

THORPE AND OTHERS *v.* BESTWICK.

1881

Will—Attesting Witness—1 Vict. c. 26, s. 15—*Marriage of Devisee after Attestation to attesting Witness.*

March 9.

Q. B. D.

Under the Wills Act (1 Vict. c. 26), s. 15, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise.

ACTION to recover possession of a house at West Hill, Derby, devised in 1865 by Jeremiah Bestwick to his niece Ann Rebekah Wolstenholme, who in 1868 married the plaintiff Thorpe.

Defence: That A. R. Wolstenholme married the plaintiff Thorpe before the death of the testator, and that at his death the marriage was still subsisting; and that Thorpe was one of the witnesses to the execution of the will.

Demurrer.

Graham, in support of the demurrer. The fact that the devisee married the attesting witness after the date of the will cannot affect the devise. The material sections of the Wills Act, 1 Vict. c. 26, are s. 15 and s. 24. (1) Sect. 15 enacts that devises to an attesting witness, or his or her wife or husband shall be void, and s. 24, that a will is to speak from the death of the testator. But it has been expressly held, in *Bullock v. Bennett* (2), that s. 24 does not apply to the objects of the testator's bounty, but only to the estate comprised in the will, Lord Justice Turner saying that he understood the section to mean that the will is to speak as if executed immediately before the testator's death, not with reference to the objects of his bounty, but with reference to the real and personal estate to be taken by those objects. And in *Jarman on Wills*, 3rd ed. vol. i. pp. 65, 66, it is explained that the rule

(1) By 1 Vict. c. 26, s. 15, if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, &c., shall be thereby given or made, such devise shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming

under such person, or wife or husband, be utterly null and void.

By s. 24, every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

(2) 24 L. J. (Ch.) 512.

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before the Wills Act was that, when an attesting witness was disqualified by reason of his being a devisee under the will, the disqualification must exist at the period of the attesting act. The cases cited in the note at the bottom of the page do not affect this principle.

J. F. B. Firth, for the defendant. Sect. 14 of the Act, enacting that if any person who shall attest the execution of a will shall, at the time of the execution or at any time afterwards, be incompetent to prove the execution, such will shall not on that account be invalid—contemplates that the witness may become incompetent after the execution of the will and before the death of the testator. To uphold the present devise would enable an attesting witness who took a devise under the will to secure himself by antedating it.

Graham, was not heard in reply.

MATHEW, J. I think the plaintiffs are entitled to judgment. The policy of the Wills Act, 1 Vict. c. 26, in depriving the attesting witness of any legacy given by the document of bequest, is not to allow wills to be proved by the evidence of persons benefited by them, and it makes void any devise to an attesting witness, or to his or her wife or husband. In the present case the plaintiff, at the time when the will was attested, took no benefit under it, but he subsequently married the devisee, and I am asked to hold that the result of this marriage is to destroy the validity of the devise. But there is no such provision in any part of the Act; the only section which could be referred to is s. 24, by which every will is to take effect as if it had been executed immediately before the death of the testator. This section has been commented upon and fully interpreted in *Bullock v. Bennett* (1), and it is clear that it does not apply to those benefited by the devise, but only to the property to be taken by them. There is, therefore, nothing to affect the validity of this devise.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Peacock & Goddard, for Clark & Huish, Derby.*

Solicitors for defendant: *Watson, Sons, & Room.*