YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by THE YALE LAW JOURNAL COMPANY, INC. P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

THE LAW SCHOOL.—With the opening of the fall term two new members of the faculty began their work at the School, Professor Thomas W. Swan, who succeeds Professor Rogers as Dean, and Professor Walter Wheeler Cook, for several years past professor of law in the University of Chicago.

Dean Swan, the son of Thomas W. Swan, B.A. Yale 1869, a lawyer of Norwich, Connecticut, received his B.A. from Yale College, with high honors, in 1900. While an undergraduate he had been made a member of Phi Beta Kappa. In 1903 he was awarded the degree of LL.B. *cum laude* by the Harvard Law School. For two years Dean Swan was an editor of the Harvard Law Review, during his last year in the school being editor-in-chief.

For the next thirteen years he engaged successfully in the practice of law in Chicago,—since 1907 as a member of the firm of Bentley, Burling & Swan. During his residence in Chicago he also took an important part in various civic activities.

While Dean Swan has in the past devoted almost all his time and energy to the active practice of the law, he has always been

greatly interested in matters relating to legal education; and, as an expression of his interest in this field of work, in 1905 and 1908 he filled temporary vacancies in the teaching staff of the University of Chicago Law School.

At Yale Dean Swan will, as Lines Professor of Testamentary Law, give the course in Wills and Administration for the second year men. He will also have the course in Torts, for members of the entering class.

Professor Walter Wheeler Cook comes to Yale from the University of Chicago Law School after a long and successful experience as a teacher of law in several universities. He holds his three degrees from Columbia University, A.B. 1894, M.A. 1899, and LL.M. 1901. He is a member of Phi Beta Kappa. Shortly after taking his A.B., he spent two years studying at the universities of Jena, Leipzig and Berlin.

After being, successively, professor of law in the Universities of Nebraska, Missouri and Wisconsin, Professor Cook, in 1910, accepted a call to the University of Chicago, where he made a distinguished record as teacher and scholar during his six years of service. He has taken an active part in the work of the Association of American Law Schools; and at the last meeting of this organization he was elected President for the year 1916-1917. From time to time Professor Cook has contributed learned and important articles to the various law reviews.

At Yale his subjects will be Pleading, Crimes and Trusts.

CONFIDENTIAL RELATIONS AND BURDEN OF PROOF OF UNDUE INFLUENCE IN WILL CASES

In *Appeal of Kirby*[1] the Supreme Court of Errors of Connecticut held, that, on an appeal from the probate of a will, the burden of proof of the issue of undue influence shifts from the contestant when there is evidence that a legatee occupied a relation of special confidence to the testator, irrespective of the question whether the legatee had participated in the actual making of the will.

This proposition contains two points of interest, namely, (1) a beneficiary occupying a relation of special confidence to the testator must remove suspicion from himself even though it may not appear that he had anything to do with the execution

[1] (1916) 98 Atl. (Conn.) 349.

of the will; and (2) upon the issue of undue influence the burden of proof may shift, and does shift when there is evidence of a confidential relation between testator and beneficiary. On either point there is a conflict of authority, and on either point the Connecticut decision has weighty support. Nevertheless it seems that on principle and the better authority the decision is to be upheld on neither point.

There has been much confusion in the rules determining the incidence of the burden of proof upon a proceeding for the probate of a will. The ordinary rule seems to be that followed in Connecticut, that the burden of proving due execution of the will and testamentary capacity of the testator is upon the proponent of the will, while the burden of proving undue influence vitiating the will is upon him who alleges it.[2] The proponent must prove due execution and capacity in order to bring the will within the terms of the statute by which alone the power of testamentary disposition is given. On the other hand the allegation of undue influence is an allegation of fraud, which is never presumed but must be proven.[3]

It has been generally recognized that certain relations of confidence such as attorney and client, guardian and ward, and the like, give to the stronger party peculiar opportunities for the exercise of fraud and that transactions resulting in a pecuniary profit to the fiduciary should be carefully scrutinized. Hence, the rule is that a relation of special confidence between a bene-

[2] *Goodno v. Hotchkiss,* 88 Conn. 655, 666; *Comstock v. Hadlyme Eccl. Soc.,* 8 Conn. 254; *Crowninshield v. Crowninshield,* 2 Gray (Mass.) 524; cases *infra* notes 5 and 6. In Page, *Wills,* Sec. 382, it is said that by the weight of authority the burden of proof upon the question of capacity rests upon the contestant. This hardly seems justified by the cases, for most of the decisions did not actually hold that the burden of proof was upon contestant. But they did attach an artificial probative value to the presumption of sanity, and the proponents of the will profited thereby. Now that the true nature of the presumption of sanity is established, there would seem to be less reason for the above statement. The discussion in Gardner, *Wills* (2d. Ed.), Sec. 48, is clearer.

