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KENNEDY

v.

UPSHAW and another.
Supreme Court of Texas.

June 18, 1886.

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Appeal from Johnson county.

Proceeding to invalidate the codicil of a will on the ground of forgery.

Poindexter & Padelford and Booth & Son, for appellant, S. W. L. Kennedy. Jo Abbott and S. C. Upshaw, for appellees, S. C. Upshaw and another.

STAYTON, J.

The statutes regulating the probate of wills require that the facts necessary to establish the will shall be proved to the satisfaction of the court. Rev. St. 1851. The evidence taken for the purpose of probating a will is required to be recorded in the minutes of the court. Rev. St. 1854. Wills cannot be admitted to probate upon the admissions of persons who may be interested in their establishment, and it may well be doubted if rule 31, made for the government of the district courts, has any application to proceedings instituted to probate wills. Article 1299, Rev. St., provides that the party having, under the pleadings, the burden of proof on the whole case, shall be entitled to open and conclude the argument.

The appellees, who offered the instrument of date February 8, 1883, for probate as the last will of James H. Martin, deceased, allege that it is the last will and testament of the testator, and the burden of proving the facts necessary to establish this rests upon them. They have the affirmative, and consequently the burden, on this issue. The person who appears, in effect, to contest this, alleges that the paper so offered is not the last will and testament of the deceased; but admits that this paper, and another which she presents for probate as a codicil, constitute the

last will. The manner in which the negative of the fact alleged by the appellees is made, is unimportant. The burden of proving that the paper purporting to be the last will is such, still rests upon those who seek its probate. When proof sufficient to show that the paper was executed under such circumstances, and with such formalities, as to authorize its admission to probate, was made, those offering it might rest; but so far the burden was upon them. After such proof was made, the person offering the paper claimed to be a codicil would have the burden of proving that it was so executed as to make it a part of the will. If this was done, the two papers would be probated as the last will, and so, upon proof, the burden of which would rest upon one in part and upon the other in part. When proof was made sufficient, if unimpeached, to establish the codicil, then, to sustain the averment that the paper offered as the last will was such in reality, it again became incumbent on those who offered it to produce the evidence which would overcome that introduced to establish the codicil. They charged in this case that the codicil was a forgery, and the evidence, if unimpeached, being sufficient to establish the codicil, the burden of proving it to be a forgery was upon those who asserted it. Thus, it is seen that the burden of proof on the whole case did not, and in the nature of things could not, rest upon those who sought to establish the codicil; and the court did not err in refusing to permit them to go forward with their evidence, and to open and conclude the argument.

The fact that the execution of a codicil operates as a republication of a will of which it in legal effect becomes a part when it clearly identifies it, has no bearing on the question before us. Those persons who offered the paper executed on February 8, 1883, allege that to be

the last will. This is denied by those who offer the codicil, who allege that the two papers constitute the last will. To invalidate the codicil, those who offer the instrument first executed as a will allege that the paper purporting to be a codicil is a forgery,

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and the evidence is of such character as to leave no doubt, if the codicil be a forgery, that the forgery was committed by one or both of the persons whose names appear as witnesses to it. The paper executed on February 8, 1883, was executed at the house of the two persons whose names appear as witnesses to the codicil, the testator then being ill, and an inmate of their house. That paper was executed openly, and without any concealment. One of the beneficiaries under it was opposed to the disposition which was made of the testator's property by it, and from the time of its execution, though the testator was ill, and related to her by the nearest ties of blood, pursued towards him a course of conduct evidencing an estrangement of feeling, for which no other reason is shown than that the testator, prompted by reasons the most cogent, had deemed it proper to bestow upon another, as nearly related to him, the largest share of his estate. There is also evidence tending to show that before the will was executed no such relations existed between the testator and the two persons who were witnesses to the codicil as would be expected from their near kinship by blood and marriage.

