); Dowie v. Driscoll, 203 Ill. 480, 68 N.E. 56 (1903); Cunniff v. Cunniff, 255 Ill. 407, 99 N.E. 654 (1912); Kellan v. Kellan, 258 Ill. 256, 101 N.E. 614 (1913). See this case criticized in 3 Wigmore, Evidence (2d ed. 1923), 728, § 1738; the same author criticizes the rule in Vol. 2, § 1081. McCune v. Reynolds, 288 Ill. 188, 123 N.E. 317 (1919); Powell v. Bechtel, 340 Ill. 330, 172 N.E. 765 (1930). "But such declarations are admissible where declarer has a joint interest instead of a common interest." Campbell v. Campbell, 138 Ill. 612 (1891); Smith v. Henline, 174 Ill. 184, 51 N.E. 227 (1898), or where legatee making admissions is sole legatee; Lyman v. Kaul, 275 Ill. 11, 113 N.E. 944 (1916); but admission of sole proponent not admissible where other legatees defaulted; Joyal v. Pilotte, 293 Ill. 377, 127 N.E. 741 (1920). The basis of the principal rule is that it would be unfair to permit the interest of all the legatees to be swept away by the admissions of one legatee. As thus stated the rule would be as applicable to testimony of a legatee as to his admissions. However, the Supreme Court has recently held that the rule does not apply to exclude a legatee from testifying, Brownlie v. Brownlie, 351 Ill. 72, 183 N.E. 613 (1932).

[31] Waterman v. Hall, 291 Ill. 304, 126 N.E. 139 (1920); Grosh v. Saom, 325 Ill. 474, 156 N.E. 485 (1927); Pollock v. Pollock, 328 Ill. 179, 159 N.E. 305 (1928); but see England v. Fawbush, 204 Ill. 384, 68 N.E. 526 (1903); Blackhurst v. James, 304 Ill. 586, 136 N.E. 754 (1922), that such evidence might be admitted if direct connection is shown.

[32] Michael v. Marshall, 201 Ill. 70, 66 N.E. 273 (1903); Larabee v. Larabee, 240 Ill. 576, 88 N.E. 1037 (1909); Lyman v. Kaul, 275 Ill. 11, 113 N.E. 944 (1916); Teter v. Spooner, 279 Ill. 39, 116 N.E. 673 (1917).

Letters written to the testator cannot be introduced in the absence of proof that he acted upon them.[33]

Letters from him tending to show undue influence are not admissible because they would be in derogation of the will.[34]

Evidence of the financial condition of heirs who are disinherited is not admissible without proof that such condition was known to the testator, nor is evidence of the financial condition of a legatee who is alleged to have exercised undue influence is not admissible.[35]

Instructions to the Jury

In the case of *Yoe v. McCord*[36] the trial court instructed the jury that if Yoe acquired such dominion or influence over McCord in relation to his property as to prevent the exercise of a sound discretion on his part in relation thereto, then the will would not be valid. The case was reversed, and the Supreme Court said:

"We regard this instruction as erroneous, in that it does not embrace the element of fraud or wrong in the dominion * * *. To avoid a will the influence which is exercised must be undue, and this, in a legal sense, is something wrongful, a species of fraud."

But this appears to have been overruled in the case of *Dowie v. Sutton*[37] where the court said that an instruction was proper which told the jury that if the testator was "so far under the dominion of any person as to prevent the free exercise of his judgment," he was not of disposing mind and memory. It was argued that the word "dominion" in this instruction should have been qualified by the word "wrongful." But the court said that "an influence exerted over another which deprives him of his free agency" cannot be other than wrongful.

Again, in the case of *Rutherford v. Morris*,[38] an instruction was held erroneous which allowed the jury to consider the "equity or inequity of the will" with other circumstances in the case in determining whether there was any undue influence.

