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### Amendment of the Real Property Law Relating to the Satisfaction of Mortgages on Real Property Inherited or Devised

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## CURRENT LEGISLATION

AMENDMENT OF THE REAL PROPERTY LAW RELATING TO THE SATISFACTION OF MORTGAGES ON REAL PROPERTY INHERITED OR DEVEISED.—In 1946 the Law Revision Commission recommended an amendment to Section 250 of the Real Property Law,<sup>1</sup> the purpose of which is to harmonize Real Property Law, Section 250, as amended in 1937, with Decedent Estate Law, Section 20, so as to avoid doubts and confusion which might otherwise result. The amendment, which was adopted and became effective March 30, 1946, allows a direction charging the executor or administrator with a mortgage or other lien on real property devised or descended to be express *or by necessary implication*;<sup>2</sup> that is to say that when there is no express statement or implication in the will that the mortgage or other charge on the land is to be satisfied out of the personal estate of the deceased, then the devisee or legatee of the property must pay the mortgage or lien out of his own funds.

The extent to which this amendment changes the former law will be seen by a consideration of the statute from its enactment.

At common law in England and in New York where the testator or intestate had given a bond or other personal security for a mortgage debt, and seemingly in all cases where a mortgage was given to secure the payment of money, the personal estate was the primary fund for the payment of the debt, and the heir or devisee could throw the charge upon the personal representatives.<sup>3</sup>

It is interesting to note that *Duke of Cumberland v. Codrington*<sup>4</sup> is usually—one might well say, always—cited as an authority for this statement. A careful study of that case reveals that, while the case so states *obiter*, it holds *contra*. Chancellor Kent has, however, collected in the *Cumberland* case all the authorities for the common law rule.

“The opinion of the citizens of New York State was that the

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<sup>1</sup> N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. NO. 65(E) (1946).

<sup>2</sup> N. Y. Laws 1946, c. 265.

<sup>3</sup> *Mollan v. Griffith*, 3 Paige 402, 404 (N. Y. 1832); *Livingston v. Newkirk*, 3 Johns. Ch. 312, 319 (N. Y. 1818); *Lupton v. Lupton*, 2 Johns. Ch. 614, 628 (N. Y. 1817); *Duke of Ancaster v. Mayer*, 1 Bro. C. 454 (1785); *Samwell v. Wake*, 1 Bro. 144 (1782); *Bridgemen v. Dove*, 3 Atk. 201 (1744); *Haslewood v. Pope*, 3 P. Wms. 323 (1734); *Fereyes v. Robertson*, Bunb. 301 (1731); *Cope v. Cope*, 2 Salk. 449 (1707); *Earl of Inchiquin v. French*, Amb. 33.

<sup>4</sup> 3 Johns. Ch. 229 (N. Y. 1817).

land was first liable for the debt."<sup>5</sup> It was felt that it could not be doubted that the intentions of testators had frequently been defeated by the operation of the common law rule and that the rule should be abrogated.<sup>6</sup>

Accordingly the common law rule was abrogated by the Revised Statutes in respect of wills taking effect after January 1, 1830<sup>7</sup> and in regard to both devises and intestacy.<sup>8</sup> The statute, 1 Revised Statutes 749, Section 4, made land mortgaged the primary fund for the payment of mortgage debts,<sup>9</sup> unless the decedent by his will made a different express provision.<sup>10</sup>

This statute applied both to mortgages assumed by decedents as well as to those made by them.<sup>11</sup> The personal estates of decedents were now liable only for deficiencies unless the will made different express provisions.<sup>12</sup> The heir or devisee was not personally liable.<sup>13</sup>

It has been held also that the statute did not contemplate that the devisee or heir should be so liable irrespective of the property which descended to him, but rather that his liability to pay the mortgage should be measured by and not exceed the value of that property. The law was designed to make the realty primarily chargeable with the mortgage debt and that the heir should take it *cum onere*. It was not, however, intended to give a mortgage creditor preference over other creditors in respect to property not covered by the mortgage.<sup>14</sup>

