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Supreme Court has ruled that the contradiction was properly admitted because it was contradiction of a material matter elicited on cross-examination.⁷

It is, therefore, yet an open question what our own Supreme Court will do, but if it follows the weight of authority and what, it is submitted, is the weight of reason it will adopt the rule that answers elicited on direct examination on collateral matters may be contradicted.

Robert S. Macfarlane.

MAY A MAN PROVIDE IN HIS WILL THAT HIS WIFE SHALL NOT TAKE UNDER IT UNLESS SHE SHALL SURVIVE HIM FOR A PERIOD OF FORTY-EIGHT HOURS?—The advantages are apparent that might be gained by a man including in his will the provision that his wife should not take under it unless she should survive him for a period of, say, forty-eight hours. As an example, there is the famous French case of *Fair v. Vanderbilt*, in which both spouses were killed, the wife surviving the husband fifty-nine seconds, and of which a learned author once remarked, "It was the first time in history that a man and his wife were ever killed while riding together." No provision had been made in contemplation of either co-accidental or incidental death. These two vast estates became merged into one. How much more equitable it would have been to let the estates remain in the respective families. Due to this sudden and unexpected death, one family was enriched, to the detriment of the other. Who can say this was a just enrichment, using this principle as a comparison, and that such a distribution was any other than a mere interpretation of words in a will or statute?

Every practicing attorney knows of some local application of this distribution in his community. Because of the risk of automobile or similar accident, each spouse may advantageously incorporate a clause in his will providing for just such contingencies. Would such a will, then, be permissible in Washington? Objections may be raised that the statutes as they now exist are mandatory, in a way that would prevent such a will, that such a provision would leave the title to devised property nowhere during the interim, that the court would declare an intestacy. It may even be urged that the same result may be effected through some established form, such a life estate.

The statutes which must be taken into consideration are as follows: Remington's Compiled Statutes §1366 reads: "When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No adminis-

⁷ *Allard v. Northwestern Contract Co.*, 64 Wash. 14, 116 Pac. 457 (1911) *McNall v. Sandygren*, 100 Wash. 133, 170 Pac. 561 (1918) *State v. Hood*, 103 Wash. 489, 491, 175 Pac. 27, 8 (1918).

tration of the estate of such decedent and no decree of distribution or other finding, or order, of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs and devisees instantly upon the death of such decedent: PROVIDED that no person shall be deemed a devisee until the will has been probated.

Rem. Comp. State. §1370, enacted at the same time as Section 1366, as a part of the same bill, provides: "This act shall apply to community real property and also to separate estates, and upon the death of either husband or wife, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised as provided in Section 3303 in the Code of Washington 1881."

Since the wife's vested interests may not be alienated by the husband, it is her contingent interest in the husband's vested interests that may accrue to her benefit, according to the intents and desires of the husband. We must look to Section 3308 of the 1881 Code to ascertain the gist of the statute which was incorporated by reference. "Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowances and the charges and expenses of administration."

These statutes are not mandatory when it is possible to go beyond their mere words and take instead, for our general principle, those statutes which direct that generally, all code provisions shall be liberally construed and shall not be limited by any rules of strict construction, and further, that the intention of the testator shall be ascertained as far as possible. The statute which provides that "The executor or administrator shall take into his possession all the estate of the deceased, real and personal, and collect all debts due to the deceased," fixes merely an administrative duty, and does not involve the passing of title to property¹

Where would the title be, during the forty-eight hour period that would ensue in all instances save where the eventuality guarded against had occurred? There are several possibilities. First, it may be in the executor or the administrator, secondly, it may be in the remainder man as trustee until the expiration of the conditional period, thirdly in the heirs at law, or lastly, in the probate court.

The principle is undoubtedly true that, broadly speaking, the law favors an early vesting of title. The Washington case of *Shufeldt v.*

¹ *Gibson v. Slater* 42 Wash. 347, 84 Pac. 648 (1906).