[3] It has been said that the allegation of undue influence simply denies proponent's assertion that the paper he is offering for probate is the true will of the deceased, and hence the burden should be on proponent. Gardner, *Wills,* Sec. 61; Page, *Wills,* Sec. 405; I Jarman, *Wills* (6th Am. Ed.), 68, note by Professor Bigelow. But the rule stated seems to work little hardship perhaps because the allegation of undue influence seems more like a plea by way of confession and avoidance than a traverse.

ficiary, not a near relative,[4] and the testator, may give rise to a presumption of undue influence. While some courts hold, in accord with *Appeal of Kirby,* that the presumption arises upon the mere showing of the confidential relation,[5] text writers seem for the most part agreed in stating the "more modern and the prevailing rule" to be that the presumption does not arise without more direct evidence, such as that the beneficiary took part in drawing the will or procuring its execution.[6]

The latter view seems the better. If the beneficiary has taken part in the preparation of the will, it is not unreasonable to require him to explain his conduct. Moreover, if the participation does in fact exist, it cannot well be concealed, but will appear from the testimony of either the scrivener or the attesting witnesses. But where such participation does not exist, the connection is too remote to justify the inference of an improper influence. By the stricter rule, then, suspicion may be cast unjustly upon one who is, from the nature of the situation, unable to clear himself.[7] It is proper to charge the jury that undue influence is not often susceptible of direct and positive proof, but may be inferred from circumstances.[8] Hence, the very nature of the accusation of undue influence indicates a secret form of wrong known only to the wrongdoer and the deceased and which, unlike a crime, need not be proven beyond a reasonable doubt. The jury would naturally expect a denial of guilt from the person accused of committing the wrong, and yet such denial would ordinarily be his chief or only means of defense. How can such a person, who is often one of the most natural objects of the testator's bounty, hope to clear himself of a suspicion which his lack of participation in the making of the will would seem to prove was undeserved?

The court in *Appeal of Kirby* felt itself bound by former precedents. There have been broad statements of the rule in some

[4] No presumption arises where the beneficiary is a child, *Lockwood v. Lockwood,* 80 Conn. 513, or other near relative. Gardner, *Wills,* pp. 160-164.

[5] *In re Bromley's Estate,* 113 Mich. 53; *Meek v. Perry,* 36 Miss. 190; *Re Davis,* 73 N. J. Eq. 617.

[6] Gardner, *Wills,* Sec. 62; Underhill, *Wills,* Sec. 145; Chaplin, *Wills,* p. 96; Borland, *Wills* (2d Ed.), Sec. 98. See *inter alia, Bancroft v. Otis,* 91 Ala. 279, 24 A. S. R. 904; *Ginter v. Ginter,* 79 Kan. 721, 22 L. R. A. (N. S.) 1024; *Parfitt v. Lawless,* L. R. 2 P. & D. 462.

[7] *Parfitt v. Lawless,* L. R. 2 P. & D. 462.

[8] *Saunder' Appeal,* 54 Conn. 108.

of the Connecticut cases; but these have been general remarks not necessary to the actual decisions. Other statements in the cases seem to look the other way, and on the whole the Connecticut courts have been loath to apply the presumption.[9] There does not seem to have been such authority to the contrary as to make the present decision imperative.

But after all this question rests upon rules of public policy and deductions from the actual experience of mankind and hence any court may feel that the stricter rule is better adapted to the jurisdiction it controls. The other proposition that the existence of this presumption causes the burden of proof to shift is more serious.

It might at first seem that the court was referring merely to the duty of going forward with the evidence; but it is not possible so to construe the language of the opinion. Thus, it is said that "it is apparent that in many cases it would make considerable difference whether the burden shifted from the party alleging the undue influence to the party who denies it and leaves the latter to support the negative by a preponderance of the evidence," and later it is said that when the presumption arises, the legatee must show by a preponderance of the evidence that the legacy was not obtained through undue influence.[10] Clearly the court was using the term "burden of proof" in its primary sense as meaning "risk of persuasion." The risk of persuasion is thus held to be shifted by the existence of the presumption.

