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Article 18

Wills - Parol Evidence Admitted to Show Will Not Revoked by Subsequent Marriage

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position with respect to the numerous problems relating to civil liability arising generally from the violation of a statute, and those relating specifically to a statute similar to the one litigated in the instant case.[22] The court concluded, in affirming a judgment for the plaintiff, that the entire section viewed as a whole, was a public safety measure, the violation of which under the prevailing rule in the state being prima facie evidence of negligence. However, this, in itself, creates no liability because the injury must have a "direct and proximate" connection with the violation of the statute—to be determined by a jury—before liability will be imposed. It appears that this decision places Illinois among the minority of jurisdictions having adjudicated the question.

In conclusion, it is submitted that imposing civil liability upon the automobile owner, whether by virtue of his violation of an applicable statute or by common law negligence, is somewhat incongruous in light of the recognized principle of agency that when an automobile is used by one to whom it was loaned, for the borrower's purposes, the lender is not liable unless, possibly, where the lender knew that the borrower was incompetent and that injury might occur because of his incompetency.[23] Such civil liability as is imposed leads to the interesting result that if someone takes the owner's car with his permission, the owner escapes liability; if someone takes it without his permission in his absence, the owner is liable.

WILLS—PAROL EVIDENCE ADMITTED TO SHOW WILL NOT REVOKED BY SUBSEQUENT MARRIAGE

A few days prior to executing his will, testator proposed marriage to a Mrs. Allison. Married when the proposal was made, Mrs. Allison left for Reno, Nevada, where she was granted a divorce, marrying testator the day the decree was granted and returning with him to Illinois where they lived until his death in 1953. Reversing an order of the County Court refusing probate to the will on the ground that it was revoked by testator's marriage, the Circuit Court held that the divorce decree was void for want of jurisdiction, that testator's marriage was of no effect, and that the will was therefore not revoked. Testator's son, who received one-fourth of the estate, appealed to the Supreme Court of Illinois, where it was held that while the marriage was valid, it did not revoke the will.[1]

[22] Ill. Rev. Stat. (1955) c. 95½, § 189; note, however, that this section does not have the exclusionary language found in the Missouri statute.

[23] Weatherman v. Ramsey, 207 N.C. 270, 176 S.E. 568 (1934).

[1] In holding testator's marriage valid, the court rejected the contention that Mrs. Allison's divorce was null and void because of a lack of jurisdiction on the part of the Nevada court. It was held that the fact that Mrs. Allison's former husband was

The court said that the gift of one-half the estate to Mrs. Allison was made with the impending marriage to her in mind, that it was apparent that testator did not intend to have the will revoked, and that the statutory presumption of revocation because of a subsequent marriage was rebutted by virtue of the extrinsic evidence as to testator's intent. *In re Estate of Day*, 7 Ill. 2d 348, 131 N.E. 2d 50 (1955).

As it acknowledged, the court overturned several past decisions which held that the statutory provision that "[m]arriage by the testator shall be deemed a revocation of any existing will executed by the testator prior to the date of the marriage"[2] could only be avoided if the testator provided in the will for his change in status and indicated that the will was not to be revoked because of a subsequent marriage to a person named in the will.[3]

The court relied heavily upon the pre-statutory case of *Tyler v. Tyler*,[4] where it was held that marriage, "in the absence of facts showing an intention to die testate,"[5] revokes a will made prior to the marriage. In the *Tyler* case, it was asserted that the purpose of the rule was to follow the intent of the testator, and that it would apply only in "the absence of facts" indicating the testator did not intend to have the will revoked. Noting that prior to the statute, the presumption that marriage revokes a prior will could be rebutted by facts *dehors* the four corners of the will, the court in the *Day* case said that the legislature did not intend to change the law in this respect. Pointing out that the presumption was rebutted where a beneficiary was referred to in a will as "my intended wife,"[6] Mr. Justice Klingbiel, speaking for a unanimous bench in the *Day* case, asserted that there is "no logical reason why it should not be rebutted by clear and convincing evidence that the person named in the will is in fact testator's intended wife, even though such evidence does not appear by the terms of the will itself."[7] The court admitted that the purpose of the

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represented by his attorney and had an opportunity to contest the jurisdiction precluded any collateral attack on jurisdictional grounds in the courts of a sister state. Since the question of jurisdiction could not be looked into, it was decided that the decree must be given full faith and credit in Illinois. To support its position, the court cited: Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948).