The will was executed at Hillsboro, and soon afterwards it was found necessary to remove the testator to Wooten Wells, on account of his failing health. It is claimed that the codicil was executed at the latter place, in the presence of the two persons at whose house the will was executed, and in the presence of a negro, and that it was written by one of the former, and signed by both of them as witnesses. One of these persons was a beneficiary under the will executed at Hillsboro, and the codicil in no way affected the interest she would take under the will. It is claimed, however, that at the time the codicil was executed, and under the same

circumstances, and with the same witnesses, the testator executed a deed of gift to the two children of the witnesses to the codicil, by which a large part of the testator's property, which under the will was given to another daughter of the testator, was disposed of. There were many persons at Wooten Wells at the time it is claimed the codicil was executed, but none of them other than the persons before named were called to witness its execution; but it is claimed that this was at the request of the testator. It appears that the two witnesses to the codicil, in consequence of several messages from the testator so requesting, went from Hillsboro to Wooten Wells, reaching the latter place on March 14, 1883, in the morning; and it is claimed that the codicil was executed on the next morning, after which the testator, the two witnesses to the codicil, and one or two other persons, left Wooten Wells for Hillsboro, which they reached on the next day. The testator lived until the twenty-eighth March, 1883.

Under this state of facts, we are of the opinion that any evidence introduced which tended to show the state of feeling existing between the testator and the two witnesses to the codicil, from a time anterior to the execution of the will until that date, which tended to illustrate the conduct of the parties, and which bore upon the probability or improbability of the execution of the codicil under the circumstances which are claimed to have attended its execution, was admissible. Such is the character of the evidence referred to in the third, third A, fourth, and eighth assignments of error.

A declaration was made by the testator to the physician who attended him before he went to Wooten Wells, and after his return, as to his condition while there, and this was admitted in evidence, over the objections of the appellant. The declaration related to the condition of the testator at a time intervening the services of the physician to whom made, related to no specific fact, but was most probably necessary to enable the physician to understand the patient's condition. The condition of the testator while at Wooten Wells was an important inquiry in the case, as was it important for the physician, in view of after treatment, to know what the

condition of the patient was during the different periods of his illness. The information was doubtless sought and given with a view to that. The declaration made to the physician

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was made under circumstances which render it free from suspicion of having been made with any other purpose than to inform him of that which it was necessary for him to know. The testator could not have expected that the declaration would ever become important on the question whether he executed the codicil. If he executed it, he could not have anticipated that its execution would ever be controverted. If he did not execute it, he could not have foreseen that a codicil would be set up of which he never had knowledge. It is often difficult to determine when evidence of this character is admissible, but we are of the opinion that offered in this case was. *Insurance Co. v. Mosley*, 8 Wall. 408; *Beaver v. Taylor*, 1 Wall. 642; *Howe v. Plainfield*, 41 N. H. 136; *Railroad Co. v. Sutton*, 42 Ill. 440.

It was proper that the jury should be placed in possession of such facts as would enable them to know what was the effect of all the papers claimed to have been executed at the time the codicil is claimed to have been executed. Therefore it was not error to admit the evidence showing the value of the testator's estate situated in Hill county, consisting of notes secured by vendor's liens, and money. This evidence was proper to show what changes would occur in the disposition of the testator's estate as made by his will, if the codicil and deed of gift made to the two children of the witnesses to the codicil were established; both of them being attacked as forgeries. It was proper that the jury should be placed in possession of every fact likely to influence the testator to change a will deliberately made, or that could give motive to any person to seek to change it by a forged codicil, or other conveyance, operating on property disposed of by the will.

