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Note and Comment

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NOTE AND COMMENT

WILLS—REVOCATION BY JUDICIAL LEGISLATION.—Wills and their revocation as we know them are peculiarly the result of the actions and reactions of our common and statute law. We are sufficiently familiar with statutes, declaratory of the common law, in derogation thereof, and creating entirely new principles of law. We also know law the result of no legislative act. Whatever may or may not be admitted about court-made law, we see the undoubted fact that the great body of our law is the outgrowth of decisions applying to new conditions principles of law found in analogous cases, whereby the common law is able to adapt itself to our changing conditions, and keep step with the march of progress. We are not unaccustomed to judicial interpretation that practically nullifies statutes, or gives to them an effect that would surprise the legislators originating them. We do not so often come upon pretty open contests between court and legislature, cases of judicial usurpation resulting in rules of law flatly contradictory to the words of the statutes.

A notable instance is found in the law as to revocation of wills, and an excursion through a certain line of cases is interesting not merely for this, but also for the curious mistakes of judges and text writers in studying and applying the precedents relied upon to establish the rule. Feudal requirements long delayed the right by will to dispose of lands, and there was not much personalty to bequeath. Such as there was might be bequeathed very informally, and by resort to uses a practical way was found to make what amounted to testamentary disposition of lands. After 1540, Statute 32 Henry VIII, this could be done by last will and testament in writing. No form or signature was required, and personalty was disposable as before. See *Butler*

and *Baker's* case, 3 Coke 25, 31, 76 Eng. Rep. 684, and footnotes. For the purpose of this note this statute is of small moment. The Statute of Frauds and the Statute 1 Vict. are the great statutes of wills, and the former, more largely than the latter, has furnished the model for American statutes. Hence cases under the Statute of Frauds are of greater interest in most American jurisdictions.

The Statute of Frauds, 1677, 29 Charles II, c. 3, required devises to be "in writing and signed by the party so devising." They must also be duly attested and subscribed by witnesses. Bequests of personalty might still be oral, but nuncupative wills were strictly limited, though no formal requirements were made for written wills of personalty. The Statute 1 Vict. required the same formalities for the testamentary disposition of real and personal property. Frauds and perjuries had occurred not merely in setting up wills, but also in attempting to prove revocation by word of mouth. The Statute of Frauds, therefore, provided in section VI that no devise, nor any clause thereof, should be revocable otherwise than by certain destructive acts to the instrument, or by certain specified instruments declaring the same. To make doubly sure, the section says this over in another way, declaring that "all devises and bequests (?) of lands and tenements shall remain and continue in force" until revoked in one of those specified ways. And finally, for treble assurance the section concludes, "any former law or usage to the contrary notwithstanding." This is said, though doubtfully, to have been drawn by CHANCELLOR NOTTINGHAM, as the result of a very shocking case of perjury and subornation of perjury in proving revocation of a will, a case tried before him the year previous, 1676. *Cole v. Mordaunt*, in a note 4 Ves. 196, also discussed in *Prince v. Hasleton*, 20 Johns. 502 (CH. KENT).

It was doubtless supposed that by these very positive words the door was bolted, barred and sealed against the admission of any other manner of revocation, and so it seemed to BARON PERROT. Not so to his brother barons, who soon found that no revocation "otherwise than by the ways specified" had left as before revocations implied by law! *Christopher v. Christopher*, Dick. 445, and so it was held in *Kenebel v. Scrafton*, 2 East 530, per LD. ELLENBOROUGH, and after great consideration by all the judges of the three courts of Westminster Hall in *Marston v. Roe d. Fox*, 8 Ad. & El. 14, per TINDAL C. J. (1838). Parliament, seeing how the attacking forces of the common law had made inroads on the undoubted territory embraced by the Statute of Frauds as to revocation, took counsel of strategy, and determined to provide for revocation by changed circumstances, but to do it in its own way, and so indubitably that the courts should not venture another attack. It did not require both marriage and birth of a child, but by the Statute 1 Vict., c. 26, 1837, it enacted that, 1. "Every will made by a man or woman shall be revoked by his or her marriage" (except in certain cases under a power); 2. "no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances," and 3. "no will or codicil, or any part thereof shall be revoked otherwise than as aforesaid, or" by other means specified, these being mainly as named in the Statute of Frauds. Thus

were the courts forbidden to invent any more methods of revocation. And they have obeyed, as will later appear, with very absurd results in some cases. But for these, Parliament and not the courts may be blamed.