Moreover, the court was familiar with the correct use of the

[9] In *St. Leger's Appeal,* 34 Conn. 434, 450, 451, it is said: "It is not that the *mere relation* necessarily induces or exerts an undue influence (for all legacies by clients to their attorneys are not presumptively induced by undue influence) but because drawing the will presents an opportunity and a temptation, which, together with the personal friendship and confidence and influence of the relation, justify suspicion and the requirement from the legatee of satisfactory evidence that the opportunity was not embraced and the influence was not exerted." In *Richmond's Appeal,* 59 Conn. 226, it is suggested that the presumption might depend upon the facts of the case and might not arise though participation in the making of the will was shown. Underhill, *Wills,* Sec. 145, gives Connecticut as in accord with the general rule that participation is necessary, citing *Richmond's Appeal, supra, Livingston's Appeal,* 63 Conn. 68, and *In re Hines,* 37 Atl. (Conn.) 384. The Connecticut courts have said that the presumption was not to be extended and have usually found some reason, such that the beneficiary was the child and natural heir of the testator, for not applying it. See *Lockwood v. Lockwood,* 80 Conn. 513.

[10] 98 Atl. 350.

terms "burden of proof" and "presumption." At one time it had been held that on the issue of testamentary capacity the presumption of sanity (which is deduced from the fact that the majority of people are sane) might be given an artificial probative effect and might be considered as itself evidence along with the actual testimony.[11] This theory was at variance with actual human experience, for when a particular person's sanity was once questioned, the fact that people in general are sane was of no moment. Hence, it has been repudiated and the court has approved the correct theory elucidated by Professor Thayer that a presumption has no probative value; that it operates only to establish a *prima facie* case in the absence of evidence; and that with the introduction of evidence it drops out of the case altogether.[12] The court has also decided that the "burden of proof" as distinguished from the "weight of evidence" or "burden of going forward with the evidence" never shifts, but remains constant from beginning to end of the trial.[13] Hence, one would naturally suppose that in *Appeal of Kirby* the terms were used with due appreciation of their bearing.

And yet it would seem that the court, in appyling in the Kirby case rules established before the decisions making clear the true nature of presumptions, have not squared the theory of this presumption of undue influence from confidential relationship with the general theory of presumptions. Such seems also to have been the situation in other states where language similar to that used in the Kirby case is criticised by text writers.[14]

The true rule would seem to be that a presumption of undue influence differs in no manner from other presumptions, and that there is no shifting of the burden of proof.[15] The contestant has the burden of proof in the first instance, for he must show the existence of the confidential relationship.[16] Until the

[11] *Sturdevant's Appeal,* 71 Conn. 392; *Barber's Appeal,* 63 Conn. 393.

[12] *Vincent v. Mutual Reserve Life Assoc.,* 77 Conn. 281, 290, 291, the court saying that they were unwilling to commit themselves "to still other extensions, which must in reason follow, of what we regard as an unsound principle and one which might easily become fruitful of unjust consequences;" Thayer, *Prelim. Treatise on Evidence,* pp. 313, 539, 551.

[13] *Pease v. Coles,* 53 Conn. 53, 71; *Baxter v. Camp,* 71 Conn. 245, 253.

[14] Gardner, *Wills* (2d Ed.), Sec. 62, n. 54. Page, *Wills,* Sec. 456.

[15] This is expressly decided in *Compher v. Browning,* 219 Ill. 429, 109 A. S. R. 346.

[16] In *Turner's Appeal, 72* Conn. 305, 319, the court said, in refusing to order a charge that the burden of proof was on proponents, that it was incumbent upon the contestant to prove the asserted confidential relations.

contestant has done at least that, the proponent need take no step to meet the issue of undue influence. The burden being on contestant in the first instance, it should remain with him to the end. And it must so remain with him unless some artificial value is given to the presumption arising from the relationship. To give such a value to the presumption is not only unjustifiable from the standpoint of logic, but is unwarranted from the standpoint of practical life. We may require such a relationship to be explained, but it is an unreasonable deduction from experience and a disregard of the motives which may prompt testamentary benefactions to say that the relationship when explained should lead to any artificial results.[17] This the court, in the Kirby case, apparently realizes, for it speaks of this presumption as a *prima facie* presumption which may be rebutted. If this is true it is difficult to see how the ultimate burden of proof can rest upon the beneficiary who has by proper evidence rebutted the *prima facie* presumption of undue influence.

Public policy may perhaps require, and experience may perhaps justify, the strict rule that a beneficiary enjoying confidential relations with the testator should explain his conduct even though he may have had no connection with the making of the will. But even if this rule, which seems unduly strict, be followed, it is respectfully suggested that the requirement of such explanation does not change the burden of proof. The burden of proof remains upon the contestant throughout.

