**Wilson Vs. Snow**

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**Court** : US Supreme Court

**Decided On :** Apr-07-1913

**Appeal No.** : 228 U.S. 217

**Appellant** : Wilson

**Respondent** : Snow

**Judgement** :

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U.S. Supreme Court Wilson v. Snow, 228 U.S. 217 (1913)

**Wilson v. Snow**

**No. 187**

**Argued March 13, 14, 1913**

**Decided April 7, 1913**

**228 U.S. 217**

*ERROR TO THE COURT OF APPEALS*

*OF THE DISTRICT OF COLUMBIA*

## SYLLABUS

The rule that an ancient deed to property in continuous possession of the person producing it proves itself on the theory that the witnesses are dead and it is impossible to produce testimony showing execution by the grantor is broad enough to admit, without production of the power of attorney, ancient deeds purporting to have been signed by agents.

The other necessary facts being present, and the possession of the property being consistent with its terms and the original records having been lost, a deed, over forty years old containing recitals that it was executed by an administrator under power of sale given by order of the court, will be presumed to have been executed in accordance with such recitals.

*Quaere* what rule obtains in the District of Columbia as to whether the power to convey given to two persons named in a will may be executed by the survivor when the designation as executors is descriptive of the persons, and not of the capacity in which they are to act.

In the District of Columbia, a power of sale given to more than one person named in a will as executors, coupled with the active and continuing duty of managing the property, making disposition thereof and changing investments for the benefit of the family of testator, is not a mere naked power to sell, but one that creates a trust which survives and can be executed by the survivor.

Where the duties imposed upon executors are active, and render the possession of the estate convenient and reasonably necessary, they will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms.

35 App.D.C. 562 affirmed.

John H. A. Wilson, of Washington county, District of Columbia, by his will, probated March 20th, 1858, after providing for the payment of his debts, devised all of his property, real and personal, to his wife, Adelaide Wilson,

during her life of widowhood, for the support of herself and his five minor children. In case of her death or marriage, the property was bequeathed to the testator's brother, Thomas O. Wilson, in trust for the use of the children.

"And I authorize and empower my said brother to exercise his own judgment and prudence in the discharge of the duties hereby confided to him, and it is my wish and desire that my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in goods, stocks, or otherwise, as they may consider best, for the benefit of my said wife and children, in fact to exercise a sound discretion in the management, disposition, and investment of my said estate for the purpose aforesaid, to-wit, for my wife and children."

There was a provision requiring the executrix and executor to care for his servants;

". . . lastly, I do hereby constitute and appoint my dear wife, Adelaide Wilson, executrix, and my affectionate brother, Thomas O. Wilson, executor, of this my last will and testament."

The will was probated March 20, 1858. Thomas O. Wilson, one of the executors, died September 21, 1858. On March 8, 1865, Adelaide Wilson made a deed in which, after referring to the will and its probate, and the authority conferred upon herself and her deceased brother-in-law as executrix and executor, to sell for the benefit of the wife and children of the testator, she, by virtue of the authority vested in her by said will, sold the land to Leonard Huyck, his heirs and assigns forever.

After eight mesne conveyances, duly recorded, the property, in February, 1905, was sold to the defendant, Chester A. Snow, he and his predecessors in title having held continuous possession of the property since 1865.

Adelaide Wilson died March 28, 1906, and on October 23, 1906, the children brought this action of ejectment against Snow. He claimed under the deed of the executrix, but was not able to prove that she had ever qualified as such. A witness who was familiar with the records in the register of wills' office testified that he had found therein the will of John H. A. Wilson, with an indorsement that it had been approved by the register of wills, and an entry in a book that the will had been approved and filed, but that he found no other entries or papers to indicate that either Adelaide Wilson or Thomas O. Wilson had ever qualified as executors or received letters testamentary; that the bond book for December 30th, 1856, to April 20th, 1861, was missing, and that, in that book, the bond of the executors would have been recorded if one had been given; that the books containing the returns of executors from 1856 to 1861 are missing; that he is unable to say whether the qualification of executors would be shown by the bond book alone or not; that he finds no docket entry relating to the case. Another witness who had frequent occasion to examine the records of the probate office between 1857 and 1860 testified that, during that period, the probate office was conducted in a negligent manner; that the witness during that period, in searching for original papers which had not been recorded,found them in a mass of others piled together in an empty fireplace in the building.

