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Wills: Blindness of testator; validity of will

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The case is of interest as bringing again into the foreground the question whether a corporation is really a separate entity apart from its stockholders or merely a giant partnership with the liability of the partners strictly limited. The prevailing opinion lays stress on the fact that most of the owners of the corporation resided in Germany during the war and thus leans toward the partnership theory. The dissenting opinion stresses the entity theory and regards the corporation as a citizen or subject of the country where it is incorporated, no matter who its stockholders might be. Perhaps this contrariety was not consciously felt by the writers of either opinion, yet it is possible that it furnishes the key to the differences between them.

C. Z.

Wills: Blindness of testator; validity of will.—*In re Bakke's Will,* 199 N. W. 438 (Wis.). The validity or invalidity of the execution of wills has raised a number of very nice questions of law, among which not the least prominent is the question of the effect of the blindness of the testator on the validity of his will. Two questions arise in discussing this subject: first, whether a blind person has sufficient testamentary capacity and second, whether he has the ability of knowing the contents of his will.

In Wisconsin, the statute on the execution of wills reads, "No will made within this state . . . shall be effectual to pass any estate . . . unless it be in writing and signed by the testator or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses in the presence of each other. . . . ."[1]

The statutes regarding who may devise or bequeath property read as follows: "Every person of full age and any married woman of the age of eighteen years and upwards, being of sound mind, . . .[2] This phrase is the deciding factor in Wisconsin as to who has testamentary capacity in the devising of both real and personal property.

In reference to the first-named statute, the question usually evolves around whether or not the clause "in the presence of" must be construed so as to mean that the testator must see the persons signing as witnesses or signing for him at his express direction. At this point, the further question arises as to whether the testator knew the contents of the will. Both of these questions will be fully discussed later.

In the present case, the facts were as follows: Guinhild Bakke, a woman of sound mind but blind and partially deaf, made her will on October 11, 1890. She was a widow holding eighty acres homestead as a life estate and 280 acres in fee. The contestant, Mrs. Stern, a daughter, received her share of the estate when her father died. No question of mental capacity or undue influence was raised but the only ground of contest was the blindness of the testatrix. The defense contended that the burden of proof resting upon the proponents was not satisfied by the evidence and that there must be, under the circumstances,

[1] Sec. 2282, Wis. Stats. 1923.

[2] Secs. 2277 and 2281, Wis. Stats. 1923.

additional affirmative proof that the testatrix had knowledge of the contents of the will.

Since the will was legally drawn, showed a good faith division of the estate, and the reason for not granting a bequest to the contestant was brought out, it was held that this was sufficient to establish mental capacity on the part of the testatrix and an absence undue influence.

There is no special statutory provision regarding blind testators, the law being concerned with testamentary capacity and absence of undue influence and fraud. Such legislation or necessity for additional proof would place an obstacle in the way of wills of the blind. This would work a hardship on those who need greater protection rather than restriction. The due proof of a properly attested will raises a presumption that the contents of the will were known to the testator at the time of its execution. Here in the case of *In re Bakke's Will,* this presumption was raised and not rebutted.

The defense further contended that the presumption should not apply because of the ease with which a blind testator might be imposed upon. This, however, does not "hold water" for the presumption is rebuttable by proof of imposition or fraud, but fraud or undue influence cannot be presumed from the mere fact that the testator would have been an easy victim. Where, as in case, the will shows care, reason, thought and attention to detail, the presumption that it was properly executed is hard to overcome and where there is no proof of fraud or undue influence offered, the will must be admitted.

The law in the last few years has become more settled on this question of the validity of wills executed by blind testators as is shown by the following extracts: Generally, if the execution of a will is proved, the presumption of law, in the absence of proof of fraud or undue influence, is that the testator knew the contents thereof.[3]

Underhill, in his treatise on *Wills,* says: "Where the testator is in good physical and mental condition and of fair education, the actual reading of the will to him need not be proved but he will be presumed to have known the contents, especially when the will agrees substantially with the instructions given by the testator. However, when the testator is blind, the presumption is not as strong and any proof of undue influence, however small, is sufficient to overcome such presumption. The court cannot infer that the testator was acquainted with the will merely from the fact of its due execution, but it is not necessary to prove that the will was actually read to him before execution."[4]

A situation parallel with that of the blind testator is that of the foreigner whose instructions are given in a foreign language and the will is written in English, the latter being impossible for him to read. The courts have held in such cases that where it would have been impossible for the testator to have read the will, due to the fact that it was written in English and he had given the instructions in a foreign tongue, being unable to speak or read English, that the will was, never-

[3] *Vernon v. Kirk,* 30 Pa. 218.

[4] I *Underhill on Wills,* P. 201.

the less, good where a substantially accurate translation had been made to the testator before execution.[5]

Georgia goes farther than most states in permitting the probate of wills of blind testators when its Supreme Court held that "it is not indispensably necessary to the validity of a will executed by a blind man that it should be read over to him in the presence of the subscribing witnesses before execution. It is sufficient if he know that it is his will."[6] Arkansas places this matter before the jury, leaving it to them whether or not the inability of the testator to read or hear read the will is sufficient to deny probate. The Supreme Court of Arkansas says: "When a will appears to have been legally executed, the onus of showing fraud or undue influence therein is on the party contesting its validity, and the circumstances that the testator could not read and did not hear the will read at the time of the signing is a fact to be weighed by the jury, with other circumstances, in determining whether or not he knew its contents."[7] The question is discussed in L. R. A.[8] and it is said that the presumption that the testator knew the contents of the will arises from the execution of it by the testator whose eyesight is so impaired that he could not read the instrument.

From this, it can be seen that the whole trend of the courts has been towards leniency in dealing with the wills of blind testators and all possible benefits are granted in order that such wills may be admitted to probate. The object of the courts seems to be to combine leniency with protection and it can be seen readily that a judicious admixture of these two policies is giving to the blind a knowledge and assurance that they may rely implicitly on the courts to see that their wishes are carried out, whether they can or cannot read or hear read, the will, and that the fact of blindness on the part of a testator will not prove him to be without mental capacity.

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Wills: Implied revocation by divorce of testator—property settlement.—In the recent case of *In re McGraw's Estate*, 228 Mich. 1; 199 N. W. 686, Mary H. McGraw, divorced wife of Howard A. McGraw, deceased, presented for probate a will made by the deceased during coverture, wherein she was made sole legatee. The marriage took place in 1912, the will was executed in 1918, and an absolute divorce was granted to her in 1921. No alimony was demanded nor received and upwards of two years had elapsed after the decree, in which time it could have been demanded. Proponent's dower was barred by the statute of limitations. No express property settlement was made between the parties either before or after divorce. As the testator left no children, the will was contested by his brother and sister. They contended that the decree of divorce, with its attendant conditions and circumstances, had wrought an implied revocation. The court held that

[5] *Benrud v. Anderson*, 174 N. W. 617, 144 Minn. 111.
[6] *Clifton v. Murray*, 7 Ga. 565, 50 Am. Dec. 411.
[7] *Guthrie v. Price*, 23 Ark. 407, 49 Cent. 270 & 389.
[8] L. R. A. 1918 D. p. 747, *Ross v. Ross*, 147 N. W. 1105.