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Wills-Abatement of Legacies

WILLS—ABATEMENT OF LEGACIES—The testator devised to his wife all of his personal property and in addition certain lands subject to one-half of his debts. Specific lands were devised to his children. The widow elected to take under the will.[1] The estate being solvent, the question to be determined, was what property should be used first in the payment of the testator's debts. The lower court held that the specific devise of land to the wife should be liable for one-half of the debts and that the personal property should be resorted to for the payment of the other half. On appeal, the appellate court sustained the judgment as to the specific devise of land, but held that the devise to the children should be resorted to first in the payment of the other one-half of the testator's debts before the personal estate bequeathed to the wife should be used.[2]

As a general rule personal property is used first in the payment of debts.[3] If in any given factual situation this fund proves insufficient, then and then only will the land specifically devised be resorted to in discharge of the testator's obligation.[4] The principal case in the final analysis involves the question whether the general rules will be strictly adhered to under the peculiar circumstances involved.

In passing it might be well to note that usually this problem is not so simply presented. Quite often we find more than one general legatee, and as a consequence, if the personal property resorted to proves more than sufficient, the court must work out a scheme of pro rata reduction in the bequests.[5] When we inject the peculiar factual complication of the principal case, the question becomes not only one of pro rata abatement of general legacies, but whether one or more of such legatees will be allowed to escape altogether the burden of payment and suffer no reduction of his bequest. Admittedly, we more closely approach the principal case, when the property to be devoted to general legacies other than the widow's are insufficient to discharge the obligations. There the question of pro rata abatement is excluded, and as here the contest becomes one between a general legacy and a specific devise.

As stated above generally specific devises will re resorted to only after all other property of the estate has been exhausted.[6] One exception to this rule, however, is when a legacy has been given for a valuable consideration as in lieu of a widow's dower right.[7] Such a legacy has priority over all other

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[1] Burns' '33, Ind. Stat. Anno., Vol. 3, Sec. 6-2332.

[2] Easterday v. Easterday et al. (Ind. App., 1937), 10 N. E. (2d) 764.

[3] 28 R. C. L. p. 300; McCampbell v. McCampbell (1824), 5 Litt. (Ky.) 92, 15 Am. Dec. 48. Henry, G. A., Probate Law and Practice, 4 Ed., Vol. 1, Sec. 176.

[4] Knotts v. Bailey (1876), 54 Miss. 235, 28 Am. Rep. 348; 28 R. C. L. p. 300. Henry, G. A., Probate Law and Practice, 4 Ed., Vol. 1, Sec. 176.

[5] Washburn v. Sewall (1842), 4 Met. (Mass.) 63; 34 A. L. R. note p. 1248: "The general rule is that in the administering of testamentary assets, gifts to general legatees, who are volunteers in partaking of the testator's bounty, abate pro rata in the event of the assets being insufficient to pay all in full after the payment of the debts and specific legacies, unless an intention to the contrary is expressly or clearly implied in the will."; Burns' '33, Ind. Stat. Anno. Vol. 3, Sec. 6-1304.

[6] Note 4 supra.

[7] Moore v. Alden (1888), 80 Me. 301, 14 A. 199, 6 A. S. R. 205.

legacies including even specific devises and will not be resorted to first.[8] There must, however, be a valid existing legal obligation at the time of the testator's death.[9] A general legacy in discharge of a moral obligation, or as compensation for services or for favors rendered gratuitously, is not entitled to a preference over the other devises or legacies.[10]

The best example of this exception to the general rule are legacies given: first, in consideration for the discharge of a debt to a creditor;[11] and second, in lieu of a widow's right of dower. As to the first, it is apparent from the decisions that it is not accepted quite as readily as consideration, as is the waiver of a widow of her dower right in consideration for her right to take under the testator's will. Some courts contend that such a legatee takes only on the bounty of the testator and not as a purchaser for value.[13]

By the great weight of authority, a general legacy in lieu of dower being in consideration of an existing legal right, constitutes the widow as a purchaser for value,[14] and for that reason is entitled to a priority over all legacies and specific devises to volunteers of the testator's bounty.[15] This is true even though the will does not specificially provide that the gift is in lieu of dower.[16] However, this exception does not apply where the intention of the testator clearly shows such gift should not have a preference over other bequests.[17]

This question is one of first impression in Indiana[18] but the court has adhered to the majority viewpoint. F. L. M.

UNFAIR COMPETITION—FUNCTIONAL AND NONFUNCTIONAL PARTS—Plaintiff filed a complaint asking for a preliminary and permanent injunction enjoining defendant from manufacturing or selling its electric shaver with its present

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8 Borden v. Jenks (1886), 140 Mass. 562, 5 N. E. 623, 54 Am. Rep. 507: "A pecuniary legacy to the testator's widow accepted by her, must be paid not only in preference to general legacies, but if the abatement of those proves insufficient in preference, first to specific bequests, and second to specific devises."

9 34 A. L. R. Note p. 1288; Pomeroy, J. N., Eq. Juris. 4th Ed., Vol. 3, Sec. 1142: "A general legacy given for a valuable consideration . . . does not abate with the other legacies, provided the dower right or the debt still exists at the testator's death."

10 Duncan v. Franklin Twp. (1887), 43 N. J. Eq. 143, 10 A. 546; but in Matthew v. Targorna (1906), 104 Md. 442, 65 A. 60, 10 Am. Cas. 153, it was held, "that a legacy to one whose right to recover for the death of the testator is barred by the Statute of Limitations is entitled to priority on the theory that the legatee is a purchaser."

11 34 A. L. R. Note p. 1285; Reynolds v. Reynolds (1906), 27 R. I. 520, 63 A. 804.

12 Pope et al. v. Pope et al. (1911), 209 Mass. 432, 95 N. E. 864.

13 Wedmore v. Wedmore (1907), 2 Ch. (Engl.) 277, 2 B. R. C. 502; Re Rispin (1914), 35 Ont. L. Rep. 385, 27 D. L. R. 574; 34 A. L. R. Note p. 1285.

14 34 A. L. R Note p. 1276; Lord v. Lord (1854), 23 Conn. 327; Pope v. Pope et al. Note 14 supra; Elmery v. Batchor (1886), 78 Me. 233, 2 A. 733 (dictum).

15 Note 9, supra.

16 Note 13, supra.

17 Note 8, supra.

18 First National Bank Exr. v. Hessong (1925), 83 Ind. App. 531, 149 N. E. 190 (dictum). The court in this case stated the general rule but held it did not apply, since the testator's intent was that all general legacies should abate pro rata.