St. John's Law Review

Volume 4
Number 2 *Volume 4, May 1930, Number 2*

Article 36

Qualification of an Attorney as a Competent Witness in Probate Proceedings

Sidney Moerman

> such former *methods* of filing, indicing, etc. Such a method of preservation seemed unsatisfactory, and old Section 64 was therefore expressly restored in 1925 in its present form. This restoration, however, did not serve as an amendment to Section 71 or as introducing a one-year period in New York City."

On the other hand, Judge Noonan in his opinion [6] felt that Section 71 was restricted in its application to counties outside of New York City by virtue of the Laws of 1925 which revived the old Section 64, and that it was necessary in the counties of New York City for the vendor to refile at the expiration of the first year.

From this labyrinth of confusion the new bill introduced promises much-needed relief. Aside from the fact that it would definitely settle the time necessary for refiling in the counties of New York City, it expedites the work of the frequently overburdened lawyer. Lawyers who have been called upon to search back three years for copies of conditional sales contracts on file in the register's office, can appreciate the benefits that would accrue if the new bill introduced—necessitating refiling in New York City at the expiration of one year—were to become law. The Legislature, in distinguishing between the counties of New York City and the rest of the state as to the time of refiling, perforce must have realized that the simplification of searches was to be desired in the densely populated counties of New York City. We cannot help but agree that a law which requires searches of the records for one year instead of three will save much time and effort to the busy lawyer, to whom time is usually of the essence.

JOSEPH A. SCHIAVONE.

QUALIFICATION OF AN ATTORNEY AS A COMPETENT WITNESS IN PROBATE PROCEEDINGS.—In order to foster and protect the relationship of attorney and client, the rule was established early in the common law, that confidential communications between attorney and client are privileged.

> "In ancient times, parties litigant were in the habit of coming into court, and prosecuting or defending their suits, in person. Subsequently, however, as law-suits multiplied, and modes of judicial proceeding became more complex and formal, it became necessary to have these suits conducted by persons skilled in the law and in the practice of the courts. This necessity gave rise, at an early day, to the class of attorneys; to facilitate the business of the courts, it was important that these men should be employed. But as parties were not then obliged to testify in their own cases, and could not be compelled

[6] Gimbel Bros. v. Brown, New York Law Journal, June 12, 1929 at 1301.

> to disclose facts known only to themselves, they would hesitate to employ professional men, and make the necessary disclosures to them, if the facts thus communicated were thus within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party." [1]

The prohibition against disclosure is not confined to communications made in contemplation or in the progress of a cause of action but applies to any matter which is the proper subject of the professional employment.[2] However, it must be intended by the client that the communications shall be confidential. If made in the presence of a third party or if the client himself disclose it, the privilege does not apply because the communication is not deemed to be made in professional confidence.[3] The essence of privilege which may be availed of by the client, lies in the intention on his part that the communication be regarded as confidential.

In the case of negotiations between attorney and a client who is making a will, the common law rule is that the attorney is prohibited from making disclosures during the lifetime of the testator, but after his death the attorney may testify as to matters tending to establish and support the will.

> "The reason for this exception to the general doctrine excluding confidential professional communications is that the rule is designed for the protection of the client, and it cannot be said to be for the interest of a testator, in a controversy between parties all of whom claim under him to have those declarations and transactions excluded which are necessary to a proper fulfillment of his will. Indeed, according to the view entertained by some courts, a client by requesting his attorney to draw his will impliedly asks him to do and say whatever might at any time and place be requisite for the purpose of establishing the integrity of the will, thereby waiving the protection of privileged communications and releasing the attorney from the obligation of secrecy." [4]

Under the common law in New York, this exception was accorded recognition without question and after the death of a testator

---

[1] Whiting v. Barney, 30 N. Y. 330, 332 (1864).

[2] Root v. Wright, 84 N. Y. 72 (1881).

[3] Rosseau v. Bleau, 131 N. Y. 177, 30 N. E. 52 (1892); People v. Buchanan, 145 N. Y. 1, 39 N. E. 846 (1895); Doheny v. Lacy, 168 N. Y. 213, 61 N. E. 255 (1901); Bauman v. Steingester. 213 N. Y. 328, 107 N. E. 578 (1915), where it was said at p. 333: "In such cases the attorney is permitted to testify not because the privilege has been waived, but because the communication, not having been made in confidence, was not privileged."

[4] 28 R. C. L. 551, 141 citing 17 L. R. A. (N. S.) 108.

the attorney who drew the will was permitted to testify as to its preparation and execution.[5]

When the Legislature of the state codified the common law on the subject no specific reference was made in the statute to cases involving testamentary instruments. In construing the enactment, the judicial opinion was that since no reference had been made in the statute to the exception, the Legislature intended to abolish it.

