NOTE

Soundness of Intellect as a Criterion for the Validity of a Will

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Frequently, individuals expecting to benefit from a will learn that their hopes were too high or entirely in vain. The jurisprudence of Quebec is replete with actions instituted by such persons who allege that the testator lacked sufficient mental capacity to make a will. The law of Quebec touching the making of wills by non-interdicted persons [1] and their validity does not exact proof of a mental derangement amounting to insanity in order to declare void what would otherwise be a valid testamentary disposition. Art. 831 C.C. requires *inter alia* that a person be of sound intellect in order to be able to dispose of his property. Lack of soundness of intellect can be regarded as the lowest common denominator among the grounds for invalidating a will by reason of mental incapacity. It includes insanity, temporary derangement of intellect arising from disease, accident, drunkenness or other cause, and weakness of understanding. It escapes precise definition because the mental aberrations of individuals can be unique. Moreover, as the disciplines dealing with the study of the mind advance and become increasingly sophisticated, new and subtler shades of mental incapacity will develop. Ultimately, perhaps more so than in any other area with which the Code deals, each case rests on the facts peculiar to it. Nevertheless, there have evolved, over a period of time, certain fundamental principles which serve to guide the courts.

I. *The Burden of Proof*

In accordance with the principle that he who alleges a fact must prove it, the burden of proving unsoundness of mind rests on those who challenge the validity of a will. If the plaintiff presents sufficient evidence as to the testator's mental incapacity, the burden of proof

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[1] A person who has been interdicted cannot make a valid will. Such an act would be absolutely null under Art. 334 C.C. Moreover, by virtue of Art. 335 C.C., acts anterior to interdiction may be set aside if the cause of interdiction existed notoriously at the time when these acts were committed.

then shifts to those who support the will and, in order for the will to be maintained, they must then prove that the will was made during a lucid interval. The earliest jurisprudential statement on the burden of proof in Quebec since codification was made in *Close* v. *Dixon*[2] where Johnson, J. said, at p. 61:

> ... The law generally presumes all persons to be sane, and that presumption only disappears upon conclusive proof to the contrary; but when a person is once plainly proved to be insane, as this man was, the existence of a lucid interval requires the most conclusive testimony to establish it. Upon this point the authorities are numerous and conclusive...

While Johnson, J. says that unsoundness of intellect in the first instance must be "plainly proved," the more authoritative and recent pronouncements of the Privy Council and Supreme Court[3] merely require that a prima facie presumption be raised. Thus, in *Robins* v. *National Trust Company*,[4] Viscount Dunedin said, at p. 519:

> Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity.

Commenting upon this passage in *Talbot* v. *Talbot*,[5] Mr. Justice Brossard observed, at p. 516:

> Le vicomte Dunedin et le juge Hudson[6] se sont servis de la formule suivante: *but the moment the capacity is called in question.* Ce n'est pas dire qu'il soit suffisant de simplement suggérer par l'allégation d'une procédure ou autrement qu'un testateur n'était pas sain d'esprit pour qu'immédiatement l'héritier qui invoque le testament ait l'obligation de faire la preuve du contraire; il faut, effectivement, que cette capacité soit sérieusement mise en doute, *called in question*, par une preuve *prima facie* suffisante pour faire naître ce doute; mais à compter du moment où cette preuve suffisante pour faire naître un doute a été faite, le fardeau de la preuve est alors transféré à celui qui veut faire maintenir le testament.

These latter statements are in accordance with the rules of evidence concerning the burden of proof. As applied to judicial proceedings, the phrase "burden of proof" has two distinct meanings: the burden of establishing a case and the burden of proof in the sense of introducing evidence. The former rests upon the party who in substance asserts the affirmative; it is fixed at the beginning of the

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[2] (1873), 17 L.C.J. 59.

[3] See, for example, *Guérin* v. *Guérin*, [1962] S.C.R. 550 at pp. 554-5.

[4] [1927] A.C. 515.

[5] [1959] C.S. 513.

