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WILLS - RIGHT OF CREDITORS OF TESTAMENTARY DONEE TO SET ASIDE HIS RENUNCIATION - RIGHT OF SURVIVING SPOUSE TO SHARE IN INTESTATE PROPERTY AFTER ELECTING TO TAKE UNDER WILL IN LIEU OF HER DISTRIBUTIVE SHARE

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WILLS — RIGHT OF CREDITORS OF TESTAMENTARY DONEE TO SET ASIDE HIS RENUNCIATION — RIGHT OF SURVIVING SPOUSE TO SHARE IN INTESTATE PROPERTY AFTER ELECTING TO TAKE UNDER WILL IN LIEU OF HER DISTRIBUTIVE SHARE — Testator left all his real and personal property to his wife for life, and the remainder to his son and daughter in equal shares. The widow elected to take under the will in lieu of dower and other legal rights in the estate. The daughter renounced any right under the will, and seven months later filed a petition for voluntary bankruptcy. Her trustee in bankruptcy instituted this suit in equity to annul the renunciation. *Held*, the daughter had the right to file an unconditional disclaimer of all benefits granted her under the will and her creditors cannot complain thereof; and secondly, the widow having accepted the provisions in the will in lieu of all other legal rights in the estate is not entitled to share in the part of the property passing by intestacy because of the rejection of benefits by another beneficiary. *McGarry v. Mathis*, (Iowa 1938) 282 N. W. 786.

It is a well-settled rule that a devisee or legatee may renounce a devise or bequest to which he is entitled, even though it be beneficial to him.[1] With few

[1] Tarr v. Robinson, 158 Pa. 60, 27 A. 859 (1893); In re Howe's Estate, 112 N. J. Eq. 17, 163 A. 234 (1932); Olsen v. Wright, 119 N. J. Eq. 103, 181 A. 182 (1935); Chilcoat v. Reid, 154 Md. 378, 140 A. 100 (1928); In re Stone's Estate,

exceptions, due only to particular circumstances,[2] he can decline the testamentary gift notwithstanding the fact that his purpose is to defeat the claims of his creditors.[3] There is disagreement, however, as to the status of the title prior to renunciation.[4] Some authorities contend that a legacy or devise is not effective until accepted,[5] while others consider the title as vesting in the donee immediately upon the death of testator.[6] Perhaps the greater number of decisions presume acceptance by the beneficiary immediately, subject to later disclaimer.[7] This view is adhered to in the present case, following a line of similar Iowa

132 Iowa 136, 109 N. W. 455 (1906); Davenport v. Sandeman, 204 Iowa 927, 216 N. W. 55 (1927); In re Johnston's Estate, 186 Wis. 599, 203 N. W. 376 (1925); Defreese v. Lake, 109 Mich. 415, 67 N. W. 505 (1896); People v. Flanagin, 331 Ill. 203, 162 N. E. 848 (1928); Peter v. Peter, 343 Ill. 493, 175 N. E. 846 (1931); In re Arm's Estate, 186 Cal. 554, 199 P. 1053, 1057 (1921); Bradford v. Leake, 124 Tenn. 312, 137 S. W. 96 (1911); Bugbee v. Sargent, 23 Me. 269 (1843); Burritt v. Silliman, 13 N. Y. 93 (1855); Albany Hospital v. Albany Guardian Society, 214 N. Y. 435, 108 N. E. 812 (1915); In re Meyer's Estate, 137 Misc. 730, 244 N. Y. S. 398 (1930); 2 PAGE, WILLS, 2d ed., § 1233 (1926); 36 HARV. L. REV. 347 (1923); 31 MICH. L. REV. 443 (1933); 18 CAL. L. REV. 298 (1930).

[2] Benefits of renunciation may be denied in the following situations: (1) Where there has been previous acceptance of the gift by the donee. Bogenrief v. Law, 222 Iowa 1303, 271 N. W. 299 (1937); Davenport v. Sandeman, 204 Iowa 927, 216 N. W. 55 (1927) (dictum). (2) Where there has been a long delay before renouncing. Crumpler v. Barfield & Wilson Co., 114 Ga. 570, 40 S. E. 808 (1902); Strom v. Wood, 100 Kan. 556, 164 P. 1100 (1917); In re Howe's Estate, 112 N. J. Eq. 17, 163 A. 234 (1932) (dictum); Olsen v. Wright, 119 N. J. Eq. 103, 181 A. 182 (1935) (dictum). (3) Where there has been collusion between the debtor and those benefiting by the disclaimer. Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20 (1922) (dictum); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502 (1908) (dictum). (4) Where the donee has caused his creditors to rely upon his apparent acceptance. Daniel v. Frost, 62 Ga. 697 (1879); Lehr v. Switzer, 213 Iowa 658, 239 N. W. 564 (1931) (dictum); Ex parte Fuller, 2 Story 327, Fed. Cas. No. 5147 (1842) (dictum); and see Kearley v. Crawford, 112 Fla. 43, 151 So. 293 (1933), noted in 43 YALE L. J. 1030 (1934).

