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Conflict of Laws-Equitable Conversion

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RECENT CASE NOTES

CONFLICT OF LAWS—EQUITABLE CONVERSION.—Testatrix died resident of Ohio and owner of Indiana real estate. By her will she gave a life estate in the Indiana property to her husband with directions for the land to be sold upon his death and the proceeds divided equally between her brother and sister. The brother and sister predeceased both the testatrix and her husband. Plaintiffs claim title to the real estate as heirs of the brother and sister. Defendants claim title as devisees of the husband who was testatrix's sole heir and residuary legatee. Held, for plaintiffs. *Duckwall v. Lease* (Ind. App. 1939), 20 N. E. (2d) 204.

A will devising personalty is governed by the law of the domicile of the testator.¹ A will devising realty is governed by the law of the situs of the realty.² The effect of the will if governed by the law of Ohio, the testatrix's domicil, was to devise personalty since by Ohio law a legacy to a brother or sister who predeceased the testator will not lapse³ and their heirs would take the proceeds of the real estate. The law of Indiana is that a legacy to a brother or sister lapses if the brother or sister dies before the testator.⁴ If this applies the bequest to the brother and sister lapsed and the testatrix's husband took the land either as sole heir or residuary legatee. The court applied the law of Ohio reasoning as follows:

1. Indiana has the right to decide whether a will concerning real estate in Indiana converts property to personalty by its own laws.⁵

2. Equitable conversion rests upon the proposition that in the absence of intervening rights the testatrix's intention, so far as it affects the beneficiaries, will control. Its purpose is to carry out the intention of the testatrix so far as that can be done within the rules of law.⁶

¹ *Irving v. McLean* (1835), 4 Blackf. 52; *McCleery v. Matson* (1850), 2 Ind. 7; *Evansville Ice and Cold Storage Co. v. Winsor* (1897), 148 Ind. 682, 48 N. E. 592; 2 PAGE ON WILLS (1926), §§ 1432-33; 1 HENRY'S PROBATE LAW (4th ed., 1931), §§ 598, 605.

² *Heistand v. Kuns* (1847), 8 Blackf. 345 note 1, p. 349-50; *Lucas v. Tucker* (1861), 17 Ind. 41; *Evansville Ice and Cold Storage Co. v. Winsor* (1897), 148 Ind. 682, 48 N. E. 592; *Clarke v. Clarke* (1899), 178 U. S. 186, 20 S. Ct. 873, 44 L. Ed. 1028; 1 HENRY'S PROBATE LAW (4th ed., 1931), §§ 598, 605; RESTATEMENT, CONFLICT OF LAWS (1934), § 249 and comment c. which says, "A will of an interest in land is governed by the law of the state where the land is, in spite of a direction in a will to convert the land into personalty."

³ 7 Paige's Ohio Gen. Code (1938), 10504-73; *Larwill's Ex'rs v. Ewing* (1905), 73 Ohio St. 177, 76 N. E. 503.

⁴ *Maxwell v. Featherstone* (1882), 83 Ind. 339; *West v. West* (1883), 89 Ind. 529; *Collins v. Collins* (1890), 136 Ind. 559, 25 N. E. 190; *Burns Ind. Stat. Ann.* (1933), § 7-709.

⁵ *Clarke v. Clarke* (1899), 178 U. S. 186, 20 S. Ct. 873, 44 L. Ed. 1028.

⁶ *Inglis v. Trustees etc.* (1830), 3 Pet. U. S. 99; *Briggs v. McCarty* (1882), 86 Ind. 352; *Fowler v. Duhne* (1895), 143 Ind. 248, 42 N. E. 623; *Mulvane v. Rude* (1896), 146 Ind. 476, 45 N. E. 659; *Comer v. Light* (1910), 175 Ind. 367, 93 N. E. 660, 94 N. E. 325; *Brookover v. Branyan* (1916), 185 Ind. 1, 112 N. E. 769; *McClen v. Lehker* (1919), 70 Ind. App. 435, 123 N. E. 475.

3. The intention of the testatrix was for the beneficiaries to receive only the proceeds of land, personally.⁷

4. To carry out this intention equitable conversion will be invoked and the property treated as personalty.

Both Ohio and Indiana have lapsed legacy statutes.⁸ The purpose of such statutes is to supply a presumed intention of the testator in the absence of actual intention appearing in the will. Since the testatrix in the principal case expressed no intention as to whether the heirs of her brother and sister should take if these beneficiaries predeceased her⁹ the intention must be derived from the lapsed legacy law of either Indiana or Ohio.

The character of property, whether realty or personalty, is to be determined by the law of the place where it is situated.¹⁰ The property in question was situated in Indiana. By Indiana law a right to the proceeds of land to be sold at the termination of a life estate is an interest in land.¹¹ The will in the principal case disposed of realty by directing it to be sold regardless of whether or not it worked an equitable conversion.¹² As to the operative effect of a will, and the rights of the parties thereunder, its construction as to the disposition of real estate or the creation of any interest therein is governed by the law of the place where the property is situated.¹³ The doctrine of comity must yield to the positive law of the land. Hence the foreign law must give way when in conflict with the statutes of the forum.¹⁴ The forum can give

⁷ The exact words of the will were, ". . . and at his (the life tenant's) demise I direct that the said farm shall be sold and the proceeds divided equally, share and share alike, between my sister Cora Lease of the Village of West Manchester, State of Ohio, and H. A. Duckwall of the city of Elkhart, State of Indiana."

⁸ Burns Ind. Stat. Ann. (1933), § 7-709; 7 Paige's Ohio Gen. Code (1938), 10504-73.

