BERTRAM, ACTING C.J. & HOLMES, ACTING J. 1910 July 6

[BERTRAM, ACTING C.J. AND HOLMES, ACTING J.]

GEORGIOS PAVLIDES AND OTHERS, *Plaintiffs*,

v.

SOCRATIS POTAMITI,

MARITZA POTAMITI AND OTHERS, *Defendants*.

WILL—ATTESTATION CLAUSE—"ATTEST"—INTERPRETATION OF LAWS—IMPERATIVE OR DIRECTORY PROVISION—WILLS AND SUCCESSION LAW, 1895, SECS. 22, 23.

It is provided by Sec. 22 of the Wills and Succession Law, 1895, that "no will shall be valid unless made in accordance with this section." In interpreting this provision the word "will" must be deemed to include the attestation clause.

The provision that "the attestation clause used for the attestation of every will shall be as follows or to the like effect" is imperative and not directory merely.

The words "or to the like effect" do not cover omissions of substance but only refer to verbal variations.

The Court has no power to relieve against clerical errors in the attestation clause.

Consequently a will in which the words "at his request and in his presence" are omitted from the attestation clause, even although in fact the witnesses set their names o the will at the request of the testator and in his presence, and although the omission was only due to a clerical error, is not a valid will.

This was an appeal from the District Court of Limassol.

The only point at issue was the validity of a will, and the only point on which the validity of the will was challenged in the Supreme Court was that the attestation clause did not contain the words "at "his request and in his presence."

It was proved that as a matter of fact the attesting witnesses set their names to the will at the request of the testator and in his presence and that the omission of the words was simply a clerical error.

The action was brought by the legatees under the will for a declaration of its validity as against the persons who were heirs of the testator on the supposition of an intestacy.

The District Court held that the omission of the words did not invalidate the will.

The Defendants appealed.

Peristiani for the Appellants. We rely upon the express words of Sec. 22 of the Wills and Succession Law, 1895. "The attestation "clause used for the execution of every will shall be as follows or to "the like effect."

He was stopped by the Court.

Oekonomides for all the Respondents except Maritza Potamiti. Sec. 22 does not require the attestation to be in writing. "Attest" simply means to bear witness. The words relied upon are simply an

equivalent to the words in the English Wills Act declaring that no special form of attestation is necessary. In all the English cases, if there was an *animus testandi*, any defect has been supplemented by evidence. The object of Sec. 33 is to enable this to be done.

Neoptolemos Paschales (*Paschales Constantinides* with him), for Maritza Potamiti, cited the following English authorities.

In the goods of M. E. J. Atkinson, Decd. (1883) 7 P.D., 165.

In the goods of Braddock (1877) 1 P.D., 483.

In the goods of Sweet (1891) P.D., 400.

The Court referred also to the following passages:

Roberts v. Phillips (1885) 4 E. and B. 450, 99 R.R., p. 555.
" It has never been held that a testimonium clause is necessary under " this statute, or that the witnesses should be described as witnesses " of the face of the will. Nothing more is required than that the will " should be attested by the witnesses; *i.e.*, that they should be present " as witnesses and see it signed by the testator, and that it should be " subscribed by the witnesses in the presence of the testator; *i.e.*, " that they should subscribe their names upon the will in his presence."

Burdett v. Spillsbury (1843) 59 R.R., p. 115.

PER LORD CAMPBELL: " I beg leave humbly to express my opinion, " that without that testimonium clause, there would have been a " good execution of the power; because here the will was signed, sealed " and published in the presence of three credible witnesses who signed " that will as the attesting witnesses. I say that that was an attesta- " tion, and that this is a good execution of the power, without reference " to the testimonium clause. The very common expression we have, " of ' attesting witness ' to a deed, explains this. What is the meaning " of an attesting witness to a deed ? Why it is a witness who has " seen the deed executed, and who signs it as a witness. He is a good " attesting witness, although there should not be upon the deed itself, " a memorandum saying that it is signed, sealed and delivered in " his presence. These are good attesting witnesses; and I apprehend " that upon principle, and not contrary to authority, this will was " attested in the presence of three credible witnesses, and that therefore " it is a good execution of the power."

These cases are conclusive as to the meaning of the word " attest." It is also clear from the case first cited that " the attestation clause

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" is no part of the will." Where therefore the Cyprus law says: " No will shall be valid, etc.," the word " will " must be construed as not including " attestation clause." The special provision with reference to the attestation clause must be construed as directory and not imperative.