But this was reversed in the case of *Pooler v. Cristman*,[39] where the court held that "inequality in the distribution of property may be considered

[33] Crumbaugh v. Owen, 238 Ill. 497, 87 N.E. 312 (1909); Snell v. Weldon, 239 Ill. 279, 87 N.E. 1022 (1909).

[34] *Supra*, note 28.

[35] O'Day v. Crabb, 269 Ill. 123, 109 N.E. 724 (1915).

[36] 74 Ill. 33 (1874).

[37] 227 Ill. 183, 81 N.E. 395 (1907).

[38] 77 Ill. 397 (1875).

[39] 145 Ill. 405, 34 N.E. 57 (1893).

as a circumstance tending to establish undue influence . . . . but is not, of itself, sufficient for that purpose." On the authority of the last case, in *Dowie v. Sutton*,[40] an instruction was approved which allowed the jury to take into consideration, in considering the question of undue influence, the propriety or impropriety, "the reasonableness or unreasonableness" of the will. But this appears in turn to have been overruled *sub silentio* in *Donnan v. Donnan*,[41] where the Supreme Court reversed the case because of the giving of substantially the same instruction.

Higher Standards of Proof

In 1906, the Supreme Court of Illinois adopted the rule that it is not sufficient for the contestants to show that the circumstances attending the execution of the will are consistent with the hypothesis of undue influence. "It must be shown that they are inconsistent with a contrary hypothesis."[42] This rule has ever since been adhered to.[43]

In effect this forces the contestants to prove their case beyond a reasonable doubt, as a crime must be proved, instead of by a preponderance of the evidence which is usually sufficient to permit recovery by the plaintiff in civil cases.

In a great many cases the Supreme Court has approved the action of the trial court in withdrawing from the jury the issue of undue influence or has reversed for failure of the trial chancellor to do so.[44]

[40] 227 Ill. 183, 81 N.E. 395 (1907).

[41] 236 Ill. 341, 86 N.E. 279 (1908).

[42] Compher v. Browning, 219 Ill. 429, 441, 76 N.E. 678 (1906), adopted from opinion of Lord Cranworth in Boyse v. Rossborough, 6 H.L. Cas. 2 (1857).

[43] Waterman v. Hall, 291 Ill. 304, 126 N.E. 139 (1920); Cunningham v. Dorwart, 317 Ill. 451, 458, 148 N.E. 314 (1925).

[44] Wilbur v. Wilbur, 129 Ill. 392, 21 N.E. 1076 (1890); Thompson v. Bennett, 194 Ill. 57, 62 N.E. 321 (1902); Yorty v. Webster, 205 Ill. 630, 68 N.E. 1068 (1903); Woodman v. Illinois Trust and Savings Bank, 211 Ill. 578, 71 N.E. 1099 (1904); Wickes v. Walden, 228 Ill. 56, 81 N.E. 798 (1907); Bauchens v. Davis, 229 Ill. 557, 82 N.E. 365 (1907); Floto v. Floto, 233 Ill. 605, 84 N.E. 712 (1908); Larabee v. Larabee, 240 Ill. 576, 88 N.E. 1037 (1909); Hutchinson v. Hutchinson, 250 Ill. 170, 95 N.E. 143 (1911); Bowles v. Bryan, 254 Ill. 148, 98 N.E. 230 (1913); Martin v. Beatty, 254 Ill. 615, 98 N.E. 996 (1912); Beemer v. Beemer, 256 Ill. 312, 100 N.E. 135 (1912); Doyle v. Doyle, 257 Ill. 229, 100 N.E. 950 (1913); Lloyd v. Rush, 273 Ill. 489, 113 N.E. 122 (1916); McCune v. Reynolds, 288 Ill. 188, 123 N.E. 317 (1919); Waterman v. Hall, 291 Ill. 304, 126 N.E. 139 (1920); Daugherty v. State Savings Bank, 292 Ill. 147, 126 N.E. 545 (1920); Chaney v. Baker, 304 Ill. 362, 136 N.E. 804 (1923); Gregory v. Richey, 307 Ill. 219, 138 N.E. 669 (1923); Munz v. Bort, 307 Ill. 412, 138 N.E. 644 (1923); Pond v. Hollett, 310 Ill. 31, 141 N.E. 403 (1924); Grantz v. Grantz, 314 Ill. 243, 145 N.E. 398 (1925); Britt v. Darnell, 315 Ill. 385, 146 N.E. 510 (1925); Grosh v. Acom, 325 Ill. 474, 156 N.E. 485 (1927); Pollock v. Pollock, 328 Ill. 179, 159 N.E. 305 (1928); Bailey v. Oberlander, 329 Ill. 568, 161 N.E. 65 (1928); Flanigon v. Smith, 337 Ill. 572, 169 N.E. 767 (1930); Greenlees v. Allen, 341