There was a verdict for the defendant. A motion for a new trial was overruled. The case was taken to the Court of Appeals, error being assigned on the refusal to charge that the burden was on the defendant to prove that the executrix had qualified; that there was no evidence that she had qualified; that the recitals in the deed were not evidence against the plaintiffs, and on the further ground that the court erred in refusing to direct a verdict for the plaintiffs. The judgment of the Supreme Court of the District was affirmed by the Court of Appeals of

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the District of Columbia, and the case brought here by writ of error.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the Court.

The plaintiffs in this action of ejectment claimed under the will of their father, John H. A. Wilson. The defendant, Charles Snow, claims under a deed executed in 1865 by Adelaide Wilson, the nominated executrix. On the trial, there was proof that the will had been probated in 1858, but no record evidence that the executrix had ever taken the oath of office and qualified as such. After showing the loss of certain books and the negligent manner in which the probate office was conducted from 1855 to 1861, the defendant insisted that the recital that the deed had been executed under the power of sale conferred by the will was sufficient to show that the nominated executrix had taken the oath and qualified as such.

The deed was more than thirty years old. The possession of the land had for forty years been consistent with its terms, and it was therefore admissible as an ancient deed, proving itself on the theory that the witnesses were supposed to be dead, and that it was impossible to produce testimony to show the signing, sealing, and delivery by the grantor. This rule has been extended so as to admit ancient deeds purporting to have been signed by agents without the production of the power of attorney -- the same reason

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that justified the introduction of an ancient deed, without proof of the signature of the witnesses or grantor, authorizing its admission without proof of the capacity in which, or the power under which, it purported to have been executed. For, in many cases, it would be quite as impossible to prove the due execution by him as agent as by himself as owner. So that, where the other necessary facts are present, and the possession of the land has been consistent with its terms, the ancient deed proves itself, whether it purports to have been signed by the grantor in his own right, as agent under power of attorney, or -- the original records having been lost -- by an administrator under a power of sale given by order of court, not produced, but recited in the deed itself. There are cases which support plaintiffs' contention ( *Fell v. Young,* 63 Ill. 110), but the weight of authority sustains the ruling of the court below. In *Baeder v. Jennings,* 40 F. 199, 216, 217, Justice Bradley at circuit, held that, other things concurring, the recitals in an ancient deed were some evidence of the facts recited, and he accordingly admitted the

administrator's deed forty years old, which purported to have been made in pursuance of an order of court which was not produced. A similar ruling was made in *Williams v. Cessna,* 43 Tex.Civ.App. 315, where an administrator's deed, executed more than thirty years before the trial, was admitted on the faith of its recitals, proof being made that probate records had been destroyed by fire. In *Willetts v. Mandlebaum,* 28 Mich. 521, a deed reciting that it was made in pursuance of an order in a partition suit was admitted on proof that the records had been lost, the court holding that the same strict proof was not required of ancient probate proceedings as where they were of recent date.

*See also* *Mumford v. Wardwell,* 6 Wall. 433; *Davis v. Gaines,* 104 U. S. 386 , 104 U. S. 398 ; *Fulkerson v. Holmes,* 117

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U.S. 389; *Taylor v. Benham,* 5 How. 272; *Carver v. Jackson,* 4 Pet. 83; *Crane v. Morris,* 6 Pet. 611; *Reuter v. Stuckart,* 181 Ill. 540-542; *Buhols v. Boudousquie,* 6 Martin (N.S.) 153.

2. The plaintiff, however, insists that even if the recitals are sufficient to show that Mrs. Wilson had qualified as executrix, her deed could not operate to convey the fee, inasmuch as she could not, by herself, execute the power conferred upon herself and her brother-in law jointly. It was urged that, in this respect, as in all others relating to the construction of wills, the testator's intention must govern; that he had indicated special confidence in the discretion of his brother, and, while contemplating that it might be necessary to sell the property, had expressly provided that this could not be done unless both the wife and the brother joined in the deed. It was further argued that this particular testamentary requirement, for the combined discretion of the two, coincided with the general rule that a joint power cannot be exercised by the survivor.

This is true where the power has been given A and B by name, and according to some cases, it is true also where given to A and B, executors. It is not so where the power has been conferred upon A and B, as executors, or where the power is

coupled with an interest. These distinctions have given rise to endless controversies and conflicting decisions -- a result naturally to be expected where an official title has been treated as a mere means of describing the persons instead of designating the capacity in which they were to act. It is, of course, true that the same persons may be referred to in different capacities in the same will. A and B may be donees of a naked power; or A and B, who are the executors, may be donees of such a naked power; or A and B, executors, may be given a power to be exercised in their official capacity. In Sugden on Powers (144), it was said

"that the liberality of modern times will probably induce the courts to hold that in every

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case where the power is given to executors, as the office survives, so may the power."