[3] Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20 (1922), noted in 36 HARV. L. REV. 347 (1923); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502 (1908); Funk v. Grulke, 204 Iowa 314, 213 N. W. 608 (1927); In re Murphy's Estate, 217 Iowa 1291, 252 N. W. 523 (1934); Lehr v. Switzer, 213 Iowa 658, 239 N. W. 564 (1931); In re Meiburg, (D. C. Iowa, 1932) 1 F. Supp. 892 (dictum); 2 PAGE, WILLS, 2d ed., § 1234 (1926); 31 MICH. L. REV. 443 (1933); 18 CAL. L. REV. 298 (1930).

[4] 2 PAGE, WILLS, 2d ed., § 1233 (1926); 43 YALE L. J. 1030 (1934).

[5] 3 WASHBURN, REAL PROPERTY, 6th ed., 494 (1902); In re Meyer's Estate, 137 Misc. 730, 244 N. Y. S. 398 (1930); Albany Hospital v. Albany Guardian Society, 214 N. Y. 435, 108 N. E. 812 (1915).

[6] Tarr v. Robinson, 158 Pa. 60, 27 A. 859 (1893).

[7] Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20 (1922); Lehr v. Switzer, 213 Iowa 658, 239 N. W. 564 (1931); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502 (1908); People v. Flanagin, 331 Ill. 203, 162 N. E. 848 (1928); Bradford v. Leake, 124 Tenn. 312, 137 S. W. 96 (1911); In re Meiburg, (D. C. Iowa, 1932) 1 F. Supp. 892 at 895 (dictum).

holdings.[8] Such being the court's premise, the result seems wholly unnecessary. Perhaps there may be sounder arguments for denying to creditors the right to force a testamentary donee to accept a gift if title thereto has not vested in him,[9] but it seems particularly benevolent to the debtor and those who take in place of him,[10] and not required from any legal standpoint, to permit an indigent legatee or devisee to prevent satisfaction of his creditors by renunciation of property the title to which the law already presumes in him. The courts say that disclaimer of a devise or bequest is not analogous to a fraudulent conveyance, because renunciation reverts back to the testator's death, and thus the debtor never had any title to fraudulently convey.[11] All that would have been needed to permit creditors to satisfy their claims out of what, in all probability, would have been part of their debtor's estate but for the threat of these debts exhausting it, would have been to say that under such circumstances renunciation is effective as of the time made. This would have made the disclaimer remarkably akin to a fraudulent conveyance. But precedent overwhelmingly rules otherwise, albeit only dryly legalistic and unconvincing argument are advanced as to why the creditors must be helpless. Certainly there is a field here for legislative action to protect creditors against the whim and caprice of an unconscientious debtor-legatee or devisee; and in jurisdictions where the rule of this case has not become entrenched, it would seem that courts presented with this problem should consider carefully before following the decisions of their sister states.

As to the second point, by statute, a devise to a surviving spouse is deemed in Iowa to be in lieu of a distributive share in the absence of a clear intention to the contrary.[12] And an election to take under or against the will must be filed by this devisee.[13] The statute does not in terms deal with intestate property, and it is at least arguable that its application was to be limited to property passing

[8] See the Iowa cases cited in note 7, supra.

[9] See the analogous cases in which it has been held that creditors could not force a devisee to take against the will. Carter v. Harvey, 77 Miss. 1, 25 So. 862 (1899); Pike County v. Sowards, 147 Ky. 37, 143 S. W. 745 (1912); Bains v. Globe Bank & Trust Co., 136 Ky. 332, 124 S. W. 343 (1910).

[10] See 43 YALE L. J. 1030 at 1032 (1934), noting Kearley v. Crawford, 112 Fla. 43, 151 So. 293 (1933), where the writer says, "While in a family affair of this nature it would be practically impossible to show the existence of actual collusion among beneficiaries under the will sufficient to estop the renunciation, it is difficult to believe that a tacit understanding of some sort did not exist."

[11] Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20 (1922); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502 (1908). But Daniel v. Frost, 62 Ga. 697 at 707 (1879), has some excellent arguments, though perhaps dicta, for limiting the rule of renunciation after the property has been seized under legal process by a creditor of the beneficiary, saying, "A creditor is not over-rash in shaping his own action by a presumption (of acceptance) which the law itself indulges. When he has so done, can the donee, his debtor, step in and by mere whim or caprice defeat him?"

[12] Iowa Code (1935), § 11847: "Where the survivor is named as a devisee in a will, it shall be presumed, unless the intention is clear and explicit to the contrary, that such devise is in lieu of such distributive share, homestead, and exemptions."

[13] Iowa Code (1935), § 12007.

under the will, and that the widow was not precluded, by her election to accept the testamentary provisions, from receiving a share in property which fails of testamentary disposition because of a beneficiary's renunciation.[14]

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[14] For an extensive and excellent discussion of this subject, see Phelps, "The Widow's Right of Election in the Estate of Her Husband," 37 MICH. L. REV. 236 (1938), with particular reference to the material beginning on pages 265 and 269.