Particularity of Pleading

In 1928 the Supreme Court had an opportunity to strike a tremendous blow at the swarm of will contests which was oppressing it. In the case of *Ater v. McClure*,[45] in a strong dictum, they held that "It is not sufficient to aver undue influence as a conclusion. Facts must be stated warranting the conclusion and go to the extent of showing that thereby the testator was deprived of his free agency."

Of course, all of our pleadings both at common law and in equity are largely made up of conclusions of law and of fact. The device of discouraging certain classes of actions by requiring facts to be pleaded is an ancient one.[46]

In 1931, the Supreme Court affirmed the sustaining of a demurrer to a bill on the ground that the facts constituting undue influence were not sufficiently pleaded.[47] In this case they indicated that the contestants must set out the words the utterance of which is claimed to have induced the execution of the will. This, of course, is the same plan adopted by the English courts in the sixteenth and seventeenth centuries to discourage actions of defamation.[48] Apparently hereafter it will not be sufficient to allege that a wife procured the will by importunities which the enfeebled testator was unable to resist. That is no less a conclusion than that she procured the will by undue influence. Rigidly enforced, this rule will practically abolish the will contest on the ground of undue influence except in those cases where the draftsman of the will is a substantial beneficiary.

Burden of Going Forward with Evidence

In January, 1934, the Supreme Court adopted a new rule[49] designed to put a heavier burden on contestants in will contests. Heretofore the pro-

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Ill. 262, 173 N.E. 121 (1931); Long v. Brink, 353 Ill. 549, 187 N.E. 508 (1933); Johnson v. First Union Trust and Savings Bank, 273 Ill. App. 472 (1934). In the following cases the withdrawal of the issue of undue influence by the trial court was held erroneous: Purdy v. Hall, 134 Ill. 298, 25 N.E. 645 (1890) (beneficiary procured draftsman and was present at execution); Yess v. Yess, 255 Ill. 414, 99 N.E. 687 (1912) (beneficiary procured draftsman and acted as interpreter); Donnan v. Donnan, 256 Ill. 244, 99 N.E. 93 (1912) (beneficiary took testator to draftsman, testator could not read); Abbott v. Church, 288 Ill. 91, 123 N.E. 306 (1919) (beneficiary drew will.)

[45] 329 Ill. 519, 161 N.E. 129 (1928).

[46] See Cook, Statements of Fact in Pleadings under the Codes, 21 Col. L. Rev. 416 (1921); Whittier, Notice Pleading, 31 Harv. L. Rev. 501 (1918).

[47] Heavner v. Heavner, 342 Ill. 321, 174 N.E. 413 (1931).

[48] Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), 288.

[49] Rule 25 of Sup. Ct., adopted Jan. 1, 1934.

ponents have been required first to produce their evidence to sustain the will, and then the contestants produced evidence. This was an advantage to the contestants. It forced the proponents to go into all of the circumstances surrounding the execution of the will while the contestants could bide their time and fit their theory to the facts produced by proponents. By the new rule this is reversed: "In proceedings to contest the validity of a will, testament or codicil, the contestant shall in the first instance proceed with proof to establish the invalidity of such instrument; and the proponent may then present evidence to sustain the will, testament or codicil."