During the trial a large number of witnesses were permitted to state that they knew the reputation for veracity of the witnesses to the

codicil, and that this reputation was bad. The witnesses were interrogated in the usual manner, and were cross-examined, by counsel for the person seeking to establish the codicil, as to their means of knowledge. In this cross-examination some of the witnesses stated that they had heard persons, when speaking of the reputation of those witnesses, refer to the matters which gave rise to this litigation; but that they had heard other matters discussed, and could not say that the reputation of which they testified grew out of the matters litigated in this action or connected with it. If we were to look alone to the statements made in the body of the bills of exception, we would strongly incline to the opinion that some of the witnesses testified to reputation which grew out of the facts on which this action is based; but these statements are qualified by the judge. The following are samples of the qualifications to the bills made by the judge: "The witnesses stated that other instances of a want of veracity were mentioned besides this case at the time witnesses' character for truth was discussed; that he could not say that it grew out of this case, etc. The court refused to permit any witness to testify who said the witnesses' character for truth had originated from this particular case, and several witnesses who so stated were not permitted to state what the reputation for truth was." "The court permitted counter-applicants to subject witnesses to a most rigid cross-examination, and refused to let several witnesses testify who stated their knowledge grew out of this suit. The court thought that if the witnesses stated that it was discussed in connection with other transactions, it was then a matter for the jury, as the court would not pass upon the weight of evidence." As the bills of exception present this question, we cannot say that the court erred in admitting the evidence.

A large number of witnesses were permitted to state that they knew the reputation of the two subscribing witnesses to the codicil and deed of gift to their children for honesty, and that this reputation was bad. This evidence could have been introduced for no other purpose than to impeach their testimony. This inquiry involved the whole moral character of these

witnesses, and, under the former decisions in this state, should have been excluded. In

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Boon v. Weathered, 23 Tex. 675, it was held that, in the impeachment of a witness, the inquiry should be confined to his general reputation for truth, and that it should not extend to his general moral character. This ruling was approved in Ayres v. Duprey, 27 Tex. 600, and is in accordance with the great weight of testimony, English and American. Humphrey v. Humphrey, 7 Conn. 118; Gough v. St. John, 16 Wend. 653; Bakeman v. Rose, 14 Wend. 110; Fowler v. Insurance Co., 6 Cow. 675; Church v. Drummond, 7 Ind. 19; Gebhart v. Burkett, 57 Ind. 380; Crose v. Rutledge, 81 Ill. 267; Spears v. Forrest, 15 Vt. 437; Crane v. Thayer, 18 Vt. 168; Com. v. Moore, 3 Pick. 196; State v. Howard, 9 N. H. 486; State v. Bruce, 24 Me. 72; Townsend v. Graves, 3 Paige, 456; Gilchrist v. McKee, 4 Watts, 381; U. S. v. Vansickle, 2 McLean, 219; Teese v. Huntingdon, 23 How. 2.

The objection urged to the reading of the testimony of the witness Miles, taken before the county court on the original trial to probate the will and codicil, were correctly overruled.

The evidence of the witnesses Riley, Brooks, Sturgis, Duncan, Jackson, Johnson, Stroud, and Reavis, as experts, was admitted by the court below, and, from the facts stated as to their qualifications, we cannot say that there was error in this.

Dr. Willis attended the testator, as his physician, during the time he was at Wooten Wells, and stated very fully his condition as to nervousness while there, and we are of opinion that his answer to the seventh interrogatory should have been received. This witness stated that "his improvement in point of nervousness was very great. He had but one nervous rigor during the time he was there, which was on the night of the fourth March, 1883. He was comparatively free from nervousness from the fifth to fifteenth March, 1883. He wrote notes with a pencil. One time I remarked to him that his nervousness was much better, as his hand

