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COMMENTS

IN RE WHITTIER'S ESTATE

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It is related of Daniel Webster that while engaged in argument before the Supreme Court of the United States he was interrupted by the Chief Justice with the comment: "That, Mr. Webster, is not the law" And Daniel Webster replied, in the grand tradition of advocacy which seems to have passed from among us: "It was, sir, until your honor spoke." That observation seems particularly apropos to In re *Whittier's Estate*,[1] which represents either a startling innovation in the normally placid field of Wills, or an unhappy contretemps from which one turns with embarrassment and the hope that everyone concerned will do better next time. It is the thesis of this comment that it is the latter, though that hope is somewhat dashed by the failure of the court to take advantage of a petition for rehearing to make amends.

[1] 126 Wash. Dec. 786 (Jan. 3, 1947), petition for rehearing denied, 127 Wash. Dec. 128 (Jan. 30, 1947) without opinion; 176 P (2d) 281. Page citations to the opinion which follow are all taken from the Washington Decisions report.

The case itself is simple enough, its issues few and sharply etched. The decedent, Mrs. Whittier, executed a will in 1937 which disposed of her entire estate. Five years later, at the age of eighty, she wrote in her own handwriting and signed a second instrument in the presence of the two witnesses who attested it at her request; in all respects its execution met the requirements of the statute. It read as follows:

"April 28, 1942.

I want Mrs. Irene Woodland to have all my household furniture and personal effects, my diamond rings and fur coat and rugs; dishes and silverware, and I also cancel the balance due me from her on the real estate contract on property for my share at 1419 and fourteen seventeen Boylston Ave., because she was so nice and did so much to make me happy after she bought my place.

Margaret Whittier.

Witness: Marian Boudreau
A. W Baker."

Though clearly competent at the time of executing the will of 1937, the passing years had so far taken their toll of Mrs. Whittier that when the 1942 document was offered for probate after her death it was contested on the grounds of mental incompetency, duress, and undue influence. There was presented to the court the usual distressing evidence of that decay which can make of old age such a dreadful thing, and after the cautious interval of a month the trial judge filed a memorandum opinion and entered an order "admitting the challenged document to probate as the last will and testament of the decedent, superseding the previously executed will to the extent that the two instruments were inconsistent, and directing the executor to distribute to the petitioner the property described by the latter document as offered by her."[2] From that order the executor appealed.

Aside from the matter of the possible violation by appellant of Rule 16, referred to with some passion in the dissenting opinion of Chief Justice Millard but with which we are not here concerned, it will be seen that only two issues are presented for decision. (1) was the trial court's ruling that Mrs. Whittier was competent supported by the evidence,[3] and (2) if so, was the challenged instrument entitled to probate. Thus it is with some bewilderment that we learn of the truly remarkable amount of consideration devoted by the court to the case; it was argued to a Department on January 22, 1946, reargued en banc on May 8, 1946, again reargued en banc on November 7, 1946, and an

[2] *Op. cit.* p. 787.

[3] This includes the duress and undue influence issues also which, as here, are normally isomeric with the issue of competency.

opinion finally handed down on January 3, 1947, followed by a denial of a petition for rehearing. It is only after a careful reading of the opinion that a realization of the reason for this comes to us: it was not the difficulty of making the decision, but the difficulty of in some fashion justifying it! That the attempt was unsuccessful should be apparent when it is examined in the light of what the writer of this comment still believes to be the existing law

THE QUESTION OF COMPETENCY

"After a careful consideration of the record before us," says the court,[4] "we will say that, had the trial court held that Mrs. Whittier was mentally *incompetent* to execute the document of April 28, 1942, we would have no difficulty in affirming such decision, for, in our opinion, Mrs. Whittier then and there lacked the necessary testamentary capacity" Thus the stage is set for rejection of the document on a familiar, technically sound, and unexceptionable ground; but the lines that follow are not the ones we expect. "However," the opinion continues, "the testimony is in sharp conflict, and the trial court resolved that conflict to the point of holding that Mrs. Whittier was mentally competent to execute the document as a testamentary instrument. For the purpose of this case, we will accept the decision of the trial court, upon the principle, expressed in *Pond's Estate v. Faust,* that 'the advantage of the trial court in hearing the witnesses and noticing their demeanor and candor, sympathy, or bias, while testifying is of more importance than usual, for the case practically hinges on the credibility and capacity of witnesses' "