Shufeldt,² acknowledges this doctrine, but in addition holds that it will not be permitted to override the contrary intention of the testator, and is resorted to only for the purpose of avoiding perpetuities, intestacy, illegal suspension of the power of alienation, and to effect an intention which might otherwise be defeated. So that principle, the motivating force of the objection of "Where is the title meanwhile?" should not be allowed to defeat the testator's intention, in the will proposed.

However, there are several possible answers to the question. Could not the title be held to be in the executor during the forty-eight hour period? In discussing a non-intervention will case, the Washington supreme court makes statements which are in reality germane also to the general descent and distribution of property, whether it be by a mere general will or by a non-intervention will.

It was held by this court in *Balch v. Smith*,³ and affirmed in *State ex rel. Phinney*⁴ "that, under the general probate act, title would not pass to the heir, excepting through the intervention of the probate court, and that the assertion of heirship, without the aid of an adjudication by that court was not sufficient to authorize him to maintain an action against the adverse holder. This must have been upon the theory that the title vested in the court, instead of the heir, until the title was adjudicated, or in other words, that the court was, in a sense, a trustee created by law to hold and dispose of the title under the provisions of the law. But under the law in question, where does the title rest? Unlike the historical coffin it cannot be suspended, but must abide somewhere. It is not in the heir, under the theory of *Balch v. Smith*. It is not in the court, because, under the special provisions of the law under which it was drawn, (non-intervention of wills statute) the court is excluded from any participation in the distribution of the estate or its management. Its only logical abiding place then is in the trustee or agent appointed by the deviser."

It could very easily be assumed by the court that all executors were trustees, even though at times, in a limited way, to carry out the provisions of the will. Especially where no provisions are directly in contravention with the directions and duties of an executor. Going one step further, it might even be said that, by implication, authority is vested in the wife to hold the title temporarily until the beneficial use shall accrue, say forty-eight hours later, since that is the obvious intent and purpose of the husband's peculiar provision of his will.

An analogous situation is furnished in cases of bankruptcy. Upon filing a petition in bankruptcy or upon petition by three creditors, a technical bankruptcy is constituted and by statute, title is divested of the bankrupt and placed in the trustee. Yet how can the title vest in the trustee when one is not appointed until ten days have elapsed, giving all of the bankrupt's creditors an opportunity to file claims against his remaining assets? It is only after a meeting of these credi-

² 130 Wash. 253, 227 Pac. 6 (1924).

³ 4 Wash. 497, 30 Pac. 648 (1892).

⁴ 21 Wash. 186, 57 Pac. 337 (1899).

tors, and a selection by them of a trustee that it is possible for the title actually to vest, as the law directs. The title in the meantime was where it had previously rested, namely, in the bankrupt, as trustee for his creditors. There is this nominal period of time,—here approximately ten days—sufficient notice to all the world of the true status of the *corpus*, *i. e.*, either assets or estate, so that no perversion of the property could be made to the detriment of creditors, whereby title might pass to a *bona fide* holder for value and without notice. Therefore, even though by statute, the law directs that title shall vest immediately in the trustee in bankruptcy, it demonstrates the inconsistency between theory and fact and proves that the law is only mandatory in analogous cases where and when conditions so come together as to make it not only possible, but reasonably practicable. And so it appears, regarding the main topic, that title may wait the intervening period of forty-eight hours, until the actual determination of the status of the beneficiaries.

The case of *Fitzgerald v. Ayers*,⁵ where a husband and wife each named the other as principal beneficiary in his will, each providing that if the other died first, their foster son should become the sole beneficiary. Both husband and wife were frozen to death, there being no evidence tending to show which died first. The foster son took under the will in preference to the next of kin.

It is well established in the common law that there is no presumption of survivorship or of simultaneous death where persons meet death in a common disaster.⁶ It is a fact to be proved by the claimant.⁷ When the claimant cannot establish the survivorship under the English view, the gift over fails, and the property passes into the residuum, or by intestacy.⁸ Precisely the same result is reached in this country where the property is distributed as if the deaths were simultaneous.⁹ In the United States, however, effect has been given, in construing a will providing for a gift over, if the principal legatee "dies before I do" to the obvious intention of the testator that if, for any reason, the primary beneficiary cannot take the property with an effective power to dispose thereof, the gift over is to prevail.¹⁰ Under the American construction, the claimant in the principal case, takes without the necessity of establishing a survivorship. This seems obviously the only just result. The case of *Young Women's Christian Association v. French* was one in which the testatrix and her son met simultaneous death in a shipwreck, in which the will provided that a gift over should take place provided her son did not survive her and if he did, he was to take all, the hus-

⁵ 179 S. W. 289 (1915 Tex. Unrep'ted).

