

14217

No. \_\_\_\_\_

# Supreme Court of Illinois

Hesterberg et al

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vs.

Clark et al

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IN THE  
 SUPREME COURT OF ILLINOIS.  
 SOUTHERN GRAND DIVISION.  
 November Term, A.D. 1896.

HENRY HESTERBERG et al., )  
 Appellants. ) Writ of Error to  
 vs. )  
 MARY A. CLARK et al., )  
 Appellees. ) Monroe County.

OPINION by Carter, J.

*Defendants in error*

Appellees filed their bill in chancery in the Circuit Court of Monroe county, to set aside the will, and the probate thereof, *deceased.* of Thomas Mathews. The bill alleged that the testator was of unsound mind and memory; that <sup>*the execution of the will*</sup> ~~it~~ was procured by falsehood, misrepresentation and undue influence of the devisees, and that it was not the will as made and executed by the testator as and for his last will, (but was fraudulently presented <sup>*and for an*</sup> ~~and for an~~ instrument in writing which he had executed purporting to be his last will and testament.

The facts are briefly these: On February 13, 1895, the testator, desiring to make his will, sent for one Powderly, a school teacher, and Thomas J. Mathews, his grandson, and by the direction of the testator, Powderly wrote the will when they were all together, and it was then and there signed by the testator, and, as witnesses, by Powderly and

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Thomas J. Mathews, as required by the statute. As executed the will contained eight paragraphs, dividing the testator's estate <sup>among</sup> between his wife, Margaret, and his <sup>sons</sup> children, Francis Mathews, Thomas Mathews, Jr. and Joseph Mathews, with legacies each of his six to ~~his~~ daughters. There was also a paragraph numbered "lastly," appointing Henry Hesterberg as executor. Two days after this will was executed, the testator again sent for the two witnesses, and Powderly, at his request and in his presence and in the presence of the other witness, inserted in the instrument, after the eighth paragraph, the following:

¶ Ninth — In addition to what I have already bequeathed to my beloved wife, I give her all the wheat I have in the granary, excepting, however, enough to pay my taxes due in the year 1895."

¶ The will was not again signed by the testator or the witnesses, and no note or memorandum of the addition was endorsed on the will. Powderly testified that the testator said,

"I should witness that he wanted to give his wife that much extra in addition to what he gave her beforehand," but that he did not ask them to sign again. He died a few days thereafter. ~~That appellant Hesterberg~~ The plaintiff in error, Hesterberg, as executor, was made one of the defendants to the bill, and he alone has prosecuted this writ. He answered the bill, denying its allegations, but the other defendants, except the infants, suffered default. When the cause came on for hearing

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the defendants, who were the proponents of the will, offered no evidence, but the complainants introduced the original

will and probate thereof, <sup>with the certificate of proof taken in the County Court, also examined</sup> and ~~the testimony of~~ the subscri-

ing witnesses. The witness Powderly was the only one interro-

<sup>in the Circuit Court</sup> gated respecting the testator's mental capacity. He testified:

"His mind was as clear <sup>+</sup> <sup>+</sup> <sup>+</sup> ~~gentlemen of the jury~~, as my mind or your mind. <sup>he</sup> was as clear as any man was, in my mind."

On motion of the complainants, the court instructed the jury to find that the instrument was not the last will of said Thomas Mathews, deceased. The jury rendered their verdict accordingly, and a decree was entered in conformity therewith, and that the said will and probate thereof be set aside and held for naught.

The first contention of defendants in error is, that the principal defendants below, the widow and two sons, <sup>the</sup> chief beneficiaries, by their ~~their~~ default, admitted all the material allegations of the bill, and that the executor has no such interest in the litigation as would authorize him to appeal or prosecute a writ of error, and counsel cite Shaw v. Moderswell, 104 Ill. 64, and Moyer v. Swygart, 125 Ill. 276. These cases decide that the executor, if pursuing the personal interests of devisees by his appeals to the courts, must look to them for his costs if unsuccessful, and cannot charge the estate. As he was named executor by the will, he was

(Administrators act, sec. 2.)

interested in sustaining it. He was made defendant to the bill and issue had been made on his answer, and we see no reason why, subject to the contingency of having to pay the costs like other suitors, he would not have the right to bring

the record here for review. *It was his duty, under the statute, to cause the bill to be proved and recorded (Sec. 2 Act Stat. title Administration). It had been set aside in a suit to which he had been made defendant. He had the undoubted right to leave the error, if any, corrected on appeal or writ of error.*

*Defendants in error*  
¶ Appellees, next contend that as the defendants below offered no evidence, they failed to establish a prima facie case, and, therefore, ~~not~~ the instruction of the court to the jury was proper. This contention is without force, for the reason that the complainants themselves furnish<sup>ed</sup> the proof which they now claim should have been made by the defendants below. By offering the evidence themselves, they waived the advantage which they now seek to take. The complainants put in evidence the will and the certificate of the oaths of the witnesses in the Probate Court, besides the testimony of the subscribing witnesses, and thereby established a prima facie case for the proponents of the will. Holloway v. Gallo-way, 51 Ill. 160; Carpenter v. Calvert, 83 Ill. 62; Pendley v. Eaton, 130 Ill. 69.