Peristiani in reply. The Cyprus law is precise. It is the only point on which it insists on an express form being followed. The expression " to the like effect " only refers to differences of language not to differences of substance.

The Court allowed the appeal.

Judgment: THE ACTING CHIEF JUSTICE: I regret very much the decision to which it seems necessary to come in this case.

The law of 1895 is a very composite statute. The sections relating to the form of the will, its probate and its administration are based upon the English law. The sections relating to Intestate Succession and the limitation of the disposable portion are based upon the Italian law. In both cases the legislator has introduced numerous modifications of substance, presumably with the view of adapting the law to the circumstances of the country.

Where however in following the English model he uses English legal phraseology, it is no doubt, reasonable that the words used should be construed in the sense which they bear in English law.

No difficulty therefore arises as to sub-sec. 4 of Section 22.* It is clear from the case of *Roberts v. Phillips*, and from the judgment of Lord Campbell in *Burdett v. Spillsbury*, that attestation does not imply certification. A witness who attests a document does not necessarily write a certificate upon the document. If he merely signs his name, even without adding the word " witness," intending to show thereby that he is a witness of its execution, he " attests " it within the legal meaning of the word. It is possible that the draftsman may not have realised this, and that he may have used the word loosely. But if the word is construed in its strict legal signification it presents no difficulty in the way of those supporting the will.

The difficulty that arises is with regard to the provision that " the " attestation clause used for the execution of every will shall be as " follows or to the like effect." At this point the Cyprus legislator, who up to this point has, substantially speaking, followed the English

* " (4) The witnesses shall subscribe their names to the will in the presence of the testator and in the presence of each other *attesting* respectively that it was signed by or on behalf of the testator in their presence, and that they subscribed it at his request and in his presence."

Wills Act deliberately departs from it. It is impossible to suppose that he did not consider the enactment of the English law—that no form of attestation is necessary. It is clear that he considered it and rejected it; that he deliberately adopted the opposite policy and required a specified and precise form to be followed in every case.*

It is also a very significant circumstance that whereas in the law of 1894 the provision with reference to the attestation clause came after the invalidating words, in the law of 1895 it is made to precede them, apparently with the object of making it quite clear that the invalidating words covered this particular provision. It seems to me impossible to read the words at the beginning of the section: "A will shall be "made as follows," and then the words at the end: "No will shall "be valid unless it is made in accordance with this section," without feeling that the clause at the end was intended to govern all that comes between itself and the clause at the beginning.

These are circumstances which we cannot ignore, though Mr. Oeconomides, and Mr. Paschales have done their best to help us to do so.

They say in the first place that the attestation clause is not part of the will. But the only authority they cite simply goes to show that a recital in an attestation clause is not part of the operative part of the will. Inasmuch as the section says that a will may follow a certain form, and that form contains an attestation clause, and also that "the attestation clause used for the execution of every will shall be" in a certain form, it seems impossible to say that an attestation clause is not part of a will within the meaning of the section.

They urge that the words should be construed as directory and not as imperative. But inasmuch as the section says that a will *may* follow a particular form, but that "the attestation clause used for the "execution of *every* will *shall* be as follows," it would be difficult to construe this last provision as otherwise than imperative, even though the final words of the section were not there, or even if we held that the attestation clause was not part of the will.

They point to the words "or to the like effect." But these words cannot justify omissions of substance. They are merely intended to allow of verbal variations.

* Section IX of the English Wills Act, 1838, referred to is as follows:
"And be it further enacted, that no will shall be valid unless it shall be in "writing and executed in manner hereinafter mentioned; (that is to say), it "shall be signed at the foot or end thereof by the testator, or by some other "person in his presence and by his direction; and such signature shall be made "or acknowledged by the testator in the presence of two or more witnesses "present at the same time, and such witnesses shall attest, and shall subscribe "the will in the presence of the testator, but no form of attestation shall be "necessary."

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They also point out that the words were omitted by accident—by a clerical error, but unfortunately we have no power to relieve against accident or clerical error.

Under the circumstances, with very great regret, I am of opinion that the appeal must be allowed, without costs.

HOLMES, J., concurred.

Appeal allowed.

The case of *In re Malicious Injury to Property* reported in pages 124-128 of the original edition is no longer of any importance.