[6] A reference to the fact that Hudson, J. referred with approval to this passage in *Léger* v. *Poirier*, [1944] S.C.R. 152, at p. 164.

trial and never shifts under any circumstances whatever. The burden of introducing evidence rests initially upon the party asserting the affirmative of the issue, but shifts constantly according to whether the evidence of one side or the other preponderates. It is in reference to this latter sense of the burden of proof that the courts say that the capacity of the testator must be "called in question" or "sérieusement mise en doute" in order for the burden of proof to shift. Nevertheless, as a matter of actual practice, the evidence required is so strong that the plaintiff does, in fact, "plainly prove" that the testator was incapable of making a will. Therefore, although theoretically the burden then shifts to the defendant, he is placed in the virtually impossible position of proving that the will was made during a lucid interval. Hence, the principle laid down by Johnson, J. in *Close* v. *Dixon* is a more accurate reflection of the burden placed upon the plaintiff.

II. *Time Element*

At what point in time is the state of mind of the testator relevant? Art. 835 C.C. reads in part as follows:

> The capacity of the testator is considered relative to the time of making his will...

This has been interpreted to mean immediately prior to and after the date of execution of a will.[7] This is only logical: soundness of mind is the rule, unsoundness is an exception and should be restrictively interpreted. Thus, in *Dame Phelan* v. *Dame Murphy*,[8] McDougall, J. said, at p. 467:

> If the theory of lucid intervals is to hold, it is unavailing for Defendants to show that in Ireland, some months after the date of the will, the deceased was seen by people who testify to some mental grasp and capacity on her part. It is the particular moment at which the will was drawn by the testatrix with which we are concerned.[9]

The doctrine is in accord with the jurisprudence. The best doctrinal statement is that of Demolombe:[10]

> Toutefois, si le demandeur prouvait que soit avant, et surtout peu de temps avant la disposition, soit après et surtout peu de temps après, le disposant n'était pas sain d'esprit, notre avis est que l'espace intermédiaire s'y trouverait compris; car enfin, on ne doit pas non plus exiger l'impossi-

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[7] *Mellen* v. *Foster*, [1955] R.L. 449, at p. 465; *Strachan* v. *Smith*, [1958] R.L. 65, at p. 78.

[8] (1938), 76 C.S. 464.

[9] See a similar statement by Challies, J. in *Strachan* v. *Smith*, [1958] R.L. 65, at p. 79.

[10] *Traité de Donations Entre-Vifs et Des Testaments*, (2e éd., 1863) t. 1, v. 18, no. 361, p. 391.

> ble ! et la vérité est qu'il serait souvent impossible au demandeur de prouver l'insanité d'esprit du disposant, au moment même, au moment précis et rigoureux, où il a fait la disposition...[11]

III. *Jurisprudential Test of Soundness of Intellect*

The problem, as Mignault[12] puts it,

> ... c'est de savoir quand il y a trouble mental assez grave pour enlever la capacité de consentir, pour détruire la plénitude de la volonté. En d'autres termes, quand faut-il dire que le testateur n'était pas sain d'esprit lors de la confection du testament attaqué ?

A will, being a juridical act, implies that the testator has given a valid consent. Unlike error, fraud, violence and fear which are but vices of consent and which import a relative nullity and are prescriptible, unsoundness of intellect involves an absence of consent and is therefore a cause of absolute nullity and is not susceptible of prescription.[13] In addition, since freedom of willing is a fundamental principle in Quebec, the courts are loath to set aside a will unless the reasons are convincing. Therefore, the Supreme Court has adopted a basic test which goes to the root of mental incapacity and which is equally applicable to cases coming from Quebec and the common law provinces. In *Léger* v. *Poirier*,[14] on an appeal from the New Brunswick Court of Appeal, Rand, J. said, at p. 161:

> But there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like...
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> Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be power to hold the essential field of the mind in some degree of appreciation as a whole...[15]

In *Mathieu et al.* v. *St. Michel*,[16] Rand, J. also said:

> ... This would mean that she was of an understanding adequate to the act done, that she was able to grasp its character and effect in the setting of the circumstances, that she appreciated the value of the property... her own physical condition, her future, that she... had, in short, the intellectual capacity in some degree to view these matters in their entirety in the perspective of her present and possible future life and her family relationships.