[2] Ill. Rev. Stat. (1955) c. 3, § 197 (d).

[3] Among the overruled cases are: Kuhn v. Bartels, 374 Ill. 231, 29 N.E. 2d 84 (1940); Campbell v. McLain, 318 Ill. 610, 149 N.E. 481 (1925); Gillman v. Dressler, 300 Ill. 175, 133 N.E. 186 (1921); Wood v. Corbin, 296 Ill. 129, 129 N.E. 553 (1920); Ford v. Greenawalt, 292 Ill. 121, 126 N.E. 555 (1920).

[4] 19 Ill. 151 (1857).

[5] Ibid. at 155.

[6] Kuhn v. Bartels, 374 Ill. 231, 29 N.E. 2d 84 (1940) at 231.

[7] 7 Ill. 2d 348, 357, 131 N.E. 2d 50, 55 (1955).

legislature was to prevent artificial or questionable revocations, but observed that "it appears unreasonable to ascribe to the legislature an intention to declare that a revocation by marriage occurs even though it is evident the testator in fact made the will in contemplation of the marriage."[8] The court said that while evidence to rebut the presumption should be "clear and convincing,"[9] there was nothing in the statute requiring that such evidence appear on the face of the will.

The court thus interpreted the statute as raising a rebuttable presumption of revocation, rather than laying down a rule of absolute law which revokes all wills except those with clauses in them expressly saving them from revocation by mentioning the impending marriage and the intended spouse.

Several cases make plain the shifting attitude of the court in regard to this matter. In *Wood v. Corbin*,[10] the statute was treated as though it laid down an absolute rule. In that case, testator married two days after executing his will, leaving a substantial amount of his estate to the woman he later married. Testator and the legatee were engaged when the will was executed and there was an understanding between them as to its contents. Such facual matters did not deter the court as it stated: "It is mere conjecture to guess at what the intention of the testator may have been after the marriage. The statute has declared that a marriage shall be deemed a revocation of a will, and it must have that effect except in the case of a will which provides on its face for a future marriage and makes provision for the wife conditioned upon such marriage taking place."[11]

However, in *Ford v. Greenawalt*,[12] the court ruled that a will was not revoked where it provided that in case the contemplated marriage between the testator and a woman named in the will should occur and she should survive him, she should get certain bequests. It was declared that it would be unreasonable to ascribe to the General Assembly an intent to declare that a revocation by the testator takes place where he provides for the new relation and "plainly intends that the instrument shall continue to be his will after the marriage."[13] In *McAnnulty v. McAnnulty*,[14] after conceding that at common law evidence was admitted to rebut the presumption that marriage and birth of issue operated to revoke a prior will, the court asserted "[i]f the statute of 1872 is to have any effect at all . . . [it] must operate, per se, as a revocation of a prior will. . . ."[15]

The cases thus define the limits the court imposed upon itself whenever it adhered to the proposition that evidence to rebut the presumption of revocation must appear on the face of the will. They also record the

[8] Ibid.
[9] Ibid.
[10] 296 Ill. 129, 129 N.E. 553 (1920).
[11] Ibid. at 132 and 554.
[12] 292 Ill. 121, 126 N.E. 555 (1920).
[13] Ibid. at 126 and 556.
[14] 120 Ill. 26, 11 N.E. 397 (1887).
[15] Ibid. at 33 and 400.

vacillation that has characterized the court's efforts to arrive at a more tenable position.[16] It would seem, then, that any reasonable construction of the statute, as well as the rationale of some of the previous decisions, supports the result in the *Day* case, however reluctant they were to achieve a similar result.