Such was the law as to wills made from and after Jan. 1, 1838. In 1858, the case of *Goods of Cadywold*, came on to be decided by that most learned judge of probate law, SIR CRESSWELL CRESSWELL. In that case one T. Cadywold made a will devising all his real estate to Elizabeth Soundy, his intended wife, for life, and then for the benefit of any children they might have living at his decease, or born in due time afterwards, and the residue of his personal estate to his intended wife absolutely. Thomas and Elizabeth carried out their marital plans, and in course of time he died, leaving her and four children surviving him. Then the question arose whether his widow, and executrix, could have probated this will which had been made for this very purpose. And the Q. C. Dr. Addams who had been instructed to move for probate of this paper, on the strength of *Marston v. Fox*, *supra*, "apprehended it could not be granted." With this agreed SIR CRESSWELL CRESSWELL, who said, "It seems at first sight rather startling to say that a will like the present, executed in contemplation of marriage*** should be revoked by such marriage," but on the cases cited so the law stands.

Now it does not appear that Sir Cresswell was relying on the positive provision of 1 Vict. that marriage revokes a will, and he should not, for though the case was decided in 1858, the will was made in 1828, and therefore did not fall under 1 Vict. When we turn to the cases cited we find that *Marston v. Fox*, *supra*, decided that notwithstanding the Statute of Frauds, *contra*, the courts had let in another manner of revocation, i. e., by presumption of law from a change in the testator's circumstances. This change was marriage and birth of a child or children. On the strength of this presumption, which was a rigid—though court-made—presumption of law, and depended not at all on the intent of the testator, this will of T. Cadywold, which he had made for the express purpose of providing for his wife and children, by the very fact that he had the wife and children was utterly revoked! Even while they were doing it the courts admitted very great difficulty in reconciling their work with the positive words of the Statute (LORD ELLENBOROUGH, C. J., in *Kenebel v. Scafton*, 2 East 541), and some cases have gone the length of calling it usurpation of legislative power, *Hoitt v. Hoitt*, 63 N. H. 475. Nevertheless, the English courts firmly stood on the ground they had seized, and the American courts have generally adopted the same rule. *Brush v. Wilkins* 4 Johns. Ch. 506, per CH. KENT, *Warren v. Beach* 4 Gray 162, per SHAW C. J.

But to return to the Cadywold case. As it was decided twenty years after this last edict of Parliament had changed the statute law, it was not probable many, or any cases, of wills under the old Statute of Frauds would raise that precise question again. We are not surprised therefore that the Cadywold case has not been much referred to by the courts, though it has been very much cited by the text writers, sometimes as applying to 1 Vict., which is, of course, a great error, e. g. *The Laws of England*, The Earl of Halsbury, Vol. 28 p. 562. The curious thing is that the editor of an edition

of Jarman's classical Treatise on Wills, which appeared shortly after the Cadywold decision, cites this case, p. 125, with the remark that the decision in *Kenebel v. Scrafton*, 2 East 530, was overlooked by Sir C. Cresswell, and his decision, therefore, cannot be taken as an authority. And Redfield in his Law of Wills, which appeared soon after, fell into the same error, and referred approvingly to this footnote in Jarman. But the reports of the Cadywold case all show *Kenebel v. Scrafton* not only was not overlooked, but it was on the strength that case that the widow was advised to try to probate the will. See 1 Sw. & Tr. 34, 27 L. J. P. 36, 6 W. R. 375. But Dr. Addams, Q. C., in following his instructions to move for its probate, apprehends that the law being as held in *Marston v. Roe d. Fox*, 8 A. & E. 14, it could not be granted. Evidently neither he nor Sir C. Cresswell read either of those cases, since both *Kenebel v. Scrafton* and *Marston v. Fox* confine the rule of revocation to cases in which there is a failure to provide for the wife and child, and expressly hold that the will is not revoked if it makes provision for both. That is precisely what this Cadywold will was intended to do, and hence there should have been no revocation under the rule of *Marston v. Fox*, *supra*.