No one can question the propriety and good sense of the rule referred to; so many of our usual tests of credibility are filtered out in the reporter's notes that one should be hesitant in rejecting the conclusion of the man who had the "advantage" mentioned. But, to paraphrase Lord Justice Bowen's famous statement,[5] the rule should be a counsel of caution rather than a canon of conduct. When the court is willing to say, with somewhat remarkable frankness, "that in our opinion Mrs. Whittier then and there lacked the necessary testamentary capacity," its acceptance of the trial court's findings in the teeth of that conviction represents an abrogation not only of the power but of the duty to reject them. It is true that in an action tried to the court the findings

[4] *Op. cit.* p. 797.

[5] He was speaking with reference to the "plain meaning" rule in *Re* Jodrell, L. R. 44 Ch. D. 590 (1890)

will not be disturbed unless the evidence clearly preponderates against them,[6] but it is obvious that here the requirement was met, else the court's opinion could not be so firmly expressed; surely, nothing short of a preponderance of the evidence would justify it. Here, ready at hand, was the politic peg on which to hang a reversal, for reasons which will presently appear, it is a matter for grave disappointment to the profession that it was not used.

THE QUESTION OF ADMISSIBILITY TO PROBATE

It must be apparent at this point in the discussion that the court has set for itself something of an Herculean task in defeating the contested document. A testamentary disposition, executed by a competent testatrix in a fashion meeting all the requirements of the statute—this is a problem of escape which would seemingly need the talents of a legal Houdini. Nor are they lacking; when the matter is *fait accompli,* when the magic words "the order of the trial court is reversed" are spoken, the reader is left with that same sense of awe mixed with incredulity which rewarded the great illusionist himself.

The first step in the process is the classification of the document as a codicil rather than a will. "The term 'codicil' is of ancient origin," the court begins,[7] and then, after quoting from Schouler, Page, and Corpus Juris, concludes: "Reading many cases on the subject enables and leads us to say that a codicil is an instrument of a testamentary nature, the purpose of which is to change or alter an already executed will by adding to and enlarging, subtracting from and restricting, or qualifying, modifying, or revoking the provisions of a prior existing will." This would of course make *any* subsequent testamentary disposition a codicil were it not that the court qualifies the definiiton by stating that the character of the document is dependent upon the intent of the testator. Here, since Mrs. Whittier intended the document to operate merely as a modification of and not as a substitute for the will of 1937, it is held to be a codicil. The conclusion seems innocuous enough—will or codicil, it should be entitled to probate, and since it is only partially inconsistent with the prior will, read with it for purposes of administration—but the deadly character of the label becomes clear when the final steps are taken.

[6] McLean v. Continental Baking Co., 9 Wn.(2d) 176, 185, 114 P (2d) 159, 162, and cases there cited.

[7] *Op. cit.* p. 798.

These consist in the application to what is now the codicil, of two unrelated rules: one taken from the probate code,[8] the other from a leading Washington case[9] involving primarily the competency of a legatee as an attesting witness to a will. It is the indecisiveness of the *coup de grace* which might be rather flamboyantly described as the vice of the opinion.

At its first session in 1854, the Territorial Legislature adopted a probate code which included among its provisions the following section:[10] "The term 'will,' as used in this act, shall be so construed as to include all codicils *as well as wills.*" In 1860, this was amended to its present form:[11] "The term 'will,' as used in this chapter, shall be so construed as to include all codicils *attached to any will.*" The purpose of the act of 1854 is reasonably obvious: out of an abundance of caution the legislature has provided a sort of dictionary to be used in construing other sections of the chapter having to do with execution. revocation, and the like. The purpose[12] of amendment of 1864 is esoteric in the extreme, but the *effect* of it, if given that urged by the appellant, is electrifying· no codicil not "attached" to a will is entitled to probate!

