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Wills--A Problem in Statutory Interpretation

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NOTES

WILLS—A PROBLEM IN STATUTORY INTERPRETATION

A testator made a will and had it subscribed by two attesting witnesses. One of the latter was also a legatee. When the will was offered for probate the non-legatee attester was available and testified to the material facts concerning the execution of the will. The legatee attester did not testify and did not appear in court. Under such circumstances should his legacy be considered a valid one?

In the case of *Doyle v. Brady*[1] the Kentucky Court of Appeals answered this question in the affirmative. It reached its conclusion under a statute providing

> "If a will is attested by a person to whom, or to whose wife or husband, any beneficial interest in the estate is devised or bequeathed, and the will cannot otherwise be proved, such person shall be deemed a competent witness; but such devise or bequest shall be void, "[2]

This decision was reached in spite of the fact that the court had before it another statute requiring that a will be attested and subscribed by at least two credible witnesses.[3] The rule laid down in *Doyle v. Brady* has been followed in subsequent decisions and appears to be established in Kentucky.[4] It is the function of this note to examine the soundness of the result reached and to determine whether or not there is any conflict between the two statutes cited.

The requirement that a will shall be attested by credible witnesses is of statutory origin and its application is, therefore, a problem of statutory construction. The original English Wills Act of 1540[5] did not require attestation of any kind, but the Statute of Frauds of 1676 included a provision that all devises of lands must be attested and subscribed by "three or

[1] 170 Ky. 316, 185 S.W 1133 (1916).
[2] Ky. R. S. (1946) Sec. 394.210 (2).
[3] Ky. R. S. (1946) Sec. 394.040.
[4] Calvert v Calvert, 208 Ky. 760, 271 S.W 1082 (1925), *see* Barnes v. Graves, 259 Ky 180, 191, 82 S.W 2d 297, 302-303 (1935).
[5] Stat. 32 Hen. VIII, c. 1 (1540) 2 STATUTES AT LARGE 272.

four credible witnesses."[6] The requirement of an attestation in England was not extended to testaments of personalty until the Wills Act of 1837;[7] however, most American wills statutes followed the English Statute of Frauds and in doing so extended it to include both realty and personalty.[8] Such was the tenor of the Kentucky statute, first enacted in 1797, and as originally adopted the Kentucky act used the word "competent" in describing the type of witness required for attestation.[9] In the *Revised Statutes* of 1852, the word "credible" was substituted for "competent."[10] It is difficult to find any reason why this substitution of words was made, but whatever might have been the reason, there was no change in effect. It is quite generally held in England[11] and in other American jurisdictions[12] that so far as attesters are concerned, "credible" and "competent" are synonymous, and this position was taken by Kentucky after the adoption of the *Revised Statutes* of 1852.[13] It is certainly a sound interpretation then to say that the Kentucky statute requires that a will be attested and subscribed by at least two "competent" witnesses.

The theory of requiring competent witnesses to attest wills grew up at a time when a person who had any beneficial interest in the thing in issue was not a competent witness for any purpose in any type of case.[14] While that disability has been removed in most situations,[15] it is still in effect as to attestors, never having been altered by statute. It is quite generally held that a person who has a direct beneficial inter-

[6] Stat. 29 Car. II, c. 3, sec. 5 (1676) 3 STATUTES AT LARGE 385.

[7] Stat. 7 Wm. IV & I Vict., c. 26, sec. 9 (1837) 32 STATUTES AT LARGE 489.

[8] Bordwell, *The Statute of Wills* (1928) 14 IOWA L. REV. 1, 8-9.

[9] *See* LAWS OF KENTUCKY (1802) Part X, p. 282.

[10] REVISED STATUTES OF KENTUCKY (1852) c. 106, sec. 5, p. 694.

[11] 1 SCHOULER, WILLS, EXECUTORS, AND ADMINISTRATORS (5th ed. 1915) Sec. 350.

[12] Jones v Grieser, 238 Ill. 183, 15 Ann. Cas. 787, 87 N. E. 295 (1909) Nixon v Armstrong, 38 Texas 297, 298 (1873), 1 PAGE, WILLS (3d ed. 1941) Sec. 312; Evans, *The Competency of Testamentary Witnesses* (1927) 25 MICH. L. REV. 238.

