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## Wills--Burden of Proof in Will Contest (In re Schillinger's Will, 258 N.Y. 186 (1932))

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tor relationship.<sup>5</sup> Likewise the purchase of an order where remittance is to be mailed does not create a trust.<sup>6</sup> The fact that money is sent by cable or radio should not change an established rule of law.<sup>7</sup> Indeed, this very fact precludes the idea of the delivery of any specific fund, which would be necessary to establish a preferred claim by means of a trust.<sup>8</sup> The instant case very logically follows the established law.

E. H. S.

WILLS—BURDEN OF PROOF IN WILL CONTEST.—The executor of Catherine Schillinger offered for probate a writing purporting to be her last will. The contestants in filing their objections alleged the execution of the will was procured by undue influence. The Surrogate refused to charge that the burden of proving undue influence was upon those that assert, but he did charge that if the probabilities were evenly balanced in the minds of the jury, then the verdict must be for the contestants, because, in his opinion, the law places the risk of the situation on the proponents. The decree denying probate was reversed on the law by the Appellate Division.<sup>1</sup> On appeal held: Affirmed. *In re Schillinger's Will*, 258 N. Y. 186, 179 N. E. 380 (1932).

A will is entitled to probate "if it appears to the Surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint."<sup>2</sup> "Restraint" includes and covers the term "undue influence."<sup>3</sup> The influence necessary to avoid a will must amount to coercion and duress.<sup>4</sup> It is a species of fraud.<sup>5</sup> Fraud and the like are never presumed, and the burden of proof is upon him who asserts it.<sup>6</sup> Proponent need only prove the proper execution of the

<sup>5</sup> *People v. California Safe Deposit and Trust Co.*, *supra* note 2.

<sup>6</sup> *Beecher v. Cosmopolitan Trust Co.*, 239 Mass. 48, 131 N. E. 338 (1921).

<sup>7</sup> *Ligniti v. Mechanics and Metals National Bank*, *supra* note 3.

<sup>8</sup> *Strohmeier and Arpe Co. v. Guaranty Trust Co.*, 172 App. Div. 16, 157 N. Y. Supp. 955 (1st Dept. 1916); *Katcher v. American Express Co.*, 94 N. J. Law 165, 109 Atl. 741 (1920). In the latter case the court distinguishes the words *forward*, *remit*, and *remittance* from *deliver*. Credit in this case was sent by cable.

<sup>1</sup> *In re Schillinger's Will*, 231 App. Div. 679, 248 N. Y. Supp. 610 (4th Dept. 1931), *rev'd*, 135 Misc. 42, 237 N. Y. Supp. 515 (Surr. Ct. 1929).

<sup>2</sup> N. Y. Surr. Ct. Act §144, as re-enacted by c. 229 of L. 1929.

<sup>3</sup> *Smith v. Keller*, 205 N. Y. 39, 44, 98 N. E. 214, 215 (1912).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Matter of Smith*, 95 N. Y. 516, 522 (1884).

<sup>6</sup> *Ibid.*; *Matter of Kindberg*, 207 N. Y. 228, 229; 100 N. E. 789, 791 (1912); *Matter of Anna*, 248 N. Y. 421, 427, 162 N. E. 473, 475 (1928);

will and that the testator was of sound mind and memory when the will was executed.<sup>7</sup> The contestant must overbear this *prima facie* proof of the proponent. The contestant is entitled to a verdict only when his evidence preponderates.<sup>8</sup> Since the charge of the Surrogate was in contradiction to this rule of long standing, the affirmance of the reversal of the decree denying probate was sound.

H. B. S.

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Matter of Fleischmann, 176 App. Div. 785, 163 N. Y. Supp. 426 (2d Dept. 1917); Matter of Allaway, 187 App. Div. 87, 175 N. Y. Supp. 70 (2d Dept. 1919); Matter of Rundles, 216 App. Div. 658, 662, 215 N. Y. Supp. 749, 752 (4th Dept. 1926); Matter of Hone, 226 App. Div. 715, 233 N. Y. Supp. 421 (4th Dept. 1929).

<sup>7</sup> N. Y. DEC. EST. LAW §§10, 15 and 21.

<sup>8</sup> Matter of Allaway, *supra* note 6.