

## JUDGE CLEVELAND'S DECISION IN THE PHILO S. BENNETT WILL CASE

District of New Haven—ss. Probate Court, November 6, 1903. Estate of Philo S. Bennett, late of New Haven, in said District, deceased.

**Memorandum of Decision:** This is a contest over an application to admit to probate a paper purporting to be the last will of Philo S. Bennett of New Haven, in this district, and to probate in connection therewith, and as a part thereof, a certain letter unattested by witnesses, but signed by the deceased, and, it is claimed, referred to in said will.

The 12th clause of said will reads as follows: "Twelfth—I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (\$50,000) in trust, however, for the purposes set forth in a sealed letter which will be found with said will."

The letter, which was found after Mr. Bennett's death in the vaults of the Merchants Safe Deposit company of New York city, in the same safe deposit box with the will, but enclosed in a separate sealed envelope, reads as follows:

"Bennett, Sloan & Co., Importers and Jobbers, Teas, Coffees and Spices, Canned Goods, Flavoring Extracts, Hudson and Franklin Streets, New York, May 22, 1900.—My Dear Wife: In my will, just executed, I have bequeathed to you seventy-five thousand dollars (\$75,000) and the Bridgeport houses, and have in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live and will enable you to make bountiful provision for those you desire to remember in your will. In my will you will find the following provisions:

"I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (\$50,000) in trust, however, for the purposes set forth in a sealed letter which will be found with this will. It is my desire that the fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan of Lincoln, Neb., or to his heirs if I survive him. I am earnestly devoted to the political principles which Mr. Bryan advocates and believe the welfare of the nation depends upon the triumph of these principles. As I am not as able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment, among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest. For this reason I will place this letter in a sealed envelope and direct that it shall be opened only by you and read by you alone. With love and kisses.

P. S. BENNETT."

The indorsement on the envelope reads as follows: "Mrs. P. S. Bennett. To be read only by Mrs. Bennett and by her alone after my death. P. S. Bennett."

No objection has been made to the probate of the will either on the ground of mental incapacity or improper execution, but the widow, next of kin, and residuary legatees object to the probating of the letter contained in the sealed envelope and to the 12th section of the will referring to such letter, on the ground of undue influence claimed by them to have been exerted over the testator by William J. Bryan, of Lincoln, Neb., who benefits by the provisions of said letter and said 12th chapter of said will. They further object on the ground that this unattested letter cannot be incorporated into the will, even if no undue influence was exerted in procuring it. No evidence was offered by the contestants except a letter written by Mr. Bryan after the will had been filed in court. The proponents' evidence consisted of the testimony of the attesting witnesses, the testimony of Mr. Bryan and of ex-Lieutenant Governor James D. Dewell, and certain letters written by Mr. Bennett.

The question of undue influence will be first considered.

It appears that while Mr. Bennett was doing business in New York city, being a member of the firm of Bennett, Sloan & Company, he resided in New Haven. Mr. Bennett's acquaintance with Mr. Bryan began during the presidential campaign of 1896, Mr. Bryan being a candidate for president of the United States and Mr. Bennett having been nominated for presidential elector on the Bryan

ticket in Connecticut. The origin and character of that acquaintance is indicated by the following letter:

"New York, Oct. 30, 1896.—Hon. William J. Bryan, Lincoln, Neb.—Dear Sir: The betting is three to one against you in this state at the present time; but, notwithstanding that, I am impressed with a feeling that you will win, and if you are defeated, I wish to make you a gift of \$3,000, and if you will accept the same, it will be a genuine pleasure to me to hand it to you any time after the 10th of next March.

"You have made one of the most gallant fights on record for a principle, against the combined money power of the whole country, and, if you are not successful now, you will be, in my opinion, four years later.

"The solid press of the east and all the wealth of the country have, ever since the canvass opened, concealed the truth and deceived the people regarding the whole question. They have succeeded in making 25 per cent of them believe that if you are elected the country will be governed by a lawless, disorganized mob. If you are elected I trust that you will, as soon as you can, issue a letter or make a speech, assuring them that the great body of the people are honest and can be trusted.

"This letter is intended only for yourself and wife to ever see. A feeling of gratitude for what you have done in this canvass for humanity, for right and justice, prompts me to write and make this offer.

"I am one of the electors at large on the silver ticket in the state of Connecticut, and accompanied you from New York to New Haven, and rode in the carriage with you and Mr. Sergeant from the station to the hotel.

"Hoping for your victory, and with kind regards, I am, sincerely yours,

"P. S. BENNETT."

The friendship thus begun continued up to the time of Mr. Bennett's death. The evidence shows that from the date of this first letter Mr. Bryan never visited New York without seeing Mr. Bennett who, except on a single occasion, always met him at the train. The correspondence continued until Mr. Bennett's last letter to Mr. Bryan, dated July 24, 1903, just before starting west upon the trip ending in his death.

Mr. Bennett invited Mr. Bryan and family on two or three occasions to spend the summer with him in Maine. In a letter written in 1899 extending such an invitation, Mr. Bennett writes: "Perhaps you can accept my invitation to come this way in August, with your family, and take a vacation upon the Maine mountains with Mrs. Bennett and myself." And he then added that Mrs. Bennett and he would meet the family at the station on their arrival in New York. None of these invitations, however, were accepted. A final indication of the high regard which Mr. Bennett had from the first cherished for Mr. Bryan is shown by his call, in the summer of 1903, a few days before his death, at Mr. Bryan's home in Lincoln, Neb.