That section has been in effect eighty-three years; during that time at least some hundreds of codicils must have been admitted to probate with no questions raised as to its application.[13] Though this of itself does not invalidate appellant's contention, the failure of the courts aided by astute counsel in hotly contested cases to realize its possible significance over that long period of time is certainly persuasive, even though only in a negative fashion.[14] More important is the utter ab-

[8] REM. REV. STAT. § 1414.

[9] State *ex rel.* Schirmer v. Superior Court, 143 Wash. 578, 255 Pac. 960 (1927)

[10] Wash. Terr. Laws 1854, c. 7, § 49, p. 319.

[11] Wash. Terr. Laws 1857-1860, c. 2, § 41, p. 172. It is now REM. REV. STAT. § 1414.

[12] Possibly it was thought desirable in the situation of revocation by act to the instrument, under what is now REM. REV. STAT. § 1398 where the question is: does a revoking act to the codicil revoke the will, and vice versa. But even when "attached", the will and codicil are considered separate instruments for purposes of execution and revocation, and the intent with which the testator's act was done is everywhere controlling. "Attachment" is no guarantee against fraud for obvious reasons.

[13] It would be extremely difficult to find out how many. The issue could be raised only on a contest, and since it was never thought of, the physical facts which might present the problem would rarely and only incidentally appear.

[14] On a similar point, compare the language of Judge Hand in Sanday *et al.* v. United States Shipping Board Emergency Fleet Corporation, 6 F (2d) 384 (C. C. A. 2d, 1925) 42 A. L. R. 308: "One would suppose that, in the multitude of cases which have arisen over charters, some charterer would have sued for a

surdity of the result achieved by its literal application, of which no better example could be found than In re *Whittier* itself. "Attached," if it is to mean anything, must mean *physically* attached; this reduces the requirement to the purely mechanical and robs it of any conceivable significance. Any codicil in the hands of a person with the will and a stapling device could qualify, and by the same token removal of the "attachment" would destroy it. The testator's intent, declared decisive by statute,[15] would be put to hazard by geography,[16] by time, by the fortuitous presence of the codicil in unfriendly hands, or by his own or his attorney's business practices.

It is true that the court does *not* apply the section to In re *Whittier*, finding it "not necessary" to pass upon appellant's contention as to its effect;[17] but the court does display a disturbing reluctance to abandon it, indeed using it as a prop to support what is made the "controlling" basis for the decision. This is found in *State* ex rel. *Schirmer v. Superior Court*,[18] already referred to as the leading Washington case on the competency of a legatee as an attesting witness. The point relied on here is barely mentioned in that opinion, one sentence being devoted to it; in fact, before it could be built up to "controlling" authority status it was necessary for the court in the *Whittier* case to have "recourse to the record therein for a fuller ascertainment of the exact facts,"[19] and it is doubtful if that recourse was markedly profitable. A Mrs. Waigall made a will in 1924, in 1926 her grandson, plaintiff in the action, hired one Nethercutt to draw another will for her which "cancelled" the first, and after making certain bequests, left one half of the residue of a considerable estate to her daughter Katie, and the other half to Schirmer, who was named executor.[20] By some incredible mischance, Nethercutt had himself and Schirmer sign as witnesses to

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breach under such circumstances as those at the bar. Perhaps it is legitimate to suppose, as the books used more frequently to say in the past, that the *absence* of any such claim indicates that nobody suspected such an action would lie. At any rate we have no doubt that the learned judge was right and that the libelants have no cause of suit."

[15] REM. REV. STAT. § 1415: "All the courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them."

[16] Suppose testator's will is in Washington and he executes a deathbed codicil in California; if otherwise valid, should it fail for lack of ante- or post-mortem "attachment"?

[17] *Op. cit.* p. 800.

[18] *Supra* note 9.

[19] *Op. cit.* p. 800.