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*defendants in error*  
¶ The next contention of appellees is, that the decree should be sustained because <sup>the will</sup> ~~it~~ was never legally executed, there having been no re-attestation of the instrument, as it is

claimed, after the insertion, by interlineation, of the ninth clause. Under the rule laid down by the authorities, the insertion of the ninth clause after the execution and attestation of the will did not work a revocation of the will or render it invalid as originally executed. In Wolf v. Bollinger, 62 Ill. 368. this court said: (b. 371)

"The power to try and determine whether the writing produced be the will of the testator or not, includes the power to adjudge upon the validity of any part of the instrument, as well as the whole. X X X

It is the rule that a valid will, once existing, must continue in force, unless revoked in the mode prescribed by statute. X X X

It has been often determined, in the construction of similar statutes, that the mere acts named, of cancellation or obliteration, will not constitute a valid revocation, unless done with the intent to revoke. X X X

It is believed to be the doctrine, as laid down in Redfield on Wills, 314, 325, 327, and well settled by the authorities, that when the testator makes an alteration in his will, by erasure and interlineation, or in any other mode, without authenticating such alteration by a new attestation in the presence of witnesses, or other form required by the statute,

it is presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute, and such alteration not being so made as to take effect, the will, therefore, stands, in legal force, the same as it did before, so far as it is legible after the attempted alteration."

¶ It is very clear that the court below erred in giving the instruction in question to the jury and in entering the decree setting aside the will, for if it be conceded that the ninth clause interlined was invalid, the whole will was not, for that reason, revoked or rendered invalid. There was no intention on the part of the testator to revoke his will. He simply desired to make a slight alteration by interlining an additional bequest to his wife, which, if it fail for want of proper attestation, leaves the original will in full force. Wright v. Wright, 5 Ind. 389; Bringle v. McPherson, 2 Brevard, 270; Jackson v. Holloway, 7 Johns. 394; 1 Redfield on Wills, §325, 326; Greer v. McCrackin, Peck, (Tenn.) 301.

*In re*  
~~Matter of~~ Wilcox's Will, 20 N.Y. Supp. 131; Wheeler v. Bent, 7 Pick. 61; Doane v. Hadlock, 42 Mo. 73.

28-7 ¶ The ninth clause inserted in the will by interlineation cannot be sustained as a part of the will. It was not signed and attested with the formalities required by the statute. In this respect, while recognizing the force of the reason-

ing employed in the opinion, we cannot agree with the conclusion reached by the Supreme Court of Indiana in Wright

*where a new provision was inserted in a will a few days after*  
v. Wright, supra, a case practically on all fours with this.

It was there said: "But why should the bequest added on the 4th of March, be deemed no part of the will? It was inserted by the same scrivener who wrote the original will, in the presence of the testator, and by his express direction.

The instrument was already signed by the testator. The witnesses who had subscribed the will when first executed, were also present. They recognized the paper on which their names were signed, and saw the provision inserted. This would seem to be a sufficient compliance with the statute. The mere re-writing of their names to the instrument would have added nothing to the importance of the transaction. Under the circumstances it would have been a useless ceremony. The law, therefore, did not require its performance. We are decidedly of the opinion that the will, including the new provision, was duly executed and attested."

Notwithstanding the ninth clause was inserted only a few days after the execution and attestation of the will as first made, and ~~it~~ was so inserted by one of the attesting witnesses at the request of the testator, and in his presence and in the presence of the other attesting witness, still, this new provision was never attested in the manner provid-

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ed by the statute, and we cannot regard the position taken in the Wright case, that a re-attestation of the will ~~would~~ *was unnecessary, as sustained by the authorities,* ~~have added nothing to the importance of the transaction,~~ *or as, in this state, being in accord with* ~~the provisions of the statute in regard to~~ *wills.*

In addition to the cases above cited, see 1 A. & E. Ency. of Law, 941, note 1, -citing Hindmarsh v. Charlton, 3 H. of L. Cas. 160, and In Goods of Maddock, L.R. 3 P.D. 169; also, 29 A. & E. Ency. of Law, 264.

In commenting on the Indiana case, Mr. Redfield in Vol. 1, <sup>(vol. 1, 325, 326)</sup> ~~325-326~~ of his work on Wills, says: "But it may be questioned how far this case is entirely reliable as a ground of action in future cases. The thing being done in this mode, and the alternative being presented of either supporting it, or nullifying the act, might sometime induce courts to maintain it, under such circumstances, so that we could not regard the case as a safe precedent to be followed in other cases. And if the rule that the witnesses must re-write their names in order to constitute a re-witnessing of the instrument, after an alteration, is to be regarded as fully established, there could be no question of the unsoundness of the preceding case."

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It is not enough that the witnesses are present when the will is executed, but they must subscribe the instrument. If a codicil be added, even in their presence, they must subscribe it also as attesting witnesses, and where an alteration is made in the will by interlineation, there is no reason, in principle, why the statutory requisites may be dispensed with, or the formalities required in the other cases mentioned, disregarded. Indeed, prudence would dictate that where an interlineation is made, it should be noted in an attestation clause to be signed by the witnesses, for, the interlineation appearing, or being shown, the presumption is, in the absence of proof, that it was made after the execution of the will, and if, when the instrument is presented for probate, the witnesses are dead, or in parts unknown, mere proof of their signatures to the original will, as provided for by the statute, would not establish the matter interlined as a part of the will. But even where it is shown, as in this case, that the attesting witnesses were present when the interlineation was made by one of them at the request of the testator, to hold that a re-attestation of the will as changed, or an attestation of the interlined part evidenced by a re-signing by the witnesses, is unnecessary, would be to dispense with a substantial requirement of the statute, and

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would lead to uncertainty and confusion as to the law in the proof of wills.

¶ Our conclusion is, that the interlined ninth clause was void, and the jury should have been so instructed, but that the court erred in instructing the jury, as the proof stood, so far as the original will was concerned, to find that it was not the last will of the deceased.

¶ The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein stated.

Reversed and Remanded.

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Ag. 5.

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Nov 26

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*Benj. R. Burroughs*

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*J. D. Carter*

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