Dr. Addams refers to another case, viz., *Israell v. Rodon*, 2 Moore P. C. 51, which was an appeal from the Court of Ordinary in Jamaica. This was a case decided in 1839, in which this same Dr. Addams, not then a Q. C., appeared, to argue for a revocation of the will. The Privy Council, speaking through Sir Herbert Jenner, agreed with him, not on the ground that there was no provision for the wife and child, but that the provision was not adequate enough to repel the presumption of revocation. That the estates must have been considerable would appear from a quarrel the widow had with the trustees over the disposition of the produce. *Israell v. Rodon*, 2 Moore P. C. 42. This adequacy of provision was reading a new element into the rule, not found in *Marston v. Fox*, *supra*, nor in other cases. The opinion has much to say of the intent of the testator in making his provisions, and this regard for intent is quite contrary to the settled rule, which rests not at all on any supposed intent in the given case, but on a positive presumption of law. The opinion of the Governor and Ordinary of Jamaica in deciding the case in the Court of Ordinary is interesting. It appears that Henry Rodon made a will in England in favor of his sisters and a brother. He then went to Jamaica and soon married and made settlement of his real estate, but not of his personal, which was considerable, upon his wife for life, and afterwards to his child or children. He died soon, leaving his wife eniente, and a posthumous daughter was born, the respondent in the case. The Governor thought it clear when the will was made there was no contemplation of marriage. "The question then comes, whether his deed of settlement gave a secure (?) and sufficient (?) provision for his child, or whether the best part of his property (that is, his personal estate) should go away from his child to half-sisters*** There is a child, now eighteen months old, entirely dependent on her mother for every present and future benefit, during such mother's life, and that mother, a young woman about twenty-five years of age, and having recently married again." The Governor was not a lawyer, but under the circumstances of this case it seemed to a layman that though he

might "possibly be wrong in the law of the case," he was positive that he was not wrong in equity. Not impugning the affection of the mother for her child, he notes no proof on the second marriage of provision for the child, so as to make her independent of the stepfather, who may have married the widow "on some consideration of her property acquired by Rodon." This ingenious suggestion that the provision for the child must be immediate, and not dependent on the death of the mother, does not seem to accord with the cases reviewed in *Marston v. Fox*, *supra*, but the facts in this case are so different from those in the Cadywold case, as to make it no authority, for in the Rodon case the will took the property away from the widow and mother, while in the other it carried the entire property to them.

Before leaving this maze of errors we may notice that this whole doctrine of revocation by implication of law from change of circumstances, seems to have been imported from the Roman law, and is not indigenious to the English. That marriage and birth of a child should revoke a will is said to be traced to *Overbury v. Overbury*, 2 Show. 242 (1682), 89 Eng. Reports 915 and footnote, and text writers wrongly, but quite generally, cited this case as authority for the doctrine. Jarman Treatise on Wills, *123, Underhill on the Law of Wills, Sec. 239, Rood on Wills, Sec. 375, Woerner, The American Law of Administration, Sec. 54. It is true that the Court of Delegates did borrow the notion from the civilians, who regarded a will which failed to provide for children as *inofficiosum testamentum*, but the Overbury case said not a word about marriage. To make a will, "and afterwards have children" and die is the case there put. But the English courts soon held that there must be both marriage and birth of children. *Lugg v. Lugg*, 2 Salk, 592 (1696), *Doe d. White v. Barford*, 4 M. & S. 10 (1815). It is not strange to find the ecclesiastical courts thus influenced by the Civil Law, see *Shepherd v. Shepherd*, note to 5 T. R. 51, but we have seen how in *Marston v. Fox*, *supra*, the entire bench of common law judges at Westminster approved the doctrine. And American cases and statutes have generally followed the English. *Baldwin v. Spriggs*, 65 Md. 373, *Durfee v. Risch*, 142 Mich. 504, *McLarney's Estate*, 153 N. Y. 416.