[13] Fuller v Fuller, 83 Ky. 345 (1885), Savage v. Bulger, 25 Ky L. Rep. 1269, 77 S.W 717 (1903)

[14] 2 WIGMORE, EVIDENCE (3d ed. 1940) Sec. 575.

[15] *Id.* at Sec. 576.

est in a will cannot be a competent attesting witness to that will.[16]

It can be seen that a strict application of this rule would defeat an entire will if one of the required witnesses happened be a beneficiary of even a small gift under the will and such was the result in the early cases.[17] However, this apparently harsh rule was altered in England by statute which provided that the gift to the attesting witness was void, but the will, as to its other provisions, was valid.[18] Thus competency in the witness was achieved by abolishing his interest and it is believed that the Kentucky statute under which the *Doyle* case was decided was intended to accomplish this result and nothing more.

The Kentucky court seems to have adopted the view that the time of competency refers to the time of probate and not to the time of execution. Such a position is unsound in theory and is in conflict with the general weight of authority[19] and is not in harmony with the cases in Kentucky prior to the *Doyle* case.[20] The fallacious reasoning of the court appears to be a result of their confusion concerning the proper function of an attesting witness, and their failure to recognize the distinction between *attesting witnesses* and *testifying witnesses.* The qualifications of attesters are properly determined by the substantive law of wills and not by rules of evidence.[21] The competency of persons called as testifying witnesses is an entirely different matter and properly belongs in a different field. The immediate question is whether or not the will was properly executed and one of the requirements of a proper execution is

[16] Sparhawk v. Sparhawk, 10 Allen (Mass.) 155 (1865), Haven v. Hilliard, 23 Pick. (Mass.) 10 (1839), Lord v. Lord, 58 N. H. 7 (1876), 1 JARMAN, WILLS (7th ed. 1930) 80; 1 PAGE, WILLS (3d ed. 1941) Sec. 319.

[17] Holdfast d. Anstey v Dowsing, 2 Strange 1253, 93 Eng. Rep. R. 1164 (1746).

[18] Stat. 25 Geo. II, c. 6, sec. 1, (1752) 7 STATUTES AT LARGE 411.

[19] Gillis v Gillis, 96 Ga. 1, 51 Am. St. Rep. 121, 23 S. E. 107 (1895) In re Trinitarian Church, 91 Md. 416, 40 A. 325 (1898), Rockland Trust Co. v Bixby, 247 Mass. 449, 142 N.E. 107 (1924) In re Potter's Will, 89 Vt. 361, 95 A. 646 (1915) ATKINSON, WILLS (1937) 261, 1 REDFIELD, LAW OF WILLS (4th ed. 1876) 256.

[20] Fuller v. Fuller, 83 Ky. 345 (1885), Savage v. Bulger, 25 Ky. L. Rep. 1269, 77 S.W 717 (1903)

[21] 2 WIGMORE, *op. cit. supra* note 14, at Sec. 582.

that it be attested and subscribed by two "competent" witnesses. When the attester subscribes his name to a will he is at that moment witnessing a state of things then existing or an act in course of performance. Such witnesses are persons with whom the testator is surrounded in order that no fraud may be practiced upon him[22] and unless they are competent at the time it is difficult to see how there can be a proper execution.[23] Although these attesting witnesses are for the protection of the testator, the testator has no authority to waive such protection. The statute requires it as part of the formalities essential to a proper execution.

The determining factor in deciding the correctness of the decision in the *Doyle* case is whether or not the legislature, by the adoption of what is now *Kentucky Revised Statutes* 394.210, changed the common law meaning of the word "competent" as applied to attesting witnesses to wills. The statute states that if " the will cannot otherwise be proved, such person shall be deemed a competent witness, but such devise or bequest shall be void, " It appears that the legislature has created competency by destroying interest. It is difficult to find any intent to permit competency and interest both to exist in the same person. The court seems to have read the statute as if it had stated, "Such devise or bequest shall be void, *unless the interested attester shall not testify in which case it shall be valid.*" The words in italics are not to be found in the statute.

The court stated that when it was admitted that the will was valid except for the legacy to the interested attester it was admitted that the will was validly executed. Here again, however, the reasoning of the court appears to be fallacious in that it seems to ignore the fact that it is the elimination of the interest that makes the execution valid. The will can become valid in its other parts *only by destroying the legacy to*

[22] 2 GREENLEAF, EVIDENCE (Redfield's edition 1868) Sec. 691.