1 Revised Statutes 749, Section 4, stated that the devisee or heir should satisfy out of his own funds a mortgage executed by his testator or ancestor upon real estate which passed or descended to him unless there was an express testamentary direction that such mortgage should be otherwise paid.<sup>15</sup> It is well settled that the customary provision in a will for the payment of debts is not a manifestation of

<sup>5</sup> Notes of the Original Revisers of the Revised Statutes (N. Y. 1829-30) 749, § 4.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Wright v. Holbrook*, 32 N. Y. 587 (1865); *Johnson v. Corbett*, 11 Paige 265, 269 (N. Y. 1844); *Halsey v. Reed*, 9 Paige 446, 454 (N. Y. 1842); *Mollan v. Griffith*, 3 Paige 402, 404 (N. Y. 1832).

<sup>8</sup> *House v. House*, 10 Paige 158, 164 (N. Y. 1843).

<sup>9</sup> *Erwin v. Loper*, 43 N. Y. 521, 525 (1871).

<sup>10</sup> *Van Vechten v. Keator*, 63 N. Y. 52, 56 (1875).

<sup>11</sup> *Halsey v. Reed*, 9 Paige 446, 454 (N. Y. 1842).

<sup>12</sup> *Glacius v. Fogel*, 88 N. Y. 434 (1882).

<sup>13</sup> *Hauselt v. Patterson*, 124 N. Y. 349, 26 N. E. 937 (1891).

<sup>14</sup> *Hauselt v. Patterson*, 124 N. Y. 349, 26 N. E. 937 (1891).

<sup>15</sup> *Matter of Black*, 293 N. Y. 85, 56 N. E. (2d) 44 (1944); *Gilmartin v. Osborn Trust Co.*, 292 N. Y. 629, 55 N. E. (2d) 505 (1944); *Matter of Burrows*, 283 N. Y. 540, 29 N. E. (2d) 77 (1940); *Matter of Hopkins*, 57 Hun 9, 11, 10 N. Y. Supp. 264 (1890); *Williams v. Eaton*, 3 Redf. Sur. 503, 506 (N. Y. 1878); *Scott v. Monell*, 1 Redf. Sur. 431, 443 (N. Y. 1862); *Rapalve v. Rapalve*, 27 Barb. 610, 620 (N. Y. 1857); *Taylor v. Wendel*, 4 Bradf. Sur. 324, 330 (N. Y. 1857); *Cogswell v. Cogswell*, 2 Edw. Ch. 231, 238 (N. Y. 1834).

an intent to relieve the real property of the burden of an encumbrance thereon.<sup>16</sup> A general direction in a testator's will to executors to pay all just and legal demands against his estate was held insufficient to charge the personal estate with mortgage debts.<sup>17</sup>

The court did, in two cases involving the same mortgage, permit the intent of the testator to overcome the letter of an express testamentary provision by a testator: Prior to the execution of *T's* will title to certain property subject to a mortgage was taken in the name of *T's* wife. Subsequent to that execution *T* entered into a personal guaranty to pay the mortgage. By his will he left the property to his wife and authorized his executors to pay off any mortgage on the same, "provided the title is in me." *Held*, that it was his evident intention to provide for the payment of the mortgage and that the will would be so construed notwithstanding the proviso as to the title.<sup>18</sup>

Under the doctrine of equitable conversion, when a contract for the sale of land is signed, the estate becomes the real property of the vendee and his interest descends to his heirs or passes to his devisees.<sup>19</sup> But when the vendee dies before completion, the personal representative, in the absence of statutory or testamentary provision to the contrary, must pay the balance of the purchase price called the vendor's lien.<sup>20</sup> The vendor's lien—no matter what resemblance it may bear in equity to a mortgage—is not within the intent and meaning of the statute making mortgages given by an ancestor or testator a charge upon the land descending to an heir or passing to a devisee, to be paid by the heir or devisee unless there be an express direction to the contrary in the will.<sup>21</sup>

1 Revised Statutes 749, Section 4, is now Real Property Law, Section 250. In 1896 the Revised Statutes were superseded by the General Laws. 1 Revised Statutes 749, Section 4, became Section 215 of Chapter 547 of the General Laws of 1896.<sup>22</sup> In 1909 the consolidated laws were enacted by the legislature and the statute became Section 250 of Chapter 50 of the consolidated laws.<sup>23</sup>

The problem of the unpaid vendor's lien is of no moment in the case of intestacy<sup>24</sup> but where the vendee leaves a will devising the realty to one person and the personalty to another, the question is of

<sup>16</sup> *Matter of Dell*, 154 Misc. 216, 276 N. Y. Supp. 960 (Surr. Ct. 1935); *Ring v. Wooley*, 155 App. Div. 817, 140 N. Y. Supp. 648 (2d Dep't 1913); *Heermans v. Robertson*, 64 N. Y. 332 (1876).