So much for the preliminary facts. Now as to the circumstances attending the drawing of the paper propounded as Mr. Bennett's will as related by Mr. Bryan.

After inquiry by letter in the spring of 1900, whether Mr. Bryan would be home at a certain time, Mr. Bennett journeyed from New York city to Lincoln, Neb., a few days before the execution of the will in question in New York city, and informed Mr. Bryan that he desired to draw his will. He took with him to Nebraska an old will and various memoranda indicating how he desired to dispose of his property. He conferred with Mr. Bryan who then dictated the will to Mrs. Bryan who wrote it out on the typewriter. Mr. Bennett asked Mr. Bryan whether he would be willing to act as executor. Mr. Bryan consented, and accordingly he and Mr. Alfred F. Sloan of New York city, Mr. Bennett's partner in business, were named in the will as executors. Most of the individual bequests were copied from the earlier will. The amounts of the bequests to Mr. Bryan and to Mrs. Bryan, in trust for educational institutions, were communicated to Mr. Bryan by Mr. Bennett, and the general provisions as to how these amounts should be given, were matters of discussion between them; the bequest for the founding of the Bryan-Bennett library at Mr. Bryan's birthplace, to which they were jointly to contribute, being the only bequest suggested by Mr. Bryan.

Mr. Bennett proposed to give Mr. Bryan \$50,000 direct. Mr. Bryan suggested that the bequest be given in the way it was finally attempted to be given by the 12th section of the will re-

ferring to the sealed letter, and in connection with the drafting of the will a typewritten draft was made of the proposed letter to Mrs. Bennett to be enclosed in a sealed envelope and filed with the will, and of a letter to be written by Mr. Bennett to Mr. Bryan, enclosing a duplicate of the contents of the sealed envelope and indicating how he wished Mr. Bryan to divide the \$50,000 between himself and family; the proposition being that, upon Mr. Bennett's return to New York, he should execute his will and mail to Mr. Bryan a duplicate of the letter which he was to place in a sealed envelope and deposit with the will, and that in connection with sending the duplicate of the contents of the sealed envelope he was to write Mr. Bryan a letter copying the form prepared by them in Nebraska.

This course was pursued. Mr. Bennett left Mr. and Mrs. Bryan in Nebraska, and returned to New York where, after executing his will in his own store among his business associates, he deposited it together with a letter enclosed in a sealed envelope, as arranged for in Nebraska, in a safety deposit vault of his own selection.

Do these facts warrant the court in finding that the testator was unduly influenced by Mr. Bryan?

While the general rule is that the burden of proof is upon those alleging undue influence, the rule is otherwise when the gift is to one who sustains the relation of attorney to the testator, and draws the will under which he takes the benefit. But this is a mere presumption which the law raises and which may be rebutted by evidence. *St. Leger's Appeal*, 34 Conn., 434; *Dale's Appeal*, 57 Conn., 127; *Richmond's Appeal*, 59 Conn., 226; *Livingston's Appeal*, 63 Conn., 68.

The testimony of Mr. Dewell, who had known him for a quarter of a century, shows that the testator was a sharp, able business man, a man of decided opinions from which he was not easily turned aside. But whatever presumption, if any, might be raised by reason of Mr. Bryan's drafting the will, has been, in the opinion of the court, abundantly overcome by the evidence. Mr. Bryan testifies that the idea of a bequest in his favor, so far from being suggested by him or Mrs. Bryan, was a complete surprise to both; a statement in which the court has entire confidence in view of Mr. Bryan's frankness on the witness stand and his evident desire to fully disclose all his relations with the testator and all the circumstances surrounding the drafting of the will. It must also be remembered that the testator had ample opportunity to change his will at any time during the last three years of his life and without the knowledge of Mr. Bryan.

Mr. Bennett did not in his will forget his heirs-at-law and made ample provision for the support of his wife. Taking the total amount of the specific legacies in connection with his estimate of the residue as expressed in the sealed letter, he evidently thought he was giving his wife \$100,000 or more, absolutely, out of an estate which he apparently thought would approximate \$300,000. The Bryans were not the only legatees outside of the widow and his heirs-at-law, but the testator, besides making liberal public and charitable bequests, made generous provision for relatives who would have received nothing but for the will.

Measured by Mr. Bennett's devotion to Mr. Bryan and to the principles for which both had contended, the bequest of \$50,000 to the Bryans, to take effect after the testator's death, does not seem more unusual than the gift of \$3,000 offered to Mr. Bryan while they were comparative strangers and actually paid during Mr. Bennett's life.

This court finds that neither the 12th clause of the will, nor the letter therein referred to, was procured by undue influence.

The other question to be considered is whether the letter contained in the sealed envelope, and referred to in the 12th clause of the will, was so incorporated by reference as to be made a part of the will. Much emphasis has been placed on the obiter remarks of the court in *Phelps vs. Robbins*, 49 Conn., 250, 271, seriously questioning whether in this state papers referred to in a will, containing instructions disposing of property, can be incorporated into a will. Whatever our highest court might decide, if the question was squarely presented to it today, it is not necessary to consider in order to pass on the questions before this court. Even though the law in this state is, as it seems to be in most jurisdictions, that such a paper, under certain conditions, may be incorporated by reference, this letter is objected to on other grounds. Even if it be conceded that the 12th clause in this will refers to the extraneous

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