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Testimony of Attorney in Probate of Will

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meet the requirements, of course only the future will tell. Apparently an attempt has been made to steer a middle course between those advocated by persons urging distinctly socialistic measures, and the attitude of the trusting conservatives who contend that if the guaranty companies had been left alone they would have been able to work out their own salvation with a minimum of loss to investors. In any event, the measures taken are both comprehensive and detailed.[42] Whether the creation of a mortgage authority or commission, as advocated during the past year, would prove more efficacious is now a dead issue, such measures having been defeated by the legislature.[43] Instead, it has seen fit to place the power and responsibility in the hands of the Superintendent of Insurance, subject to the supervision of the courts, and on his ability and integrity in the last analysis the final outcome of the situation depends.[44]

WESLEY DAVIS.

TESTIMONY OF ATTORNEY IN PROBATE OF WILL.—Exclusion of an attorney's testimony as to the circumstances surrounding the execution of his client's will proceeded from the intention of the courts to promote freedom of consultation for those who sought legal advice.[1] The conditions in which the rule had its genesis were discussed by the court in *Rochester City Bank* v. *Suydam*.[2] It was

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without regard to the restrictions as to whether or not the security constitutes a legal investment. Laws of 1934, c. 914. In addition, the Civil Practice Act now provides that the court may direct a receiver of rents appointed in a foreclosure action to apply the net rental received by him towards the payment of accrued interest on the mortgage. N. Y. CIVIL PRACTICE ACT §977-a, added by Laws of 1934, c. 911.

[42] Not mentioned hereinbefore, and typical of the details which have been considered and enacted into law, are the tax exemptions granted relative to the reorganization of the properties. Mortgages made by corporations formed pursuant to Real Property Law §121 or Insurance Law, art 12, as well as mortgages made to the Home Owners Loan Corporation, are exempt from the taxes imposed by art. 11 of the Tax Law. N. Y. TAX LAW §252-a, added by Laws of 1933, c. 311, as amended by Laws of 1934, c. 910; N. Y. TAX LAW §252, as amended by Laws of 1933, c. 785 and Laws of 1934, c. 455. Corporations formed for reorganization purposes under the Schackno Act are exempted from corporate taxes imposed by Tax Law §180. N. Y. TAX LAW §180, subd. 1-a, added by Laws of 1934, c. 454.

[43] Second Extraordinary Session, Senate Bill No. 11, Introductory No. 9; July 13, 1934; Second Extraordinary Session, Senate Bill Nos. 81, 120, 149, Introductory No. 70, Aug. 1, 1934.

[44] It is, of course, entirely possible that the next session of the Legislature will see a complete revamping of these laws and perhaps wholesale substitution of new measures. Most of the legislators-elect stated during the campaign that they favored "relief for mortgage certificate holders," whatever that may mean. Citizens Union Voters Directory, Vol. XXIV, No. 2, Oct., 1934.

[1] 2 GREENLEAF, EVIDENCE (16th ed. 1899) §243.
[2] 5 How. Pr. 254 (N. Y. 1851).

there said that in the early days when litigants conducted the prosecution and defense of their own causes, they could not, in the course of trial, be compelled to disclose facts exclusively within their own knowledge. When the conduct of suits became more complex and it was found necessary that lawyers transact the business of the courts, suitors entrusted them with such facts as were relevant to the case but within their own knowledge. "If the facts they communicated were liable to be extorted from the attorney or counsel, suitors would hesitate to employ them, to the great inconvenience of the court, and obstruction of judicial business." [3]

During his lifetime it is unquestionably the testator's desire that the contents, and perhaps the existence, of his will be kept secret. But it is also indisputable that he knows full well that its probate will be attended with some publicity and that both the will and the proceedings are destined to be matters of public record. It should follow that after his death his attorney should be permitted to disclose the circumstances affecting its execution and purpose. Such, indeed, was the rule at common law, if the purpose of the attorney's testimony was in support of the will.[4] No evidence tending to defeat the will, however, as lack of testamentary capacity or undue influence was admissible.[5] In Massachusetts this still appears to be the rule.[6] The Supreme Court of the United States has also retained the doctrine, holding that the testimony of the attorney who drew the will was admissible to prove the legitimacy of the testator's children. The court said, "How can it be said to be for his (the testator's) interest to exclude any testimony in support of what he solemnly proclaimed and put on record as his will?" [7]

The adoption of the Code of Civil Procedure in 1877 containing Sections 835 and 836 (now Sections 353 and 354 of the Civil Practice Act) was considered merely a codification of the common law principle.[8] The statute prohibited the disclosure of any communication made by a client to his attorney in the course of his professional employment,[9] but permitted the client to waive the privilege under prescribed conditions.[10] In 1888 the Court of Appeals decided that an attorney who witnessed a will and signed the attestation clause should be permitted to testify as to circumstances attending its execution.[11] The court based its ruling upon the theory that the testator