was comparatively steady. As near as I can remember, I think this occurred on the eleventh or twelfth of March, 1883. I noticed his improvement more particularly in taking his meals, medicine, and water. His hands were comparatively steady. He wrote two or three notes; seemed to do it with ease. This was a few days before I last saw him, and was done with lead pencil, and he was but very little nervous. I saw him professionally the day he left the Wells, which was March 15, 1883." An expert is not permitted to testify to such things as are within the range of common experience, and may be as well understood by an unskilled person as by an expert. We cannot, however, say that the opinion which the witness gave related to such matters. It may be that the nervous affection of the testator was such as to be exhibited by his acts only when his hand and arm were in certain positions, while in an effort to use the hand and arm in some other way it would not be manifested. As to such matters, the skilled physician who knows the actual condition of the patient is presumed to have more knowledge than is possessed by others, and to be able to give an opinion more likely to be correct than would that of a jury, formed solely from a general statement by the physician of the condition of his patient at a given time. The physician testifies upon the facts within his own observation, which, of themselves, may not be so fully appreciated as they ought to be, by a jury, from the description of the condition of the patient which the physician may give. Such testimony can be given no conclusive effect, and it rests with the jury, from all the evidence before them, to find the fact to be as, in their judgment, the evidence preponderates. The jury may and should consider the opinion of an expert as it is their duty to consider other evidence, and if, in their judgments, in view of all the evidence before them, it is not entitled to credence, then they may disregard it. So much of the testimony of Dr. Willis as related to declarations by the testator showing affection for Chester Kennedy, and an intention to reward him for his devotion and kindness, was admissible; for it would have some bearing in illustrating

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the motive which may have influenced the testator to make the deed of gift to him and his sister, claimed to have been executed at the same time the codicil was executed. That deed of gift was of such a character, and so connected by the circumstances under which it is claimed to have been executed, and its subject-matter, with the will and codicil, that any fact showing a motive for its execution was relevant. The answer of the witness, however, seems to have been offered as an entirety, and was in part not responsive to the interrogatory. So much of the answer as was not responsive to the interrogatory was inadmissible for reasons other than that it was not responsive; and, for this reason, the answer, when offered as an entirety, was properly excluded.

There was no error in admitting evidence tending to show that the deed of gift was a forgery. It may be that the five notes, bearing transfers purporting to have been signed by the testator, were admissible for purposes other than to furnish writings upon which comparison might be made, and we do not now deem it necessary to determine whether they would have been admissible for the latter purpose only.

The declaration claimed to have been made to Dr. Scofield by one of the persons whose name appears as a witness to the codicil, made after the death of the testator, was relevant to one or more inquiries in the case, and therefore admissible.

The court gave the following charge to the jury: "If you believe from the evidence that J. H. Martin is dead; and that, before his death, he, on the fifteenth day of March, 1883, executed the instrument read in evidence, and offered as a codicil, and dated on fifteenth day of March, 1883; and that at said time he was over the age of twenty-one years; and that he was of sound mind, as hereinbefore explained; and that he signed the said instrument in the presence of N. B. Kennedy and S. W. L. Kennedy; and that said N. B. Kennedy and S. W. L. Kennedy were at said time of the signing of said codicil, if you find it so signed, over the age of fourteen years; and that they are creditable persons; and that they subscribed their names to the same as witnesses in the presence of the said J. H.

Martin, and at the request of the said J. H. Martin, — then, in case you so believe from the evidence, you will find that said instrument offered as a codicil was executed by said J. H. Martin." This charge was misleading, and required the jury to pass upon a fact which it was the duty of the court to pass upon, and which the court did pass upon when the witnesses to the codicil were permitted to testify to the fact of its execution. Within the meaning of the law prescribing the qualifications of witnesses to wills, such witnesses as are competent to testify are deemed "creditable" witnesses. Under the charge given, the jury might have found every fact to have existed necessary to the probate of the codicil, and still have found a verdict against it, if, in their opinions, the witnesses to it were not, in the popular sense of the term, "creditable" persons; may have found that the witnesses had stated the exact truth in reference to the execution of the codicil, and yet that it was not entitled to probate, upon the sole ground that the witnesses to it were not persons to whose testimony credence would ordinarily be given.

Both parties manifest a desire that his case should here end; but, in view of the fact that the trial was before a jury, for the errors mentioned it will be necessary to reverse the judgment of the court below, and to remand the cause for another trial. It is so ordered.