The question was fully considered by the Supreme Judicial Court of Massachusetts in *Ingersoll v. Hopkins*, 170 Mass. 401. The court erroneously cites *Goods of Cadywold*, *supra*, as authority for the English interpretation of the Statute of 1 Vict., passed nine years after the Cadywold will was made, and holds that under the Massachusetts statute a will made in contemplation of marriage is revoked by realizing on that contemplation, and that the Massachusetts statute, which, unlike the English, provides for an exception if "it shall appear from the will itself that the will was made in contemplation of such marriage," requires that this contemplation shall appear on the face of the will, and all evidence not derived from the will itself is excluded. On this it may be remarked, 1. That the Cadywold case cited is no authority as to a will under 1 Vict., 2. That the only other case cited as interpreting the English statute, *Otway v. Sadleir*, 33 L. T. 46, was an Irish case also reported in 4 Ir. Jur. N. S. 97, in which the Irish court said, "I cannot introduce any qualification into the 18th Section which I do not find in the Statute." This

rule of interpretation, if it had been followed in *Marston v. Fox*, would have forbidden any revocation by presumption under the Statute of Frauds. It may be noted in passing that Wills, Part VIII, p. 562 of the Earl of Halsbury's *Monumental Laws of England*, vol. 28 (1914), lays down the same construction of the statute, and cites only these two cases, *Goods of Cadywold*, *supra*, which is no authority for a will under the Act 1 Vict., and this Irish case. On turning to the list of contributors it appears that Part VIII was contributed by the late Irish Master of the Rolls, and a member of the Irish bar. They have, of course, interpreted the Statute as Parliament must have intended, but with results that are quite absurd when the will, like the Cadywold will, gives all to the wife and children. We may agree with Sir C. Cresswell, that not only at first sight, but at every other sight, this result seems, not only rather but altogether startling. The positive language of Parliament in 1 Vict. may require this conclusion as to wills made after Jan. 1, 1838, but in Massachusetts the courts have not that defense, for, 3. the Massachusetts statute does not apply this rule of revocation when it appears from the will itself "by fair inference from its provisions as applied to the parties and the subjects to which it relates, that the will was made in contemplation of the marriage that was subsequently solemnized," to use the paraphrase of the trial judge who had upheld the will. The high court found it must "appear" on the face of the will. The fact that the will gave to the contemplated wife all the property and made her one of the executors was not enough, because it required evidence outside the will to show that a will giving all to Mary Alice Payson, who within a year became his wife, was made in contemplation of marriage. This was a strict and narrow construction, and in its results so absurd as to defeat the obvious intent of the statute without furnishing a single safeguard against fraud. It is always necessary to go outside the will to determine the identity of devisees and legatees. A gift to my only son, John, requires evidence *aliunde* to identify John. The fact that a man gives all his property to Mary Alice Payson, "single woman," ought to be appearance enough on the face of the will to prevent his marriage to her soon after from defeating his purpose in making the will. It is suggested in *Francis v. Marsh*, 54 W. Va. 545, that a man can always prevent this result by republishing the will after marriage. This, however, is cold comfort to the wife whose husband has died in ignorance of any such absurd requirement of the law. We remark on this case, 4. That fortunately the cases are few where the testator would fail in his will to make some reference to his intended marriage. There seems to have been no case in Massachusetts since *Ingersoll v. Hopkins* (1898), and that case has never been cited on that point in any other jurisdiction. This is in part at least due to the fact that the wording of most statutes would not permit such a result, the Michigan statute, to take one instance, providing in express terms for "revocation implied by law from subsequent changes in the conditions and circumstances of the testator." If we may judge what the Michigan court would do from its language in a late case under this Statute, *Durfee v. Risch*, 142 Mich. 504 (1905), we may conclude it would follow *Marston v. Fox* and not *Goods of*

Cadywold. This language is, "The reason of the law is the essence and soul of the law."

