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Abolition of The Rule in Shelley's Case in Florida -- Effect of Statute on Wills Executed Prior Thereto

arise from the cooperative's articles of association, by-laws, or other binding contract.[8] Distribution cannot depend upon an informal agreement between the co-op and its members[9] nor upon action taken by the co-op *after* its receipt of the funds later distributed.[10]

In the instant case, the cooperative's by-laws were mandatory in requiring distribution of the difference between the cost of operation and selling price to members, but a subsequent amendment to the articles of incorporation nullified these by-laws by leaving it to the discretion of the board of directors to distribute any part of the difference. The leading case of *Uniform Printing & Supply Co. v. Commissioner*[11] seems clearly distinguishable. In that case by-laws required the directors to distribute some part of the difference; only the amount payable was left to their discretion. But in the principal case "the very obligation itself to make such refunds" was within the discretion of the directors.[12] It is submitted that the court in the instant case properly held that there was no binding obligation, and consequently that even though distribution was effected, no allowable deduction resulted.

American Box Shook Export Ass'n v. Commissioner, 156 F. 2d 629 (C. C. A. 9th 1946); United Cooperatives, Inc. v. Commissioner, 4 T. C. 93 (1944).

8 Peoples Gin Co., Inc. v. Commissioner, *supra* note 7.

9 American Box Shook Export Ass'n v. Commissioner, *supra* note 7. *But see* Home Builders Shipping Ass'n v. Commissioner, 8 B. T. A. 903 (1927), where an oral agreement was held to constitute a legal obligation.

10 Peoples Gin Co., Inc. v. Commissioner, *supra,* note 7.

11 88 F. 2d 75 (C. C. A. 7th 1937).

12 Associated Grocers of Alabama, Inc. v. Willingham, 77 F. Supp. 990 (N. D. Ala. 1948).

ABOLITION OF THE RULE IN SHELLEY'S CASE IN FLORIDA — EFFECT OF STATUTE ON WILLS EXECUTED PRIOR THERETO.

Old laws, like old soldiers, die hard. The ancient Rule in Shelley's Case, abolished in Florida by act of legislature,[1] appears to have been revived by a recent case.[2]

These were the facts noted in the opinion: A testator directed that

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1 LAWS OF FLORIDA, 1945, c. 23126, sec. 2, F.S.A. sec. 689.17.

2 Elsasser v. Elsasser et al, Fla., 32 So. 2d 579 (Fla., 1947).

the residue of his estate be held in trust for his wife during her life and that it be distributed after her death. Income from the estate was to be paid in three shares, two shares to the widow and one share to the testator's father so long as the latter should live. Upon the death of the wife, the principal was to be divided into four shares: one share to the heirs of the wife and one each to the testator's father, mother, and brother, or their heirs. The wife, claiming her share in fee, filed a bill for construction of the will, seeking a declaratory decree to determine whether or not she was the owner in fee simple of one-fourth the estate. An order of the Circuit Court ruling that she had no interest in the principal was affirmed; the Supreme Court held that the Rule in Shelley's Case does not apply to an equitable life estate followed by a legal remainder. On these facts the court was correct in its holding.[3]

There were two other facts that could have been material, namely, that in June, 1945, the Florida legislature abolished the Rule in Shelley's Case, and that in April of the same year the testator died. These two facts of time the court failed to mention. It is true that in order to determine the issue before it, the court need not have referred to these two facts inasmuch as their inclusion would not have affected the decision, because by the terms of the will, as it was construed, the Rule in Shelley's Case was inapplicable.[4] It made no difference in this particular controversy whether the Rule was in effect, or not. It is regrettable, though, that the court did not consider these two facts material, for if it had done so, the court could have settled the troublesome problem of what effect the 1945 statute has on wills executed prior thereto, and on property rights created by those testaments.

All facts of time are immaterial unless stated to be material and those facts which are stated in the opinion are conclusive and cannot be contradicted from the record.[5] If, however, the opinion omits a fact which appears in the record, as in this case these two facts did (it is presumed), "this ommission may be due to (a) oversight, or (b) an implied finding that the fact is immaterial. The second will be assumed to be the case in the absence of other evidence."[6] There is no evidence in the opinion of the Elsasser case to warrant the assumption that the court did, in fact, overlook the two facts of time, for, as may have been intended, the determination of the single issue therein presented is wholly complete. Two quite reasonable but utterly irreconcilable inferences compete for the puzzled lawyer's attentions. The first

3 Bross v. Bross, 123 Fla. 758, 167 So. 669 (1936).

4 " . . . . The court is of the opinion that the rule in Shelley's case does not apply in this particular trust wherein the plaintiff has a life estate in the equitable interest, and the legal remainder—as distinguished from the equitable remainder—goes to her heirs . . . " Elsasser v. Elsasser, *supra*.

5 Goodhart, *Determining the Ratio Decidendi of a Case*, from "ESSAYS IN JURISPRUDENCE AND THE COMMON LAW," 1-26, CAMBRIDGE UNIVERSITY PRESS (1931).

6 Id. at 26.

inference is that neither of the facts of time is material; it follows, that to construe a will it is necessary only to consider the laws in force at the time the will was made, and that, conversely, it is proper to disregard subsequent legislation.[7] Although logical, this inference would make for an unsatisfactory rule of law, as will be seen below. The other valid inference is that the court may have purposed to announce no principle of law other than the one it did, intentionally excluding any reference to the two facts of time. For the following reasons this is the more plausible inference.