[20] The facts recited are taken from the *Whittier* opinion, *op. cit.* p. 800 ff.

the will, thereby providing the major controversy Sometime thereafter, Mrs. Waigall executed a codicil in the presence of the same witnesses; though it was labelled "Codicil," and referred to "said will heretofore mentioned," the indefatigable draughtsman failed therein to mention any other will whatsoever, merely providing that of the property already willed to Katie, only the income was to be paid her, the principal being held in trust by the executor until ten years after Mrs. Waigall's death. As the court puts it in the *Whittier* case, that "codicil, though designated as such, was never attached to the will, but was kept separate and apart therefrom";[21] can this be one of the "exact facts" garnered by the "recourse to the record," bolstering the somewhat wraithlike importance of Section 1414? In any event, when the codicil was offered with the will of 1926 for probate it was rejected, a ruling affirmed on appeal with these words:[22] "The so-called codicil to the will is not in this case connected with the will in any way sufficient to identify it, and its rejection was therefore proper." From this molehill grew the mountain of In re *Whittier* It is not clear what "connection" the court had in mind; certainly the change in the scheme of Katie's gift referred clearly to that made in the will, of which there was only one, and the "identification" problem seems simple enough. if it means identification of the codicil, the witnesses could establish that, and if of the will, a modicum of ingenuity in comparing their terms should have been sufficient. It will hardly do to say there might have been *another* will, since the court had already decided that the one of 1926 was entitled to probate, hence was the "last" will of the testatrix, which is to say the only one. If the codicil was insensible when read in connection with the will, that would properly be a question of construction and not of admission to probate. In short, neither the writer of this comment nor the court in the *Whittier* case has been able to think of a rational justification for the *Schirmer* rule. The books are barren of authority in support of it[23] as is sufficiently indicated by the failure to cite a single case after what must have been a rather desperate search. The only mention in the cases of any requirement of reference by

[21] *Op. cit.* p. 801.

[22] From the *Schirmer* opinion, *supra* note 9 at p. 581. This is the only reference to the problem in the opinion.

[23] This is believed to be literally true; curious about the lack of citation in the *Whittier* opinion, the writer satisfied himself as to the reason for it. Among other reasons, the case is unique in the sense that it seems not to be supported by a shred of authority unless the *Schirmer* case is counted, which is lifting oneself by his bootstraps.

codicil to will has nothing to do with admissibility to probate but with quite different matters: incorporation by reference and the related doctrine of republication.

One further matter should be mentioned before we may sit back and hope that In re *Whittier* will be overruled: the unfortunate refusal of the court to settle the effect of Section 1414. True, it found it "not necessary" to decide, but the language in the concluding paragraph of the opinion is disturbing.[24] "Since the codicil in this case was neither *attached* to the will nor made any reference whatever to it, the *Schirmer* case is controlling, and the document was therefore not entitled to be admitted to probate." The opinion itself italicized the word "attached," the precise requirement of the statute and not a part of the *Schirmer* rule at all; does this mean that the court is committed to the attachment rule? Is reference enough, or must both reference and attachment exist to win probate for a codicil? At least half of the quandary could have been avoided had the court chosen to take a stand. Either Section 1414 is applicable and decisive or it is not, and it is a matter of real consequence to the profession to know Perhaps it was not necessary to decide the question for the purpose of disposing of In re *Whittier*; if so, it should not have been used as an additional, or at least a make-weight argument for the result. An opinion has a precedent-making function which is at least as important as its function of disposing of the case itself, and such temporizing, albeit only a careless choice of words, compounds confusion.

[24] *Op. cit.* p. 802.

RECENT DEVELOPMENTS UNDER THE DEAD MAN STATUTE

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The "Dead Man Statutes" of the several states, which exclude testimony by interested parties in certain cases, stand in the unique position of being condemned by all the modern writers on the law of evidence.[1] Yet this exception to the abrogation of the common law rule against testimony by interested parties still survives in the majority

[1] Wigmore attacks it with characteristic vigor: "As a matter of policy, this survival of a part of the now discarded interest-disqualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." 2 WIGMORE, EVIDENCE (3d ed. 1940) 697, § 578.