In threading this maze of errors this note is already too long. It may close without further notice of the present state of the law as to the revocation of wills by marriage, than a reference to two recent cases reviewing the subject, *Hoy v. Hoy* 93 Miss. 732, and annotations in 25 L. R. A. N. S. 182 (1909), *Herzog v. Trust Co.* 67 Fla. 54, Ann. Cas. 1917 A 201, and annotations p. 203. E. C. G.

ALIENATION OF CONTINGENT REMAINDERS. The recent case of *Bisby v. Walker*, 169 N. W. 467, decided by the Supreme Court of Iowa November 23, 1918, is an interesting instance of an all too common lack of appreciation and understanding of the very fundamentals of property law.

Under the will of her grandfather B became entitled to a contingent remainder (at least the court treated it as such) in certain lands; the contingency upon which her taking depended was her being one of the surviving children of her mother at the time of the death of the life tenant, the testator's widow. During the continuance of the prior estate and therefore while her remainder was contingent B executed several mortgages, some describing the mortgaged property by metes and bounds and some as all her "right, title, and interest" in the devised lands. These mortgages all contained covenants for title or recitals indicating an intention to convey "absolute title in fee simple." While the remainder was still contingent and after the execution of all of the mortgages but one B went through bankruptcy and received the usual discharge. It was held, undoubtedly correctly so, that the mortgages were enforceable liens upon B's interest in the devised lands after the death of the life tenant, B having survived her.

At common law contingent remainders being considered in the nature of mere possibilities (see *Fulwood's Case*, 4 Co. 64b, 66b; *Lampel's Case*, 10 Co. 48 a) were deemed incapable of alienation by a conveyance at law, "otherwise than by way of estoppel by fine (or by a common recovery, etc.);" FEARNE, CONTINGENT REMAINDERS, *p. 537. As to the operation of estoppel in these cases see *Doe d. Christmas v. Oliver*, 10 B & C, 181. If, then, in Iowa contingent remainders such as B had in the principal case are incapable of conveyance except by the operation of an estoppel, it was necessary for the court to consider whether the mortgage deeds were such as to raise an estoppel and the effect thereon of a discharge in bankruptcy. Considerable space is taken up by the court in concluding that the mortgage deeds were such as to raise an estoppel. It is then concluded that the discharge in bankruptcy did not affect the inurement of the after acquired title, though no attention is given to the exceedingly interesting and nice point argued by PROFESSOR GRAY and disposed of by Mr. JUSTICE HOLMES for the court in *Ayer v. Philadelphia & B Face Brick Co.*, 159 Mass. 84. The bankruptcy discharge, so it was said, could not affect the mortgagee's rights, for the mortgage liens had fastened upon the property more than four months prior to the petition in bankruptcy!

Contingent remainders in England were made alienable by 8 & 9 Vict. c 106 (1845) the provision being a sweeping one. It is provided that "a contingent, an executory and a future interest, and a possibility coupled with an interest *** whether the object of the gift or limitation of such interest or possibility be or be not ascertained *** may be disposed of by deed." In this country statutory provisions to the same effect though generally not so explicit are common. See STIMSON, AM. ST. LAW, §1420. In Michigan the provision, essentially the same as in New York, provides that "Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession." HOWELL'S STATS. (2nd ed.) 10657. The remarkable thing about the principal case is that in Iowa it has been settled that the statute providing that "Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used," enables a contingent remainderman to make effective conveyances of the remainder. This was settled in *McDonald v. Bank*, 123 Iowa 413, in which the remainders in question were contingent in the same way as in the principal case. The *McDonald* case was cited by the court at the outset, with the statement that "The mortgages, then, were valid when executed," which statement of course is in keeping with the observation, referred to above, that the discharge in bankruptcy did not displace the pre-existing liens created by the mortgages. Without realizing that they had thus decided the case in the first two sentences stating the law applicable to the facts, the court went on to a consideration of the matter of inurement of after acquired title apparently being led astray by several earlier Iowa cases, which are cited, in which the question of inurement by estoppel was vitally important for the reason that the conveyances or mortgages were made at a time when the grantor or mortgagor had no interest in the premises, not even a contingent remainder.

