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COMMENTS

FROM WHAT TIME DOES A WILL "SPEAK"?

A recent Iowa case raises interesting questions as to the construction of a will. The testator provided in his will that, on his death, his executors should convert all his property, both real and personal, into money, pay his debts and give to his wife one third of the residue. The remainder was to be distributed equally among his children. At the time of the execution of the will testator's principal property consisted of farm and city realty. Subsequently, he and his wife sold the farm land, but not the city property. The wife died first. Within a few months testator died without having altered the will. The testator's children insisted that the devise to the wife had lapsed, but a child of the wife by a former marriage, a stranger to testator's blood, claimed his mother's share under the Iowa Code.¹

The basis of plaintiff's (testator's children) claim lay in the proposition that a devise identical with what the law would allow the devisee lapses, and the beneficiary takes the "worthier title" which the law affords. This is the law in Iowa.² But defendant (deceased wife's son) insists that since the wife is entitled to one-third of the

¹IOWA CODE, 1924, 11861.

²Tennant v. Smith, 173 Iowa 264, 155 N. W. 267 (1915); Herring v. Herring, 187 Iowa 593, 174 N. W. 364 (1919). See also Gilpin v. Holingsworth, 3 Md. 190, 56 Am. Dec. 737 (1852); Post v. Jackson, 70 Conn. 283, 39 Atl. 151 (1898); Davidson v. Koehler, 76 Ind. 398 (1881).

husband's realty, regardless of his debts, the provision in the will is not identical with the statutory provision, and consequently the devise does not lapse. The court ruled with the defendant, the devise was upheld, and the "stranger" took his mother's share under the statute.³

But the distributive share of personal property to which the wife is entitled, under the Iowa law, is exactly in accord with the directions in the will. The wife is entitled to one-third, after all testator's debts are paid. Attorneys for plaintiffs urged upon the court that, since the will imperatively demanded the conversion of all deceased's property into personalty, the will should be treated as one disposing entirely of personalty. If this were done, the case would fall within the rule that the devise lapses when the devise and statutory provisions are the same.

The court, however, takes the other view. The whole opinion hangs upon the proposition that the mental or equitable conversion by the testator was insufficient to bring the case within the above mentioned rule. Thus the court argues: "It is doubtless true that the provisions of the will worked an equitable conversion of the real estate owned by the testator at the time of his death in so far as it was within his power to work such conversion. But he had no power to work such conversion as against his surviving wife. The very provision of the will which purported to work such equitable conversion was an invasion of the right of distributive share in kind rather than a recognition of it. This of itself destroyed the identity claimed as between testamentary and statutory provision. We have no need to pursue the discussion further."⁴

Now the facts in this case stipulate that the wife was dead when the testator died. The facts should not be ignored. In view of this situation, then, it is submitted that the construction of this will is made as of some time prior to the wife's death, otherwise there is no obstacle to the theory of equitable conversion, for the wife had been dead several months when the testator died. But the general rule is that when the will, as here, contains unequivocal directions to convert, the property is to be regarded as converted as of the time of the testator's death.⁵ The Iowa cases are in accord with this prevailing rule, and yet to deny the application of equitable conversion, the Iowa court is here insisting upon construing the will as of some time prior to the wife's death, it is not clear just when.

But there is still another peculiar phase to the situation. If the court is actually construing this will as of some time prior to the wife's death, and determining its effect at that time, it would seem clear that it is bound in logic to carry out the construction as of that same time, in order to determine the rights of the parties under the will. Equitable conversion is expressly denied in the opinion, *because the testator could not work such conversion as against his surviving wife*. This alters the actual facts of the case and sets up a hypothetical case, namely, the situation of the wife *surviving* the testator. But it will be noticed that under the will, the wife is entitled to *less* than she would take under the law. The testator obviously *intended* that she should

³*In re Davis' Estate*, 213 N. W. 395 (1927)

⁴*Ibid.* 396

⁵*Dever v. Turner*, 200 Iowa 926, 205 N. W. 755 (1925); *Re-Sargent's Estate*, 215 App. Div. 639, 214 N. Y. S. 479 (1926); *Baker v. Commissioner etc.*, 253 Mass. 130, 148 N. E. 593 (1925); *Westfield Trust Co. v. Beekman*, 97 N. J. Eq. 140, 128 Atl. 791 (1925).

take exactly what the law would allow, but this, in fact, he could not bring about because now the wife survives him. As a matter of law, the wife's rights are substantially greater under her distributive share, for the husband might owe more than the value of his real estate, in which case she would take nothing under the will.

Now under such a situation, the court's hypothetical case—not the actual facts in the case—the wife must elect.⁶ Earlier Iowa cases held that if she failed to elect, she would be deemed to have elected to take her distributive share and to have waived her rights under the law.⁷ Only by statute was this rule changed in Iowa,⁸ and in case of failure to elect she is conclusively presumed to take under the will. But this would only be a case for the application of this presumption, if it be presumed further that the wife would refuse to elect to take her distributive share, when that share is substantially larger than what the will affords her. The reasonable assumption is that she would elect to take under the law, in which case, of course, the devise would lapse and defendant in this case would have no claim upon the estate.

To avoid imputing such an unreasonable and unlikely election to the wife, it appears that the court has construed the will, so far as permitting defendant to claim under the Iowa statute is concerned, as of the time of testator's death when no election is necessary because the wife is already dead. But this is inconsistent with what the court has done when denying the theory of equitable conversion in this case. The hypothetical situation is abandoned and the court reverts to the actual facts, and by the facts the wife died first. It seems that the court is trying to eat its cake and save it at the same time, which is difficult to do. It adopts one theory to exclude the application of equitable conversion while resorting to another in order to permit defendant to take under the Iowa Code. Otherwise the court is confronted with the insufferable assumption that the wife is to be deemed to have refused to take under the law, when her rights were substantially greater under the law than under the will.

FOWLER V. HARPER.

RIGHTS OF SUBROGEE OF FIRST MORTGAGE

The defendant K arranged with the plaintiff Loan Company to float a bond issue of \$10,000 secured by a third mortgage executed on 1400 acres of land, with the understanding that the first and second mortgages thereon should be discharged either from the proceeds of the loan or by K from other sources. In pursuance with this agreement, the plaintiffs paid, together with other incumbrances, the first mortgage of \$1800, and charged the payment against K on account of the loan, rendering a statement to K showing the first mortgage as paid, but not recording a satisfaction thereof. The loan was insufficient to pay the second mortgage of \$2000 to N on part of the land, and K failed to pay it from other sources. The plaintiffs had given N to understand that he had no cause to worry, inasmuch as the first mortgage was paid. Relying on this representation, N foreclosed and bought in the land at sheriff's sale in full satisfaction of the amount of his claim at a time when K was solvent. The plaintiffs then procured

⁶CODE, 1924, 12007.

⁷Everett v. Croskey, 92 Iowa 333, 60 N. W. 732 (1894).

⁸CODE, 1924, 12010.