In the first place, the chief purpose of the rule as applied at common law was to protect the testator's intention. This position is amply supported by the cases,[17] and by such celebrated authority as Chancellor Kent.[18] The statutory change of 1872 has been recognized as having adopted the principle, if not entirely the letter, of the common law rule. This was recognized in *Ford v. Greenawalt*,[19] where it was said that

> [t]he statute declares that a subsequent marriage shall be deemed a revocation of a will, which means that the act of the testator in entering into the new relation shall be considered . . . as a recalling of his will. . . . It is not improbable that the General Assembly had in mind . . . [the] lack of provision for the changed condition arising from a subsequent marriage and intended only to change the existing law by eliminating the condition that there should be no issue of the marriage.[20]

If the protection of the assumed intention of the testator is the reason for the rule, and if it can be shown by "clear and convincing"[21] evidence that the testator did not want the will revoked, what reason can there be for so holding it revoked when the statute declares a subsequent marriage shall only *be deemed* a revocation of a prior will?

In the recent case of *In re Estate of Kent*,[22] the court recognized the problem and in a sense anticipated the *Day* decision. Testator's will was held revoked because of his subsequent marriage when the statute in force read: "Marriage by the testator shall revoke any existing will executed by the testator prior to the date of the marriage."[23] There was an antenuptial agreement and other evidence indicating that the testator intended for his

[16] The inconsistency of some of the cases is noted in 35 Harv. L. Rev. 95 (1921).

[17] In Lugg v. Lugg, 2 Salk. 592 (1795), 1 Ld Raym. 441 (1792), it was said that marriage and the birth of children following the making of a will amount to "circumstances so different at the time of [testator's] death from what they were when he made his will, here was room and presumptive evidence to believe a revocation, and that testator continued not of in the same mind." See Brown v. Scherrer, 5 Colo. App. 255, 38 Pac. 427 (1894); In re Hulett's Estate, 66 Minn. 338, 69 N.W. 31 (1896); McAnnulty v. McAnnulty, 120 Ill. 26, 11 N.E. 397 (1887).

[18] Kent Comm. 522. "[T]here is not, perhaps, any code of civilized jurisprudence, in which this doctrine of implied revocation does not exist, and apply when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator."

[19] 292 Ill. 121, 126 N. E. 555 (1920). [20] Ibid. at 125 and 126.

[21] In re Estate of Day, 7 Ill. 2d 348, 357, 131 N.E. 2d 50, 55 (1955).

[22] 4 Ill. 2d 81, 122 N.E. 2d 229 (1954). [23] Ill. Laws 1939, § 46, p. 4.

will to remain in force after the marriage. The court ruled that under the statute then in force, marriage per se revoked the will, but asserted that under the present statute, including the words "be deemed,"[24] the legislative intent was to create a principle of "presumptive revocation."[25] The court said that if the testator "by some clear and positive act, being mindful of entering into a marriage, evinces an intention that his last will shall remain in force and effect," then the will would not be revoked.[26]

What was meant by "clear and positive act" was not set out, but it was not equated with the test requiring testator to show on the face of the will that it is not to be revoked. Thus, if under the statute not containing the words "be deemed" marriage is a revocation per se, then a statute containing the words "be deemed" should operate only as a presumption of revocation.

Because of the diversity of language existing in the statutes of the various states in regard to revocation of wills by a subsequent marriage, it is difficult to state exactly where Illinois stands in relation to those jurisdictions that have considered the problem. A number of the cases have held that where the will fails to mention the intended spouse of the testator or fails to indicate that it was made in contemplation of marriage, it is revoked as to the spouse.[27] Indeed, some courts have ruled that mention of the intended spouse in some other status without indication of the future relationship is sufficient to revoke the will.[28] However, there have been decisions which appear to support the position of the Illinois court in the *Day* case.[29]

Considering, then, the language of the Illinois statute, its present construction by the court recognizes the *raison d'être* of the act, and at the same time gives the statutory words their apparent value. It is conceivable that the certainty of the old decisions will be missed and that the test of "clear and convincing evidence" may prove troublesome. But few, it is hoped, will lament the passing of the anomalous situation where a single

[24] Statute cited note 3 supra.