It is held where contingent remainders are alienable that a mortgage thereof may be foreclosed even before the contingency is determined. *Peoples' Loan and Exchange Bank v. Garlington*, 54 S. C. 413. And this would seem entirely proper.

R. W. A.

WITNESS—COMPETENCY OF AN ALLOPATHIC EXPERT IN THE FIELD OF HOMŒOPATHY—OPINION ON VERY FACT THE JURY MUST DETERMINE. *Van Sickle v. Doolittle*, (Ia., 1918), 169 N. W. 141, was an action for malpractice against a physician of the homœopathic school of medicine. Upon the trial, a physician of the allopathic school was called, and after testifying that he was unskilled in the science of homœopathy, was allowed to testify that the treatment shown to have been given to the patient by defendant, would produce no physiological effect, and that proper treatment required the giving of such medicines as would produce such effect. This was held error upon the ground that the defendant was called to treat the patient as a homœopathic physician and that his only obligation was to exercise such care and skill as was common to practitioners of that school of medicine, and the witness having been shown to be unskilled in the science of medicine as practiced by that school, was not qualified to speak as expert in the field in-

volved. This would seem to be the only ruling which would avoid a fruitless controversy in the court room between two schools of medicine whose apostles would hesitate to agree on so simple a proposition as that the normal man has one and not two livers.

It doubtless is one answer to such an action that the patient got what he asked for, if he got treatment according to the standards of the school to which the practitioner called belonged, and cannot complain that the result was not what he had hoped, and the court seems to have adopted this view.

But suppose the patient at the time of the treatment is *non compos mentis* and cannot make the request for treatment; that the physician, discovering his condition, gives the treatment out of a spirit of humanitarianism only, and the patient recovering, brings his action to recover for claimed malpractice. Would he be entitled to recover, if he could satisfy a jury that the care and skill exercised was not that common among practitioners of medicine in that community? Would it be enough to defeat such action that he did exercise that measure common to practitioners in his particular school, that of homœopathy? Does the liability depend at all upon the fact that in the one case the patient engaged for homœopathic treatment and got it, and in the other did not, and got it? Unless the physician is to be penalized for acting on his humanitarian impulses it would seem reasonable to conclude that if the physician used the care and skill common to practitioners of a school which the law recognizes and licenses, he should be held harmless. The record does not indicate that the Good Samaritan's nostrum was diluted quite to the extent of that shown to have been used in this case, but he seems not only, not to have been condemned for his act, but to have been considered worthy of imperishable memory.

One paragraph of the opinion reiterates the fallacious doctrine that an expert witness cannot express an opinion upon the very question which the jury must determine by its verdict. Why not? That the only question a jury has to determine in a particular case is whether fact X exists has never been thought to be a good objection to the testimony of A, who has had opportunity to personally observe whether it does exist, that it does or does not exist. His testimony is received because it has a tendency to assist the jury to a correct determination of the question at issue, that of the existence of fact X.

For precisely the same reason should we say, that if the jury after having heard the testimony as to what were the circumstances accompanying the death of A and finding what they were, is unable to tell what these conditions mean, it is proper to call one who is able to say that they mean that A died of typhoid fever, or that he died of arsenical poisoning, as the case may be? As in the previous case the testimony is taken because it furnishes just the information the jury lacks. *Fenwick v. Bell*, 1 C. & K. 312; *Poole v. Dean*, 152 Mass. 589; *Snow v. R. Co.*, 65 Me. 231; *Littlejohn v. Shaw*, 159 N. Y. 188; *Western Coal & M. Co., v. Berberich*, 36 C. C. A. 364. V. H. L.