⁶ *Underwood v. Wing*, 19 Beav. 459 (1854) *Newell v. Nichols*, 12 Hun. (N. Y.) 604 (1878).

⁷ *Wing v. Augrave*, 8 H. L. Cas. 182 (1860) *Newell v. Nichols*, *supra*.

Elliott v. Smith, 22 Ch. Div. 236 (1878).

⁹ *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132 (1888) *Re Wilbor* 20 R. I. 126, 37 Atl. 634 (1897).

¹⁰ *Y. W. C. A. Home v. French*, 187 U. S. 401 (1903) *St. John v. Andrews Institute*, 191 N. Y. 254, 117 App. Div. 698, 83 N. E. 981, 214 U. S. 19 (1909).

band having died previously and therefore not before the court. Mr. Chief Justice Fuller said.

"But the argument is that the testatrix's wishes cannot be carried out, inasmuch as it is insisted each of the devises and bequests was on the express condition of survivorship, and to give effect to the alleged intention would require the interpolation of some phrase covering the contingency of inability to ascertain survivorship, which interpolation would be wholly inadmissible.

"This, however, is matter of construction, and if the state of facts at the time of Mrs. Rhodes' death did not substantially differ from what the will shows she contemplated when it was executed, then no interpolation is required, and the property must go according to the intention necessarily deducible."

Therefore, the United States Supreme Court will not declare an intestacy where there is a possibility of effectuating the intentions of the testator. Merely because it is shown that there is no intention of a fee simple vesting immediately in the wife, is no indication that there will be either an intestacy or a forced vesting but the property will rather "go according to the intention necessarily deducible."

Washington, too, staunchly upholds the doctrine of intent. In *Davis v. Brown*,¹¹ the court speaks upon the fundamental rules in the construction of wills:

"The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will, as viewed, in the case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was executed, although technical rules are not used, or, as is sometimes said, the testator's intention must be ascertained from the four corners of the will. "

The court says that these principles have been recognized since the earliest decisions in this state.¹² *Shufeldt v. Shufeldt*,¹³ reaffirms the doctrine in all the preceding cases and quotes Remington's Compiled Statutes, §1415

"All courts and others concerned in the execution of wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them."¹⁴

The court has by law and precept given close scrutiny to the intents and circumstances surrounding the making of wills and in the most

¹¹ 112 Wash. 121, 191 Pac. 1098 (1920).

¹² *Newport v. Newport*, 5 Wash. 114, 31 Pac. 428 (1892), and subsequently in *Webster v. Thorndyke*, 11 Wash. 390, 39 Pac. 677 (1895), *Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087 (1908), *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137 (1913) *Denton v. Schneider* 80 Wash. 506, 142 Pac. 9 (1914) *In re Moran's Estate*, 95 Wash. 428, 163 Pac. 922 (1917) *In re Peter's Estate*, 101 Wash. 572, 172 Pac. 870 (1918) *In re Wilson's Estate*, 111 Wash. 491, 191 Pac. 610 (1920), and in the instant case, *Davis v. Brown*, 112 Wash. 121, 191 Pac. 1098 (1920).

¹³ 130 Wash. 253, 227 Pac. 6 (1924).

¹⁴ *In re MacMartin's Estate*, 131 Wash. 192, 229 Pac. 530 (1924).

interpretative manner has endeavored to carry out that intention, provided it was not against statutory provisions or public policy

It is now necessary that we examine some of the decisions of our courts in regard to the actual application of these principles.