⁹ The words of the will in this respect appear in footnote 7, *supra*.

¹⁰ Lemmon v. Peo. (1860), 20 N. Y. 562, 602 where it is stated, ". . . where the Legislature of the State, in which a right or privilege is claimed on the ground of comity, has by its laws spoken upon the subject of the alleged right, the tribunals are not at liberty to search for the rule of decisions among the doctrines of international comity, but are bound to adopt the directions laid down by the political government of their own state;" McCollum v. Smith (1838), Meigs (Tenn.) 342, 33 Am. D. 147 where a question of succession to property located in La. arose in Tenn. By La. statute it was declared realty but by Tenn. law it was personalty. Held, the law of the forum cannot impress property with a character different from the character it has by the law of its situs.; Biggs v. McCarty (1882), 86 Ind. 352-363 distinguishing between actual and legal intent.; RESTATEMENT, CONFLICT OF LAWS (1934), § 221 and comment b.

¹¹ Brumfield v. Drook (1885), 101 Ind. 190; Bowen v. Swander (1899), 121 Ind. 164, 22 N. E. 725; Lantz v. Caraway (1913), 180 Ind. 484, 103 N. E. 335. See also Brook v. Badley (1868), L. R. 3 Ch. App. 672.

¹² Norris v. Loyd (1918), 183 Iowa 1056, 168 N. W. 557.

¹³ DeVaughn v. Hutchinson (1896), 165 U. S. 566, 17 S. Ct. 461, 41 L. Ed. 827; Clarke v. Clarke (1899), 178 U. S. 186, 20 S. Ct. 873, 44 L. Ed. 1028; Jacobs v. Whitney (1910), 205 Mass. 477, 91 N. E. 1009, 18 Ann. Cas. 576; Evansville Ice and Cold Storage Co. v. Winsor (1897), 148 Ind. 682, 48 N. E. 592; RESTATEMENT, CONFLICT OF LAWS (1934), § 209.

¹⁴ Lemmon v. Peo. (1860), 20 N. Y. 562, see quotation from this case in footnote 10 *supra*; Green v. Van Buskirk (1866), 5 Wall. 307, 18 L. Ed. 599; Hervy v. R. I. Locomotive Wks. (1876), 93 U. S. 664, 23 L. Ed. 1003; Higgins v. Eaton (1911), 188 F. (2d) 933.

effect only to an intent not contrary to its own laws.¹⁵ It would therefore seem to follow that the presumed intention must be supplied by the Indiana lapsed legacy law. By it the bequest to the brother and sister lapsed and the husband as residuary legatee or sole heir took the real estate as real estate, there being no equitable conversion.

To apply the doctrine of equitable conversion to this will is not in accordance with Indiana law.¹⁶ It can be invoked only by reference to the Ohio law of lapsed legacies under which the bequest of the proceeds would not lapse and the heirs of the beneficiaries would take the proceeds of the sale of the real estate. The court applied equitable conversion to give effect to the testatrix's intention. But any intention to pass personalty to the heirs of the brother and sister must be implied and it can be implied only under the Ohio lapsed legacy law. The court refers to Ohio law to justify a reference to Ohio law. The propriety of any reference to Ohio law is questionable in the light of the authorities.¹⁷

The decision stated in summary appears to be: To determine the character of an interest in Indiana real estate the intention implied by a foreign law to a testator of a foreign will is given effect although not in accord with Indiana law. Thus stated we have a new proposition of conflict of laws without cited or known precedent.¹⁸ Such a conclusion hardly follows from the propositions in the decision whereas the opposite result can easily be reached and supported logically.

R. B. W.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND PRESS—MUNICIPAL ORDINANCES RESTRICTING DISTRIBUTION OF PRINTED MATTER.—Ordinances were passed in three cities prohibiting the distribution of handbills and other similar printed matter in the streets. A fourth city prohibited canvassing, soliciting, and the distribution of circulars from house to house without first having secured a permit from the Chief of Police, in whose discretion such permit was to be issued. In each of the first three cities, petitioners were convicted of distributing handbills and leaflets to pedestrians on the street, and in the fourth, petitioner was convicted of canvassing and soliciting money contributions without a permit. Held, convictions reversed, for all these ordinances are void, as applied to petitioners' conduct, as being in violation of the Fourteenth

¹⁵ *Smith v. Bell* (1832), 6 Pet. U. S. 68; *Blatt v. Blatt* (1926), 79 Colo. 57, 243 Pac. 1099, 57 A. L. R. 221 where it is said, "All the authorities that speak on the subject declare that the laws of the state where the testator lived at the time he made his will will not, in the courts of another state, where the will is probated, be controlling or conclusive or be followed in so far as it concerns the intention of the testator or as bearing on the effect and operation of the will, if it is contrary to the public policy or the statutes of the state where the will is probated." THOMPSON, CONSTRUCTION OF WILLS (1928), § 48 and cases cited.

¹⁶ *Burns Ind. Stat. Ann.* (1933), § 7-417, "Foreign wills—Filing and recording in Indiana—Effect.—Such will . . . shall have the same effect as if it had been originally admitted to probate and recorded in this state."; § 7-709, lapsed legacy statute.

¹⁷ *Lemmon v. Peo.* (1860), 20 N. Y. 562, quoted from in footnote 10, *supra*; *Holcomb v. Wright* (1894), 5 App. (D. C.) 76; *Clarke's Appeal* (1898), 70 Conn. 195, 483, 39 Atl. 155; STORY ON CONFLICT OF LAW (8th ed., 1883), 447.

¹⁸ *Cf.* *Clarke's Appeal*, 70 Conn. 195, 483, 39 Atl. 155.