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Decedent Estate Law § 27--Validity of Bequest to Subscribing Witness

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CURRENT LEGISLATION

DECEDENT ESTATE LAW § 27—VALIDITY OF BEQUEST TO SUBSCRIBING WITNESS.—Under common law, a will was void where a subscribing witness was a legatee and the will could not be probated without his testimony.[1] Naturally, great hardship resulted from this strict rule. Relief from this hardship was obtained through statutory enactment, which deprived the witness of his interest, thus making him competent to testify and the will good.[2] But although such provision allowed the will to be probated, the subscribing witness, who was a legatee, was in no better position than he was before. Subsequent legislation added a saving clause to the statute by providing for those who would have been entitled to an intestate share of the estate, had there been no will.[3]

By its express words, the statute makes void a bequest to a subscribing witness where such will could not be proved without this testimony.[4] By judicial decisions, it was determined that the statute would not apply where there were three subscribing witnesses who were legatees. In such a case, the testimony of only two being necessary to prove the will, the legacy would be saved to the third witness.[5] Furthermore, a legacy to a subscribing witness would not be void, even though he testified, if the will was provable without his testimony.[6]

In 1941, the Court of Appeals rendered a decision which made it quite apparent that the statute was not so effective as it might be.[7] In the case noted, a testatrix bequeathed a business to her employees. Both of the subscribing witnesses to the will were employees. Thereafter, one of the witnesses left this state and resided in another until after the will had been admitted to probate. There is no doubt that

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[1] *In re* Smith's Estate, 165 Misc. 36, 300 N. Y. Supp. 1057 (1937); Matter of Dwyer, 192 App. Div. 72, 182 N. Y. Supp. 64 (4th Dep't 1920).

[2] 2 R. S. p. 65, § 50.

[3] DEC. EST. LAW § 27. ". . . But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them."

[4] DEC. EST. LAW § 27. "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 said will, in like manner as if no such devise or bequest had been made. . . ."

[5] *In re* Tactkian's Estate, 109 Misc. 519, 179 N. Y. Supp. 188 (1919); *In re* Owen, 48 App. Div. 507, 62 N. Y. Supp. 919 (2d Dep't 1900).

[6] *In re* Owen, 48 App. Div. 507, 62 N. Y. Supp. 919 (2d Dep't 1900).

[7] Matter of Walters, 285 N. Y. 158, 33 N. E. (2d) 72 (1941).

her purpose in leaving the state was to avoid testifying and to save the legacy to herself. The will was admitted to probate on the testimony of one witness, testimony of the other having been dispensed with as provided by law.[8]

The argument of the witness seeking her legacy, was that since the will actually was admitted to probate without her testimony, it cannot be said that the will could not have been admitted without her testimony. Thus, the bequest to this witness should be upheld. Surprisingly enough, the Court of Appeals reversed the holding of the Surrogate Court and the Appellate Division on that point, and held the devise to said witness to be good.[9]

The trouble with this reasoning is that it tests the validity of the legacy by what actually did happen, rather than by what might have happened. The dissenting opinion points out, that since, when first offered, the will could not have been probated without the testimony of the two witnesses (both were then present in the state), the legacy to both was void. Such void legacy could not become validated by the subsequent act of the witness in leaving the state.[10]

The unfairness of the majority opinion is manifest. Under this decision, one witness profits by acts which were performed with a view toward evading the ordinary process of the law. On the other hand, the witness who has aided the administration of justice, must pay the price of his legacy. The net result is that one who is so fortunate as to have money and time enough to enable him to absent himself from the state until the need for his presence is gone, reaps a benefit.

Such a situation does not appeal to any sense of justice. The legislature, however, was not long in coming forth with a remedy. This year, the statute was amended by inserting a new second paragraph.[11] The statute now provides that a legacy to a subscribing witness shall be void unless there are two other subscribing witnesses to the will who are not beneficiaries thereunder.[12]

Although there are, as yet, no judicial decisions applying the amended statute, there would seem to be little room for doubt. The statute was designed to prevent the situation involved in *Matter of*

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[8] SUR. CT. ACT § 142. This section provides that whenever, by reason of death, absence from state, or incompetency, the testimony of a subscribing witness cannot be obtained, the surrogate may dispense with such testimony and the will may be admitted to probate on the testimony of one subscribing witness.

[9] See note 7, *supra*.

[10] *See* DESMOND, J., dissenting in Matter of Walters, 285 N. Y. 158, 33 N. E. (2d) 72 (1941), at 163.

[11] N. Y. Laws 1942, c. 622.

[12] DEC. EST. LAW § 27. ". . . Except as hereinafter provided in this section no subscribing witness to a will shall be entitled to receive any beneficial devise, legacy, interest or appointment of any real or personal estate thereunder unless there are *two other subscribing witnesses to the will who are not beneficiaries thereunder*. . . ." (Italics mine.)

Walters, discussed above, from ever arising again.[13] The statute, as it now stands, also embraces a case where there are three subscribing witnesses who are legatees. Even in such a case, a witness would not be protected, for the statute demands two other subscribing witnesses who are not beneficiaries. The statute aims to provide equal treatment of all legatee-witnesses and its language seems clear enough to effect its purpose.

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ACTIONS TO BE COMMENCED WITHIN SIX YEARS

A legislative note on the present statute of the period of limitations in stockholder's derivative actions

A recently passed amendment concerning the rights of stockholders in derivative actions has thrown an entirely new light on what was heretofore a confused, ambiguous and indiscernible rule. This statute, a section of the Civil Practice Act, provides for a clear and satisfactory method of computing the time within which derivative actions may be brought under varying facts.[1] To better appreciate and understand the significance of this new rule let us briefly examine the earlier situation. Formerly, in determining the period of limitation several theories were advanced. The earliest and most adhered to was the *trust or equitable theory,* wherein the action was brought by the stockholder as trustor against the directors as trustees of the corporate property. In *Brinkerhoff v. Bostwick* [2] it was held that the director was the "guardian" of the corporate property and answerable and responsible to the stockholders for any misconduct. All trust

[13] Note of Commission, MCKINNEY, DEC. EST. LAW (1942) Supp. 49. ". . . The purpose of this amendment is to prevent the circumvention of the statute in the manner outlined in Matter of Walters (285 N. Y. 158, 33 N. E. [2d] 72). . . ."

[1] Section 48 (subd. 8, added by L. 1942, c. 851, in effect Sept. 1): *"Actions to be commenced within six years.* The following actions must be commenced within six years after the cause of action has accrued . . .

"Subd. 8. An action legal or equitable, by or on behalf of a corporation against a director, officer, or stockholder, or a former director, officer, or stockholder, if such action is for an accounting, or to procure judgment on the ground of fraud, or to recover a penalty or forfeiture imposed or to enforce a liability created by common law or by statute unless such action is one to recover damages for waste or for an injury to property or for an accounting in connection therewith in which case such action shall be subject to the provisions of subdivision seven of section forty-nine."

[2] 99 N. Y. 185, 1 N. E. 663 (1885).