[25] In re Estate of Kent, 4 Ill. 2d 81, 83, 133 N.E. 2d 229, 230 (1954).

[26] Ibid. at 83 and 230.

[27] In re Stark, 52 Ariz. 416, 82 Pac. 2d 894 (1938); In re Eustace, 198 Wash. 142, 87 Pac. 2d 305 (1939); In re Haselbud, 26 Cal. App. 2d 345, 79 Pac. 2d 443 (1938); In re Smith, 15 Cal. App. 2d 548, 59 Pac. 2d 854 (1936).

[28] Barlow v. Barlow, 233 Mass. 468, 124 N.E. 285 (1919); Ingersoll v. Hopkins, 170 Mass. 401, 49 N. E. 623 (1898); In re Scolpino, 231 App. Div. 690, 248 N.Y.S. 634 (2nd Dep't, 1931); In re Mosher, 143 Misc. 149, 256 N.Y.S. 235 (Surr. Ct., 1932); In re Bent, 142 Misc. 811, 255 N.Y.S. 538 (Surr. Ct., 1932).

[29] In re Adler, 52 Wash. 539, 100 Pac. 1019 (1909); In re Neufeld, 145 Misc. 442 260 N.Y.S. 302 (Surr. Ct. 1932); In re De Coppet, 142 Misc. 816, 255 N.Y.S. 544 (Surr. Ct., 1932), aff'd. 237 App. Div. 810, 260 N.Y.S. 990 (1st Dep't, 1932); In re Appenfelder, 99 Cal. App. 330, 278 Pac. 473 (1929).

sentence in a will had greater legal effect than a succession of undisputed utterances and acts by the testator which clearly evidenced his intention.

WORKMEN'S COMPENSATION–INJURY OCCURRING DURING PARTICIPATION IN INTRA-COMPANY SOFTBALL LEAGUE GAME HELD COMPENSABLE

Claimant sustained serious accidental injuries while playing softball with a team of company employees in an intra-company league competition game played after the hours of employment and off the employer's premises in a public ball park. At the request of the employees, the employer cooperated in the program by furnishing balls, bats, and T-shirts with the name "Jewel Food Stores" on the back. Team awards and trophies were presented by company executives at a special banquet held by the company. Information about the games was reported in the company publications distributed to the employees, and on the company operated FM radio station to the company stores before they were opened to the public. The Jewel personnel chief testified that the games were encouraged and used to promote the health, welfare, and happiness of the employees, a condition advantageous and desirable both for the employees and for the company because it furthered the joint effort. Participation in the league was voluntary and without pay, nor was there any time off granted from work for practice. The Superior Court of Cook County set aside an award entered by the Industrial Commission against the employer. On certiorari proceedings, the Supreme Court of Illinois, Justice Maxwell dissenting, held that the injuries were compensable as arising out of and in the course of employment within the meaning of the Workmen's Compensation Act. *Jewel Tea Company, Inc. v. Industrial Commission*, 6 Ill. 2d 304, 128 N.E. 2d 699, and 128 N.E. 2d 928 (dissenting opinion) (1955).

For an injury to be compensable under the usual Workmen's Compensation Act, it must "arise out of" and "in the course of" the employment. Since the phrases are used conjunctively, there must be a concurrence of both elements for an accident to be compensable.[1] The Act is not applied to every accidental injury which might occur to an employee during his employment, and the employer is not an insurer of his employees at all times during employment.[2] Each case is decided on its own particular circumstances.[3] The burden is on the plaintiff to show by positive evidence, or by evidence from which the inference can fairly and reasonably

[1] Dietzen Co. v. Industrial Board of Ill., 279 Ill. 11, 116 N.E. 684 (1917).

[2] Klug v. Indus. Comm., 381 Ill. 608, 46 N.E. 2d 38 (1943).

[3] Figgins v. Indus. Comm., 379 Ill. 75, 39 N.E. 2d 353 (1942).