<sup>17</sup> *Matter of Fogarty*, 165 Misc. 78, 300 N. Y. Supp. 231 (Surr. Ct. 1937); *Carpenter v. Carpenter*, 131 N. Y. 101, 29 N. E. 1013 (1892).

<sup>18</sup> *Sutherland v. Gesner*, 27 Hun 282 (N. Y. 1882); *Sutherland v. Clark*, 61 How. Pr. 310 (N. Y. 1881).

<sup>19</sup> *Dodge v. Gallatin*, 130 N. Y. 117, 124, 29 N. E. 107, 108 (1891).

<sup>20</sup> *Wright v. Holbrook*, 32 N. Y. 587, 590 (1865).

<sup>21</sup> *Lampont v. Beeman*, 34 Barb. 239, 248 (N. Y. 1891); *Wright v. Holbrook*, 32 N. Y. 587, 590 (1865).

<sup>22</sup> N. Y. Laws 1896, c. 547.

<sup>23</sup> N. Y. Laws 1909, c. 52.

<sup>24</sup> N. Y. DECEDENT ESTATE LAW Art. 3.

importance. Accordingly, by amendment, vendor's liens were included in Section 250 of the Real Property Law in 1937.

In 1941 Section 20 was added to the Decedent Estate Law.<sup>25</sup> This addition was designed "to conform the rule as to specific bequests of personalty to the provisions of Section 250 of the Real Property Law which relate to specific devises of encumbered real property."<sup>26</sup>

Section 20 of the Decedent Estate Law, written to conform with Section 250 of the Real Property Law, is looser than Section 250. It has been pointed out above that Section 250 (prior to the 1946 amendment) provided that there must be an express direction in the will of the testator that a mortgage on land be paid by the executor or administrator and in the absence of such an express direction the heir or devisee of the land must pay it. An exhaustive search of the cases reveals none but the two noted above<sup>27</sup> which relaxes the rule and allows an implication to suffice for an express direction. Yet Section 20 of the Decedent Estate Law, designed "to conform the rule as to specific bequests of personalty to the provisions of Section 250 of the Real Property Law which relate to specific devises of encumbered real property" allows the direction to be "express or by necessary implication."

The 1946 amendment to Section 250 of the Real Property Law, it would seem, will really prevent the defeat of the intentions of testators. The statute as enacted and construed since 1830 was fully as rigid as the common law rule it abrogated. It does not appear that requiring a certain formula in a will to effect a result will carry out the intent of the testator with respect to that result so easily or readily as will follow when his intent is to be gathered by *necessary implication* from the four corners of the instrument. If the intent of the testator is to be carried out, that intent must first be ascertained. How better to ascertain the intent of the testator than from his own words; surely not from compliance with certain statutory formalities.

If the words of the testator make the conclusion irresistible that he intends the devisee of a certain piece of land to take it unencumbered by any mortgage or vendor's lien and that his executor is to pay off any such encumbrance, why should such intent be frustrated merely because the testator did not use the required words in specific reference to that devise?

Changes in the law of real property, as a general thing, occur with glacier-like speed. Over a hundred years ago the revisers in their statute could have provided for the intent of the testator; instead, they excluded it. At long last, the section, by amendment, allows this intention to be ascertained by construction and carried out.

KENNETH FOX.

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<sup>25</sup> N. Y. Laws 1941, c. 104.

<sup>26</sup> See N. Y. Laws 1941, c. 104 (Note of Commission).

<sup>27</sup> Sutherland v. Gesner, 27 Hun 282 (N. Y. 1882); Sutherland v. Clark, 61 How. Pr. 310 (N. Y. 1881).