> "It is difficult to see upon a reading of the sections in question how any such idea (that said sections do not apply to testamentary dispositions) came to be entertained, because its language is positive and unequivocal, and makes no exceptions as to the class of cases to which they shall apply; and they must necessarily apply to testamentary cases as well as to any others, unless the plain provisions of the sections are to be repealed by judicial legislation. They require no construction but are plain and explicit." [6]

In the Coleman case, it is significant that the contestants to the will were attempting to introduce evidence by the attorney in order to establish insanity of the testator and undue influence. It is submitted that were the evidence offered in support of the will by the proponents, the Court would not have been so positive in its refusal to judicially legislate—remedial statutes often are construed liberally.

However, where the testator requested the attorney who drew the will to become a subscribing witness it was held that this constituted a waiver of the privilege, for the intent of the testator that the attorney should testify in the probate proceedings, was manifest.[7] Accordingly, in 1892 the statute was amended to read:

> "But nothing herein contained shall be construed to disqualify an attorney on 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 and execution in case such attorney is one of the subscribing witnesses thereto." [8]

With the passage of this amendment it was obvious that the Legislature meant to extend the rule of privilege to cases of testamentary instruments, except where the attorney became a subscribing witness. Little choice was left for the Court but to so hold,[9] and the rule so exists today in New York, contrary to that in most jurisdictions.[10]

---

[5] Sheridan v. Houghton, 16 Hun 628 (1880), *aff'd* 84 N. Y. 643 (1881); Sanford v. Sanford, 61 Barb. 293 (1872); Matter of Chase, 41 Hun 203.

[6] Mason v. Williams, 53 Hun 398, 400, 6 N. Y. Supp. 479 (1889).

[7] Matter of Coleman, 111 N. Y. 220, 228, 19 N. E. 71 (1888); *Cf.* Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874 (1888).

[8] Added by Ch. 514, Laws of 1892.

[9] Matter of Cunnion, 201 N. Y. 123, 94 N. E. 648 (1911).

[10] Including California, *In re* Dominicis Estate, 151 Cal. 181, 90 Pac. 448 (1907); New Jersey, *In re* Veazey's Will, 80 N. J. Eq. 466, 85 Atl. 176 (1912); Iowa, where in spite of a similar enactment in the Code, it has been held that

The enactment of the proposed amendment to Section 354 of the Civil Practice Act would restore the rule of the common law as it existed before the first codification, by providing:

> "* * * But nothing contained in this section shall be construed to disqualify an attorney or his employees in the probate of a will * * * from becoming a witness as to its preparation and execution, *whether such attorney is, or is not, one of the subscribing witnesses thereto,* * * *."

When a client executes a will it is undoubtedly his intention that the execution and especially the contents of the will be kept secret during his life. Obviously such an intent does not prevail after his death—it is his desire that the will then be established, published and its provisions carried out.[11] No one is in a better position to effectuate the desires of the testator than the attorney who drew the will. When the reason for the rule of privilege ceases to obtain, the application of the rule should cease. The state endows its citizens with the privilege of testamentary disposition. The burden of proving the proper exercise of the privilege is on the proponents of the will who thus represent the testator. Obstacles should not be placed in the way when there is no justification for their existence. However, the statute or its application should be qualified so as to apply only to those cases where the evidence to be adduced is in support of the will. Otherwise a dangerous weapon will be placed in the hands of unscrupulous attorneys who may be induced, by bribe or otherwise, to use the knowledge obtained through their position of confidence so as to favor interests detrimental to their erstwhile clients.

SIDNEY MOERMAN.

JURISDICTION OF NON-RESIDENT MOTORIST.—By the former provisions of Section 52 of the Vehicle and Traffic Law [1] it was provided that a non-resident operator of a motor vehicle or motorcycle should be deemed by such operation on a public highway in this state to have appointed the secretary of state to be his attorney upon whom summons might be served in any action against him, growing out of any accident or collision in which he might have been involved while engaged in such operation. Further details of the method of effecting such service were contained in the section. The constitutionality of a Massachusetts statute, similar to ours, was upheld by the Supreme Court of the United States in Hess v. Pawloski.[2]

---

testamentary cases are not included within the meaning of the statute; Iowa, Conway v. Rock, 139 Iowa 162, 117 N. W. 273 (1908); and in Arkansas the common law rule prevails despite a statute similar to the one in New York, Broadway v. Thompson, 139 Ark. 542, 214 S. W. 27 (1919). See cases collected in American Digest "Witnesses" Key 202 and 217.

[11] 5 Wigmore, Evidence (1923), Sec. 2314.

[1] Laws of 1929, Ch. 54.

[2] 274 U. S. 13, 47 Sup. Ct. Rep. 632 (1927).