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[11] See also Mignault, *Droit Civil Canadien* (1899), vol. 4, at p. 247.

[12] *Ibid.*

[13] *Ibid.*, at p. 249.

[14] [1944] S.C.R. 152.

[15] This statement has been approved of by the Supreme Court in *Mathieu et al. v. St. Michel*, [1956] S.C.R. 477; *McEwen* v. *Jenkins*, [1958] S.C.R. 719; *Hayward* v. *Thompson*, (1960) 25 D.L.R. (2d) 545; *Guérin* v. *Guérin*, [1962] S.C.R. 550.

[16] [1956] S.C.R. 477, at p. 487.

IV. *Evidentiary Requirements*

In speaking of the proof necessary to establish mental incapacity, Mr. Justice Loranger said:

> ...il faut la prouver par des actes, des paroles ou des faits clairs et précis et capable de porter la conviction complète.[17]

To meet this requirement, testimony should possess two characteristics:

> ...1st — It should come from persons of general capacity, skill, and experience, in regard to the whole subject in all its bearings and relations; 2nd — It should come, as far as practicable, from those persons who have had extensive opportunities to observe the conduct, habits, and mental peculiarities of the person whose capacity is brought in question, extending over a considerable period of time, and reaching back to a period anterior to the date of the malady.[18]

According to the general principles of evidence, there is no distinction between the evidence given by experts and that given by ordinary witnesses: the testimony of experts must be appreciated and weighed by the courts in the same manner as that of any other witness. Nonetheless, although one might think that medical evidence would be virtually conclusive since the mental capacity of the testator is at issue, the courts have been reluctant to accept such testimony as binding upon them. Their attitude can be summed up in the words of Loranger, J.:

> Quoiqu'il en soit, malgré tout le respect que je conserve pour la haute compétence des messieurs les experts, j'estime, avec Laurent, que l'aliénation mentale en matière de donation et de testament n'est pas une question de médecine légale; c'est une question de fait qui se réduit à savoir si lors de l'acte le disposant était ou n'était pas sain d'esprit. Il ne faut pas attacher trop d'importance aux distinctions d'après les témoignages et les faits constatés, si au moment de la signature du testament, le disposant jouissait de sa raison.
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> Les médecins, ajoute l'auteur, ont parfois des préjugés de théorie, de système, et ils prétendent imposer leurs opinions aux juges, c'est moins un avis qu'on leur demande, qu'une déposition sur les faits.[19]

In *Laramée* v. *Ferron*,[20] a woman, interdicted due to false representations made by a notary to the family council, was released and subsequently given a judicial adviser by a judge who refused to interdict her. A will made by her six days later was attacked on the ground of her incapacity. Two doctors who had examined her testified that she was suffering from incurable insanity. The court upheld

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[17] *Dame Ouellette* v. *Brunet*, (1923) 61 C.S. 507, at p. 508.
[18] *Close* v. *Dixon*, (1873), 17 L.C.J. 59, at p. 61.
[19] *Dame Ouellette* v. *Brunet*, (1923), 61 C.S. 507, at p. 508.
[20] (1908) 17 B.R. 215; confirmed by (1909) 41 S.C.R. 391.

the will, preferring the testimony of lay witnesses that her insanity was only temporary and was curable.

Another instance where medical testimony was not accepted occurred in *Protestant Board of School Commissioners of the Village of Ayer's Cliff* v. *Wilson*.[21] Eight days before she died, a seventy-nine year old woman suffering from loss of memory and senility, made a will revoking a previous will in English form made 2 months earlier in which she had bequeathed the residue of her estate in trust to a trust company for the purpose of establishing a scholarship. The court upheld the first will on the ground that the testatrix was not mentally capable of disposing of her property when the second will was signed. The court did not consider itself bound by the evidence of a doctor who, having witnessed the testatrix's cross, testified that it had been made during a lucid interval, due to contradictory facts and circumstances.