[23] "There is, therefore, the more propriety in requiring such persons to possess competency, at the time of attesting the act; since the judgment and opinion of the witnesses, formed at the time, and from observations then made, much of which could not be perfectly recalled, so as to enable the witness to rejudge that question, after the removal of any disability existing at the time, is to become testimony." 1 REDFIELD, *op. cit. supra* note 19, at 256-257.

the interested attester The effect of the statute was to destroy the legacy *ab initio* and thereby establish the competency of the purported legatee as an attesting witness. No doubt the legislature at the time of the adoption of *Kentucky Revised Statutes* 394.210 was aware of the common law meaning of the word "competent" as applied to attesters and the presumption is that if it had intended to effect any change in the meaning of that word it would have expressly so stated.

Great emphasis appears to have been placed by the court upon the words, "If the will cannot otherwise be proved." It erred in believing that the will in question was otherwise proved. While it is true that a will can be proved by one witness it is also true that all facts necessary to constitute a valid execution must be proved. In this case the attester testified to the capacity of the testator and to his signature, but he did not and could not testify that the will was subscribed by two credible witnesses since one of the subscribing witnesses was an interested witness and, therefore, neither competent nor credible. Until it was properly attested and subscribed it could not become a valid will.

It would appear that the proper interpretation of the phrase, "cannot otherwise be proved," would be that it applies to all situations in which a beneficiary is needed as an attesting witness in order to make up the two attesters required by *Kentucky Revised Statutes* 394.040. If he is needed to fill that requirement he is made competent by the destruction of his interest. But if the attesting has any meaning at all, the witness must be competent at the time he attests, and the interest must be destroyed as applicable to that time and is accomplished by the act of subscribing one's name as an attester. A situation in which the will can be otherwise proved would arise where there was a surplus of attesters. In such an event it could be shown that the will was attested and subscribed by two competent witnesses even though the name of a third or fourth incompetent witness appeared on the instrument. This result has been reached in at least two jurisdictions having statutes similar to the Kentucky statute.

The Supreme Court of Texas, under a statute almost identical with the Kentucky statute, had before it in the case

of *Fowler* v. *Stagner*[24] a situation similar to that of the principal case. The phrase, "If the will cannot otherwise be proved," was interpreted to mean, "If the will cannot otherwise be established as a valid will." The court held that when the non-legatee attester appeared as a testifying witness and proved the execution of the will he proved its invalidity since his testimony showed that one of the two attesting witnesses required by law was an interested witness and, therefore, not a competent attester. It was the opinion of the court that the only means of giving any effect to the will was by holding that the supposed beneficiary by the very act of subscribing his name as a witness destroyed his gift.

A like result with comparable reasoning was reached in Virginia under a similar statute in the case of *Bruce* v. *Shuler*[25] The principle was there laid down that the primary purpose of the statute requiring that a will be attested by competent witnesses was to protect the testator from frauds and perjuries and that to hold that the tests for competency were to be applied at the time of the probate rather than at the time of execution would defeat that purpose. Like the Texas case cited above, the Virginia court held that to establish the will as a valid one it was necessary that the testifying witness prove that it was executed with all the formalities requisite to a proper execution, one of those requisites being that the will was attested and subscribed by two competent witnesses. As soon as it appeared that one of the subscribing witnesses to the will was named in the instrument as a beneficiary, his competency as an attester could not be considered except under the section of the statute voiding his gift.

The state of West Virginia has a statute practically the same as the Kentucky statute and in the case of *Davis* v *Davis*[26] it placed upon it an interpretation which coincides with the Kentucky position. It was admitted that "competent" witnesses were required as attesters but it was held that the statute rendering a beneficiary competent by destroying his gift referred to the competency at the time of probate and not at the

[24] 55 Texas 393 (1881).
[25] 108 Va. 670, 62 S.E. 973 (1908)
[26] 43 W Va. 300, 27 S.E. 323 (1897)

time of execution. From this point they reasoned that although an interested witness was not a competent testifying witness he was a competent attesting witness. It is difficult to see how such an inference can be drawn from the words used by the legislature, and it is believed that that court, like the Kentucky court, read into the statute a meaning which was not there.