C. E. C.

AFFECTING QUALITY OF THE NATURAL PRODUCT WITHOUT ADULTERATION IN THE SENSE OF THE FOOD AND DRUGS ACT

Under a statute providing that "no person shall sell . . . any article of food . . . not of the nature, substance and quality demanded," and regulations providing that "where a

[17] The jury may, in considering the evidence, draw *inferences* ("presumptions of fact") from the relationship. The *presumption* ("presumption of law") should drop out with the production of evidence just as does the presumption of sanity. While the facts giving rise to the presumption of undue influence may justify inferences of fact, the facts giving rise to the presumption of sanity would not ordinarily justify any inferences, since the presumption of sanity rests on the basis that most people are sane and in a particular case where sanity is questioned an inference from the sanity of others would not be justified. But the effect of the *presumption* should be the same in either case.

sample of milk contains less than 3 per cent of milk fat it shall be presumed . . . until the contrary is proved, that the milk is not genuine," a farmer is prosecuted for selling milk testing below standard; the milk proves not to have been tampered with since the milking, but the cows have intentionally been fed green, washy, quantity-producing fodder.[1] It was held, with Bray and Scrutton, JJ. dissenting, that the conviction should be quashed, as the milk is genuine. The dissent followed *Smithies v. Bridge*,[2] where a majority of the court held that the milk of a cow not milked at the proper time, and for that reason deficient in fats, was not of the nature, substance and quality of milk; *quality*, when unspecified, they define as "merchantable quality," and consider its presence a question of fact. The majority, adopting *Scott v. Jack*,[3] hold that an unadulterated thing is genuine and not within the act; *adulterated*, as to milk, means mixed with another substance, or minus any part of the original constituents, so as in either case to affect injuriously the quality, nature or substance.[4]

Our own courts do not extend adulteration so far. An article shall be deemed adulterated where any substances are mixed with it so as to injuriously affect it;[5] or, in Michigan, if it is an imitation of or sold under the name of another article, or if it contains any added substance or ingredient which is poisonous or injurious to health.[6] Whether "imitation" could be construed to include, *e. g.*, even milk or flour from which some of the nourishing constituents had been abstracted, is a question. The Federal courts, as well, would seem in the Coca Cola Case to accord with the restriction set by the English decision: an article of food other than confectionery is not to be deemed adulterated merely because it contains poisonous or deleterious ingredients, unless such ingredients have been added, and are foreign to the natural or normal composition of the article.[7] If the natural presence of actively harmful elements is not adulteration, the mere natural absence of nourishing elements will scarcely be held so.

---

[1] *Hunt v. Richardson*, 115 L. T. (K. B. D.) 114.
[2] (1902) 2 K. B. 13.
[3] (1912) 49 Sc. L. R. 989.
[4] Act of 1899, § 1, subsec. 7.
[5] *Small & Co. v. Commonwealth*, 120 S. W. (Ky.) 361.
[6] Mich. Comp. Laws, § 5012.
[7] *U. S. v. 4 Barrels and 20 Kegs of Coca Cola*, 191 Fed. 431.

Regulation of food sales seems generally regarded as aiming at the protection of the public from imposition. Cheats as to the substance sold are met by statutes on adulteration, branding, and coloring[8]—not always too successfully.[9] Cheats as to grade are properly fought by setting standards of quality. But there regulation stops; Georgia will not permit a municipality to go on and prohibit the sale of a "valuable and useful commodity" for being below the standard set, as ice cream containing less than the required percentage of butter fats.[10] This same idea of protection from imposition only, seems at the bottom of the majority decision in the principal case; so, too, with the New York provision that if the herd sample be as deficient as the sample tested, there shall be no prosecution.[11] But beyond warning the public of defective commodities, is it not within the legitimate scope of food regulation to take active steps to keep them out of the market? Wisconsin, at least, has taken such a step in enacting that milk containing less than 3 per cent milk fats is, flatly, adulterated;[12] and the court, in interpretation of this enactment, acts with a rigor beyond that even of the Legislature.[13]

K. N. L.

---

[8] Food and Drugs Act.

[9] *People v. Fried*, 133 App. Div. (N. Y.) 889; *State v. Hanson*, 136 N. W. (Minn.) 412.

[10] *Rigbers v. City of Atlanta*, 7 Ga. App. 411.

[11] Consol. Laws Ch. 1, § 35.

[12] St. 1898, § 4607.

[13] *Splinter v. State*, 140 Wis. 567.