The testimony of a notary who has prepared and received a will is a common occurrence in cases of this nature. In weighing his evidence, the courts, in effect, bear in mind that:

> It is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.[22]

In *Russell* v. *Lefrançois*,[23] the fact that the notary who received the will did not notice that the testator was of unsound mind was disregarded. In *Mellen* v. *Foster*,[24] the medical testimony demonstrated that the testatrix, while able to understand questions put to her, was unable to understand the nature and effect of a will. In annulling the will, the court did not attach importance to the notary's testimony that the testatrix appeared normal to him.

While this reflects the usual attitude of the courts, circumstances may be such that the court will attach importance to the evidence of the notary. Thus, in *Vocel* v. *Vocel*,[25] a notary refused to receive the last will of the testator. Forest, J. said that while the notary's opinion could not be accepted as that of an expert, nonetheless, it constituted an important element of proof to be taken into consideration. In *Laramée* v. *Ferron*,[26] the court gave considerable weight to the fact that the notary prepared the will upon notes taken at the dictation of the testatrix, that he re-drafted and rearranged these

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[21] [1954] B.R. 169.
[22] *Pendlebury* v. *Smart*, [1949] R.L. 292.
[23] (1884) 8 S.C.R. 335.
[24] [1955] R.L. 449.
[25] [1943] R.L. 30.
[26] (1908) 17 B.R. 215; confirmed by (1909) 41 S.C.R. 391.

notes at his home and that three days afterwards he returned to the testatrix, accompanied by another notary and that she then repeated, without suggestion or aid, what she had told him in regard to her last wishes, that the will was then read to her and that she approved of it as being what she wished and what she had dictated, and that they both were fully alive to the necessity, under the peculiar facts (the testatrix had been interdicted, released and provided with a judicial adviser), of taking every precaution to satisfy themselves with regard to her mental condition and her wishes with respect to the disposition of her property.

In receiving lay testimony, the court is always faced with the difficult and delicate task of sifting through the impressions the individual witnesses have of the capacity of the testator. It is often necessary to take into consideration the competence of the witness and his particular interest in interpreting the facts the way he has. In particular, the courts must be careful to avoid confusing what the witnesses take to be signs of incapacity with mere eccentricities of conduct. In *The Royal Institution for the Advancement of Learning* v. *James Scott et al.*,[27] the testatrix lived in a solitary way, her surroundings being indicative of extreme poverty and discomfort, although she was at the time possessed of considerable means. While she was eccentric in many respects, her mental faculties were nevertheless sufficiently clear to enable her to manage her own affairs up to the time of her death. She had no relations closer than nephews from whom she was estranged. She left the bulk of her estate to a university, in pursuance of a preconceived intention to devote it to charitable purposes and it was proved that she clearly understood what she was doing and the use to which the legacy was to be applied. In upholding the will, Mr. Justice Loranger did not mince words when he said, at p. 251:

> J'ai eu l'avantage de suivre l'enquête et de voir et entendre les témoins; et s'il est un cas où il est bon que le juge soit présent à l'enquête, c'est celui-ci. Rien n'est fallacieux comme la preuve de faits qui servent de base à l'opinion que les témoins viennent exprimer sur la sanité d'esprit d'une personne. Chacun se place à son point de vue et celui de sa position sociale. Tel fait qui dans l'opinion d'une autre serait qualifié d'un acte de folie; un préjugé parfois reconnu par une certaine classe de la société, mais ignoré par une autre classe d'une condition différente, serait jugé un acte de démence. Il importe donc que les témoins soient examinés devant le juge, qui les entend et les voit, pour bien se rendre compte s'ils apprécient à leur valeur les faits sur lesquels ils témoignent, et de la rectitude du jugement qu'ils basent sur ces faits.

There remains to be considered certain grounds which have been invoked in challenging wills and the attitude of the courts to them.

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[27] (1882) 26 L.C.J. 247.