This prediction has not been altogether fulfilled, though the tendency is to hold that the words "A and B, executors," "A and B, hereinafter named as executors," "my said executors," is not a roundabout means of designating the individuals who are to act, but confer power upon them in their official capacity which may be exercised by the survivor.

The plaintiffs, insisting that the rule contended for by them is a rule of property, argue that the authority to "my executor and executrix hereinafter named" conferred power upon Adelaide Wilson and Thomas O. Wilson *nominatim* and as individuals only -- the words executrix and executor being merely descriptive of the persons later referred to by name, rather than designating the capacity in which they were to act. Numerous cases referred to in *Robinson v. Allison,* 74 Ala. 254, are relied on to sustain the contention. Many authorities to the contrary are cited by the defendant in error, among which are *Brassey v. Chalmers,* 4 De Gex, McN. & G. 528; *Davis v. Christian,* 15 Gratt. 11; *Smith v. Winn,* 27 S.C. 598, where the power was given "executors hereinafter named." *Weimar v. Fath,* 43 N.J.L. 1. *See also Gould v. Mather,* 104 Mass. 283, 286; *Zebach v. Smith,* 3

Binnney (Pa.) 69; *Clay v. Hart,* 7 Dana 1; *Wolfe v. Hines,* 93 Ga. 329; *Wood v. Sparks,* 18 N.C. 389.

3. It is unnecessary to attempt to reconcile the authorities or to determine which rule obtains in the District of Columbia. For, reading this will as a whole, it is clear that the power survived because coupled with an interest. It is true that the will did not specifically give the executors any interest in the land, nor was the word "trust" used by the testator. But the power to sell was coupled with the active and continuing duty of managing the property, making disposition thereof, and changing investments for the advantage of his family. Debts were to be paid,

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and the executors were to care for the slaves. If, in their discretion, it became necessary, "my executor and executrix hereinafter named" were to sell all of the property and reinvest the proceeds in good stocks or otherwise,

"in fact, to exercise a sound discretion in the management, disposition, and investment of my said estate [for the benefit and advantage of] my wife and children."

This was not a mere naked power to sell, but created an interest or raised a trust which would preserve the power to sell without regard to whether the interest was beneficial to the executors or not. For it is "the possession of a right in the subject over which the power is to be exercised that makes the interest" or creates "an authority coupled with an interest" which "survives for the purpose of effecting the object of the power." *Peter v. Beverly,* 10 Pet. 532, 35 U. S. 564 ; *Taylor v. Benham,* 5 How. 233; Pomeroy, Eq.J. (3d ed.), 1011.

And even if, as claimed, the power to sell was not mandatory, it was coupled with duties which, though to be exercised at their discretion, could not be arbitrarily disregarded by the executors. The duty of management raised the obligation to care for the property, keep it insured, pay the taxes, and collect the rents. Adelaide Wilson and Thomas O. Wilson, whether acting as executors or as trustees by implication, having accepted the appointment, were bound also to appropriate the

income from the land or the dividends from the stock to the maintenance of the family and the education of the minor children. For neglect so to do, any one of the *cestuis que trust* would have been entitled to maintain a bill against the executors or trustees, to compel them to discharge the duties for the performance of which full power had been conferred. The rights of the beneficiary would not cease upon the death of either of the representatives, and as the duty to manage survived, and followed the land, so did the coupled power of sale, which was

"manifestly subservient and auxiliary

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to the execution of the trusts which the testator had seen fit to connect with the administration of his will."

*Gould v. Mather,* 104 Mass. 286; *Tobias v. Ketchum,* 32 N.Y. 319. For

"where the duties imposed upon the executors are active and render the possession of the estate convenient and reasonably necessary, [they] . . . will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms."

*Ward v. Ward,* 105 N.Y. 68; *Toronto Trust Co. v. Chicago &c.; R. Co.,* 123 N.Y. 44; *Gray v. Lynch,* 8 Gill, 404, 423; *Weimar v. Fath,* 43 N.J.L. 1.

The duties imposed by the will continued after the death of Thomas O. Wilson, and the power to sell was lawfully exercised by Adelaide Wilson, surviving executrix, when she executed the deed to Huyck, the predecessor in title of the plaintiff. The judgment is

*Affirmed.*