In *Reeves Executors v. School District No. 59*¹⁵ the testator provided that the balance of his property, real and personal, should descend to his crippled son Charles, excepting his share of the interest that he and R. J. Reeves held jointly on a section of land. In case of Charles' death, it was his desire that his sole property should be applied to the school fund of Wilbur, Washington. The testator died three days later and the son Charles died four year later, single, under twenty-one and without a will. Under Ballinger's Code, §4508, Remington's Compiled Statutes, §1409, "Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall appear clearly by the will that he intended to convey a less estate."

This devise therefore was an unequivocal, direct and positive devise of an absolute estate, and not restricted by ambiguous and uncertain provisions following in the will. Upon the death of the testator during the lifetime of the devisee, the will conveyed an absolute title. This is merely affirming the doctrine set forth by Judge Chadwick, that the title to real property shall vest immediately upon the death of the testator.

In *Moore v. Martin*,¹⁶ the testator left a will devising to his daughter Mary one-half of the proceeds of his undivided one-third interest in certain lands which should be unsold at his death, and a similar provision was made for the minor son Amos. The will was thereafter admitted to probate and the executor was permitted to sell the land to the plaintiff. Mr. Chief Justice Hadley held that "It was the intention of the executor to convey the interest of the deceased in the land and divide the proceeds among the children and, therefore, the title to the land did not vest in the children at the death of the testator. The executor became the trustee for all purposes necessary to execute the terms of the will."¹⁷

The terms of the trust could not be carried out without the power to sell the land and to transfer the title thereto. Mr. Hadley quotes 2 UNDERHILL, LAW OF WILLS, §781

"If the purposes of the trust require that the trustee shall take the fee simple of the legal interest in order that those purposes may be carried out, he will take an estate of inheritance, though no words of inheritance have been used by the testator in devising the legal interest. Hence, if the interest given to the beneficiary through it was devised to

¹⁵ 24 Wash. 282, 64 Pac. 752 (1901).

¹⁶ 49 Wash. 288, 94 Pac. 1087 (1908).

¹⁷ *Newport v. Newport*, 5 Wash. 114, 31 Pac. 428 (1892) *Seattle v. McDonald*, 26 Wash. 98, 66 Pac. 145 (1901) *In re McDonald's Estate*, 29 Wash. 422, 69 Pac. 1111 (1902).

him in indeterminate language, is greater than the legal interest devised to the trustee, the trust estate will be enlarged in the trustee to answer all the purposes of the trust. If the carrying out of the purposes of the trust require that the trustee shall take a fee, equity will create a fee simple in him by implication without the use of the word 'heirs.'

It will be seen that the executor or administrator was impliedly a temporary trustee for a specific purpose, who was to hold the property in the interim until the testator's intention could be effected. Could not the estate vest in the executor or even the devisee wife as trustee, until the expiration of the forty-eight hours?

A life estate could be created by necessary words, and, to a restricted degree, effectuate the purpose of the testator. But this would be very unsatisfactory in case the wife survived the testator for any considerable time, for she would be deprived of the privileges of the estate in fee simple.

Stephen Darden Brown.

MAY AN ACTION FOR DAMAGES BE BROUGHT IN A STATE COURT BY A SEAMAN INJURED IN THE COURSE OF HIS DUTY, OR BY HIS PERSONAL REPRESENTATIVES IN CASE OF HIS DEATH, UNDER SECTION THIRTY-THREE OF THE JONES ACT?—Section 33 of the Jones Act,¹ amending Section 20 of the Seamen's Act of 1915,² gives to a seaman injured in the course of his duty, or his personal representatives in case of his death, the right to proceed at his election under the provisions of the Employers' Liability Act.³ The last sentence of the Jones Act, it will be noticed, reads as follows: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The question is, what is the meaning of the words "the court of the district"? Did Congress mean the *federal* court or did it intend

¹ Sec. 33 Jones Act (Passed June 5, 1920). "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railroad employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 41 Stats. at Large 1007, U. S. Comp. Stats. Ann., 1923 Supp. §8337a, Fed. Stats. Ann., 2nd ed., 1920 Supp. p. 227.

² Fed. Stats. Ann., 1916 Supp. p. 251.

³ 35 Stats. at Large 66; 36 Stats. at Large 291, U. S. Comp. Stat. 1916, vol. 8, §8662.