The validity of a will executed by a person suffering from delusions or hallucinations is often a subject of dispute. The mere existence of a delusion in the mind of the testator does not necessarily invalidate a will, unless the delusion forms the groundwork of the will. In *O'Neill* v. *The Royal Trust Company* and *McClure*,[28] the husband of the testatrix died and left her a legacy, an annuity, and a general power of appointment by will over the residue of his estate. The will also contained a request that his wife should make a will leaving the entire estate to his sister for her life and after her death to his grandnieces. In 1920, the testatrix made a will substantially in accordance with her husband's desires. Later becoming dissatisfied with the terms of her husband's will, in 1927 she executed a new will leaving the estate of her late husband to her own niece and nephew. In July, 1929, she voluntarily entered a sanitarium where she remained until her death in 1943. In November, 1929, she made a third will leaving her own estate and that of her husband to the latter's nieces; and the validity of this last will was challenged. The testatrix was subject to hallucinations and delusions which "at times" disturbed her, but "were never very fixed at any time," and, amongst them, that she heard voices from the grave, smelled either gas or dusting powder in her room and tasted poison in her food. But her general rationality was conceded: she was able to converse rationally, had a good memory, and was conversant with her husband's estate, her own assets and the contents of the first two wills. The Supreme Court found that there was no connection between the delusions and the dispositions contained in the will. In upholding the validity of the will, the court invoked the governing principle of *Banks* v. *Goodfellow*[29] where it was stated, at p. 565:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of it which, if the mind had been sound, would not have been made.

If a man through advancing years or other physical infirmity has reached a condition where intelligence is wanting, but his condition falls short of complete mental derangement or disorder, he may nevertheless be incompetent to make a will. It is not suggested that a mere lack of intelligence will prevent a man from disposing by will of his property. The most unintelligent may control his wishes.

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[28] [1946] S.C.R. 622.

[29] [1870] L.R. 5 Q.B. 549.

The test is whether he possessed sufficiently the mental power to exercise his will along the lines of his wishes and desires.

If a disposition has been inspired by hatred, anger or jealousy, or its provisions are cruelly unjust, this in itself is insufficient to upset a will. To interfere on one of these grounds would be a volation of the principle of freedom of willing. Thus, in *The Royal Institution for the Advancement of Learning* v. *James Scott et al.*,[30] where the hatred of the testatrix for her relations was well-known, Loranger, J. said that in order for a will to be annulled on this ground,

> ...il faudrait dire que cette haine avait un caractère de violence telle que son esprit en était affecté au point de ne pouvoir plus affecter son libre arbitre.

Similarly, suicide is not *per se* a proof of insanity.[31] In *Martineau* v. *Durocher*,[32] the testator committed suicide after making his will. He had previously been struck by a train and on another occasion was found looking beneath railway cars. Still, Mr. Justice Walsh refused to accept this as proof of insanity, arguing that it could only be inferred if there were other indicia.

The influence of drugs and alcohol upon the mind of the testator is always a factor of importance. In *Mellen* v. *Foster*,[33] among the facts pointing to a conclusion that at the time of the execution of the will the testatrix was unable to understand the meaning and the consequences of the act and was not of sound intellect, the court attached importance to her addiction to drugs as a result of the administration to her under medical supervision of large and increasing quantities of sedation over a period of more than a year prior to the date of execution of the will, as a result of which, for a considerable time prior to the date of the execution of the will, she was never out of the influence of drugs.

Finally, when there is doubt as to the soundness of intellect, the character of the will can be of importance. If the provisions are reasonable, viewed in the light of all the circumstances, this is a circumstance which points to the capacity of the testator and vice-versa. The fact that the testator underestimated the amount of his estate is not evidence of a lack of testamentary capacity.[34]

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30 (1882) 26 L.C.J. 247.

31 Planiol et Ripert, *Traité Pratique de Droit Civil Français*, deuxième édition, t. 5, 1957, no. 180, p. 256.

32 (1936) 42 R. de J. 121.

33 [1955] R.L. 449.

34 *Trudeau* v. *Desrosiers*, [1945] R.L. 341.