The holding in *Davis* v. *Davis* differs but slightly from the contention of Lord Mansfield in *Windham* v *Chetwynd*[27] that "credible" does not mean "competent" and that competency refers to the time of testifying rather than to the time of execution. Thus, in his usual straightforward manner, Lord Mansfield, by denying the necessity for competent attesters, met the issue more squarely than did the West Virginia court. However, Lord Mansfield's position is unsound in that it ignores the substantial nature of the requirement that attesters be "credible." His view was not followed in England after his death[28] and, as previously indicated, it is in conflict with the great weight of authority

In addition to the West Virginia case, the Kentucky court cited in support of its position a line of cases in New York holding that if an attesting witness to a will is a beneficiary under the will but is not needed as a testifying witness his gift is not defeated.[29] While the Kentucky court indicated that the New York cases were decided under a statute similar to that of Kentucky, the fact is that the New York statute is radically different. The applicable section[30] is entitled, "Devise or bequeath to subscribing witnesses," and provides that if a subscribing witness to a will is also a beneficiary "

[27] 1 Burr. 413, 97 Eng. Rep. 377 (1757)

[28] Hatfield v Thorp, 5 B. & Ald. 589, 106 Eng. Rep. 1305 (1822).

[29] Caw v. Robertson, 5 N. Y. (1 Seld.) 125 (1851) Cornwell v. Wooley, 47 Barb. (N.Y.) 327 (1866), In re Owen, 26 Misc. Rep. (N.Y.) 179, 56 N.Y.S. 853 (1899).

[30] "*Devise or bequest to subscribing witnesses.* If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made." 1 LAWS OF NEW YORK (Thompson, 1939) c. 18, sec. 27.

and such will cannot be proved without the testimony of such witnesses, " then the gift fails. Thus the statute makes it clear that it is the *testimony* and not the *attestation* by the interested witness that defeats the gift. Even if the Kentucky statute were as specific as that of New York we would still have the problem of a proper execution including an attestation by two credible witnesses. However, such a problem is not faced in New York because the New York statute on execution merely requires two attesting witnesses but does not specify that they should be credible.[31] Thus it can be seen that the New York statute is by no means comparable with that of Kentucky

Kentucky Revised Statutes 394.040 and 394.210 can both be given full efficacy according to the plain meaning of the words used without creating any conflict between them. Section 394.040 requires that a will be attested and subscribed by two credible witnesses. Section 394.210 provides that if the credibility of a witness conflicts with his interest, his interest will have to yield to his credibility The credibility of the witness would be established by destroying his interest. Since it is necessary that credible witnesses (attesters) subscribe their names in the presence of the testator, such witnesses (attesters) must be credible at the time. The question whether or not such persons later become testifying witnesses is then wholly immaterial so far as the effect it can have on a valid execution is concerned. In order to support the position taken by the Kentucky court it should be clearly shown that the legislature intended to change the meaning of the word "competent" as applied to attesting witnesses, and no such intent appears. An indication of how that result may be accomplished is indicated by the New York statute referred to above and even its provisions were not sufficiently clear to avoid some confusion.

The case of *Doyle* v *Brady,* having the effect of giving an erroneous interpretation to one statute[32] and nullifying part

[31] "*Manner of execution of will.* 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator." 1 LAWS OF NEW YORK (Thompson, 1939) c. 18, sec. 21.

[32] KY. R. S. (1946) Sec. 394.210.

of another,[33] is unsound and should not be followed. It is believed that the view taken by Texas and Virginia in the interpretation of similar statutes has much stronger support in both logic and authority It is also a very serious question whether or not the policy of making interested persons competent as attesting witnesses to the execution of wills would be desirable. Credible witnesses are required as attesters in order to prevent testators from being imposed upon. They constitute a shield protecting the testator at a time when he is likely to be *in extremis* or, for other reasons, might easily fall into the control of unscrupulous, crafty, or fraudulent interested witnesses if such persons were permitted to serve as attesters. If the Kentucky court is right in its holding that a legatee may properly attest his own gift, that protecting shield is destroyed and the reasons for attestation itself are rather obscure.

It is submitted that it would represent a much sounder policy if the Kentucky court would adopt the view taken by Texas and Virginia, and leave to the legislature the matter of writing a new definition of competent attesters.

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[33] KY. R. S. (1946) Sec. 394.040.