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[3] *Id.* at 256.
[4] Sanford v Sanford, 61 Barb. 293 (N. Y. 1872).
[5] Sheridan v. Houghton, 16 Hun 628, *aff'd*, 84 N. Y. 643 (1879).
[6] Dougherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726 (1892).
[7] Blackburn v. Crawfords, 70 U. S. 175, citing with approval the English case of Russel v. Jackson, 9 Hare 387 (Ch. 1851). But see Bullivant v. Attorney General for Victoria, (1901) A. C. 196, 206.
[8] Matter of King v. Ashley, 179 N. Y. 281, 72 N. E. 106 (1904); Hurlburt v. Hurlburt, 128 N. Y. 420, 28 N. E. 651 (1891).
[9] §835.
[10] §836.
[11] Matter of Coleman, 111 N. Y. 220, 19 N. E. 71.

had waived the privilege when he requested the attorney to sign. "He must have been aware that his object in making a will might prove ineffectual unless these witnesses could be called to testify to the circumstances attending its execution." [12] Professor Wigmore declares that this conclusion is not in harmony with the theory of waiver but rather with the view that the evidence was not intended to be privileged. "When the attorney is made a witness to attest *execution* of a document (and not merely to draft it) there is no confidence contemplated, and therefore no privilege for the occasion when the attorney is called upon to fulfill the function thereby assumed. He cannot be an attesting witness and yet not attest: * * *." [13] In accordance with this the legislature amended Section 896 in 1893 by inserting the sentence, "But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation or execution in case such attorney is one of the subscribing witnesses thereto." [14] This was nothing more than a restatement of the rule pronounced in the *Coleman* case [15] with the endorsement of legislative approval.

The courts have continued since to affirm the general rule thus provided, excluding the testimony of the attorney who drew the will unless he was a subscribing witness.[16] The amendment to Section 354 of the Civil Practice Act (enacted during the current year)[17] admitting such evidence is the first assault upon the citadel of the privilege since the adoption of the Code of Civil Procedure in 1876; because as we have already seen, the testimony of the subscribing witness cannot be regarded as privileged. Section 354 now reads as follows regarding this point: "But nothing contained in this section or in section 353 shall be construed to disqualify an attorney, or his employees, in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation or execution *whether such an attorney is or is not* one of the subscribing witnesses thereto. But such attorney or his employees, upon a trial or examination, shall not be permitted to disclose any confidential communications which would tend to disgrace the memory of the decedent."

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[12] *Id.* at 226.

[13] 4 WIGMORE, EVIDENCE (2d ed. 1923) §2315.

[14] N. Y. Laws 1893, c. 295.

[15] *Supra* note 11.

[16] Matter of Cunnion, 201 N. Y. 123, 94 N. E. 648 (1911); *In re* Williams' Will, 121 Misc. 243, 201 N. Y. Supp. 205 (1923); *In re* Carter's Will, 122 Misc. 493, 204 N. Y. Supp. 393 (1924); Matter of Eno, 196 App. Div. 131, 187 N. Y. Supp. 756 (1st Dept. 1921); *In re* Putnam's Will, 257 N. Y. 140, 177 N. E. 399 (1931).

[17] N. Y. Laws 1934, c. 305.

Since the New York courts do not "strain for probate" [18] the new rule will prove a welcome aid in expediting will contests here. The old formula has been severely criticized as having no basis in logic.[19] A testator who is insane or unduly influenced is necessarily unaware of either disability. It is imposing a great strain upon the language to say that he "communicates" the "fact" of such incompetency to his attorney, since he neither knows of its existence nor communicates it in confidence. Nor can it seriously be argued that the testator intends that facts which will clarify the meaning of his will should be kept secret. His very purpose in seeking the services of a lawyer is that his will be so drawn that his wishes cannot be disputed after his death. The conclusion is inescapable, also, that knowing that probate is impossible without due execution, he cannot wish the facts surrounding this act to remain undisclosed.[20] It appears not quite reasonable that his attorney's testimony should ever have been excluded.

LEON BRAUN.

POWER OF THE SURROGATE TO VACATE ORDER OF ADOPTION.—The legislature has belatedly recognized the inconvenience attending the restraint, by judicial rulings, placed upon the surrogate's powers denying him authority to vacate an order of adoption issued out of his court. An amendment to Section 113 of the Domestic Relations Law now specifically provides that "The Surrogate may open, vacate or set aside, an order of adoption for fraud, newly discovered evidence, or other sufficient cause, in like manner, as a court of record and of general jurisdiction exercises the same powers." [1] This legislation was found necessary in spite of the broad powers given the surrogate by subdivision 6 of Section 20, of the Surrogate's Court Act,[2] which permits him to "open, vacate, modify or set aside, or to enter as of a former time, a decree or order of his court." The former rule, forbidding the vacating of an order of adoption, or the setting aside of a consent to an abrogation of adoption, resulted from the Appellate Division's view that an adoption proceeding was administrative rather than judicial. "In both cases he (the surrogate), representing the public interests in domestic relations, is approving a contract, and his approval gives it the prescribed statutory effect, in the one

[18] Taft, *Comments on Will Contests in New York* (1921) 30 YALE L. J. 593, 606.
[19] *Cf.* 4 WIGMORE, EVIDENCE (2d ed. 1923) §2314.
[20] *Ibid.*

[1] Laws of 1934, c. 368, N. Y. DOMESTIC RELATIONS LAW, art. 7, §113, effective Sept. 1, 1934.
[2] Laws of 1920, c. 928, derived from §2481, N. Y. CODE OF CIVIL PROCEDURE.