This adds yet another burden to the already heavily laden contestant.

Fiduciary Relationship

An expression which appears in most will contests and which, like "undue influence," has proved captivating to courts and lawyers, is "fiduciary relationship." Again the iteration of consonant sounds, the tripping of the tongue that lulls the intellect, may be observed. There is much brave talk in the cases on "fiduciary relationships." I venture the suggestion, however, that the significance of a fiduciary relationship in a will contest is *exactly nothing*.

In 1904, the Supreme Court declared:

> "Where a fiduciary relation exists between the testator and a devisee who receives a substantial benefit from the will and where the testator is the dependent and the devisee the dominant party and the testator therefore reposes trust and confidence in the devisee as in the ordinary relation of attorney and client, and where the will is written, or its preparation procured, by that beneficiary, proof of these facts establishes *prima facie* the charge that the execution of the will was the result of undue influence exercised by that beneficiary, and this proof standing alone and undisputed by other proof entitles contestants to a verdict."[50]

The court here said that three elements raised the presumption of undue influence:

A. A fiduciary relationship.

B. Writing or procurement of the will.

C. A substantial legacy to the person writing or procuring the will.

But elements B and C raise the same presumption without element A. If a stranger to the testator wrote or procured the writing of a will in which he was a substantial beneficiary the same presumption—perhaps a stronger presumption, in fact—would arise. Ever since the Lex Cornelia

[50] Weston v. Teufel, 213 Ill. 291, 299, 72 N.E. 908 (1904).

(42 B.C.) it has been the law: "He who writes himself heir shall be infamous and his legacy void."[51]

If a red-haired man writes or procures a will in which he is a substantial beneficiary, a presumption of undue influence arises. Obviously the fiduciary relation is as immaterial as the red hair. The Supreme Court of Illinois has in effect so held,[52] but the words "fiduciary relationship" still remain in the opinions and instructions to plague the courts and confuse the juries.

Conclusion

We thus find the courts of Illinois picking up a catch-word of comparatively modern origin in the phrase "undue influence." We find them struggling to define its vague content. We find them accepting a definition which, instead of restricting, expands its scope and effect. Then we find them struggling to prevent that expansion by every means which their ingenuity could devise. No one will say that their struggle has not been successful,—but what of the cost to litigants? Two generations of citizens of the state have spent untold wealth in litigating the significance of "undue influence." Is it not time that this waste be stopped by a clear restatement by the court of the whole subject in the light of modern methods and research?

[51] *"Si quis legatum sibi adscripserit, tenetur poena legis Cornelia, quamvis inutile legatum sit." —Corpus Juris Civilis, Recognoverunt Adnotationibusque Criticus Instructum—Ediderunt D. Albertus, et al.* (10th ed. 1865), 905; Andrews v. Powis, 1 Lee 242 (Eccles. 1728).

[52] That fiduciary relation is immaterial in the absence of writing or procurement of will by fiduciary see Waterman v. Hall, 291 Ill. 304, 126 N.E. 139 (1920); Cunningham v. Dorwart, 317 Ill. 451, 148 N.E. 314 (1925); Jones v. Worth, 319 Ill. 225, 149 N.E. 793 (1926); Pollock v. Pollock, 328 Ill. 179, 159 N.E. 305 (1928). That fiduciary relation is immaterial in the absence of substantial legacy to person writing or procuring will see Compher v. Browning, 219 Ill. 429, 76 N.E. 678 (1906); Trubey v. Richardson, 224 Ill. 136, 79 N.E. 592 (1906); Williams v. Ragland, 307 Ill. 386, 138 N.E. 599 (1923); Pond v. Hollett, 310 Ill. 31, 141 N.E. 403 (1924).