A majority of the courts in this country have adhered to the view that the construction of a valid will should, in the absence of any expression of testatorial intention to the contrary, be controlled by the law in force at the time of the testator's death, and not by the law in force at the time of execution of the instrument.[8] It is said that a will is ambulatory until the death of the testator, which is a terse way of saying that until the death of the testator the power of a person to make a testamentary disposition is subject to the superior will of the state, as expressed in its laws, if, to repeat, the will is valid.[9] Conversely, if a testator does not die before the enactment of a new law, his will must be governed by it.[10] Thus, statutes abolishing estates tail, or, more pertinently, the Rule in Shelley's Case, have been held in some cases to apply to the will of a testator dying after the passage of such statute, notwithstanding the will was executed prior thereto.[11] From these cases the principle evolves that it is the death of the testator, rather than the execution of the will, which is the significant event, because the death of the testator is the occurrence which vests those property rights

[7] By implication this might be the principle of the case. "The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them . . . In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion." Ibid.

[8] Hill v. Hill, 149 Ga. 741, 102 S. E. 151, 10 ALR 1514 (1920). Annotation: 66 ALR 1071; 129 ALR 863; Ann. Cas. 1913A 1290.

[9] Pond v. Faust, 90 Wash. 117, 155 P. 776, Ann. Cas. 1918A 736, and note (1916).

[10] Lincoln v. Aldrich, 149 Mass. 368, 21 N. E. 671, 4 LRA 215. Annotation: Ann. Cas. 1913A 1290 (1889).

[11] Price v. Taylor, 28 Pa. 95, 70 Am. Dec. 105, 129 ALR 869 (1857). In Reynolds v. Love, 191 Ala. 218, 68 So. 27, 129 ALR 869 (1915), where the death of a testator, whose will had been executed while the Rule in Shelley's Case was in force, occurred after the enactment of a statute abolishing the rule, it was held that his will was not controlled by such rule, but by statute. This case made no special distinction between the act abolishing the rule and other acts, and correctly followed the broad principle as set forth in the leading case of Price v. Taylor. But compare Reynolds v. Love with the cases noted in note 14 *infra*.

that the Constitution seeks to protect from the caprice of legislatures.[12] A legislature may intend, on the other hand, that the new statute is to apply only to wills executed after its passage, in which case "inchoate" rights (to often an unfortunate fiction) will not be disturbed. No such legislative intent appears in the 1945 Florida act, which states simply that upon the date of its formal enactment the Rule in Shelley's Case be abolished; nor is the act so worded as to be remedial.[13]

A bewildered minority of courts have entertained, with varying degrees of seriousness, the notion that since a will is presumed to be made in view of statutes then existing and with the intent that such statutes shall prevail, a court in looking about for an aid to construction, will consider the laws in force at the time of execution of the will, even though they had later been repealed.[14] Rather uniformly, the soundest

[12] There is not one, but two distinct ratio decidendi behind this proposition. The majority of cases follow that stated in Rowlett v. Moore, 252 Ill. 436, 96 N. E. 837 (1911): "Upon the death of a tetsator property rights become fixed. If he leaves a valid will the title of the legatees . . . becomes a vested right . . . " This statement is a compromise between the power of the legislature and the rights of the individual; it recognizes that the individual will is subordinate to the sovereign will, but that the sovereign will is in turn subordinate to the supreme law as embodied in the ex post facto and due process clauses in the Constitution. It is what the up-to-date legalist would call "a balancing of social interests." This ratio decidendi has the advantage of relying on no presumptions for its existence, but on other rules of law. The other ratio decidendi is less pretentious but relies on a presumption which no scientific court would care to make, namely that " . . . testators make their wills on the supposition that the state of law will not be altered; and it is contended that this will ought to be construed as it would have been under the old law. The answer to that is that a testator that knows of an alteration in the law (as this testator must be presumed to have done), and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law . . . The act does not affect the meaning of the will; it only alters its legal operation." Hasluck v. Pedley, LR 19 Eq. (Eng.) 271 (1874). How the antithetical conclusion can be reached by this sort of reasoning, *see* note 14 *infra*.

[13] Note 1 *supra*.

[14] Rudolph v. Rudolph, 207 Ill. 266, 69 N. E. 834, 99 Am. Rep. 211 (1904). The further qualification is made that in determining the intention of a testator in the use of language capable of more than one construction, the state of law at that time of execution is a factor to be considered. Wallace v. Noland, 246 Ill. 535, 92 N. E. 956, 138 Am. St. Rep. 247 (1910). In Quick v. Quick, 21 N. J. Eq. 13 (1870) the Rule in Shelley's Case was held to govern in the construction of a will made while such rule was in force, although the rule was abolished before the death of the testator occurred. The court noted the date of the passage of the act abolishing the rule and the date of the death of the testator which was years

of these cases interpret the effect of later statutes on the validity of earlier wills and say that a will which is valid when it is executed is valid forever afterwards, unless specifically remedial legislation is subsequently passed.[15] For example, if T executes a will attested by two witnesses in 1492, and in 1776 the state in which he is domiciled enacts a law requiring the attestation to be performed by three witnesses, T need not make another will.

later, thereupon declaring, without argument: "But the rule was in force at the date of this will . . . which must be construed by it if, by the decisions in England and this state which control our courts, it applies to this will." The case cited for authority was Kennedy v. Kennedy, 5 Dutcher 185 (1861), but it is not clear in what connection. The view is best stated in Reynolds v. Love, note 11 *supra,* in which the court said: "The general rule seems to be, as between laws in force at different times in the same jurisdiction, that the law existing at the time the will was executed may be referred to in determining the testator's intention; but the operative effect of the will and the rights of the parties thereunder are to be determined by the law in force when the rights of the parties accrued, and this ordinarily is the law existing at the time of the testator's death, as against a law passed thereafter, or as against a law existing when the will was made, unless a contrary intent appears in the will. A law which is prospective merely does not extend to a will executed before the law goes into operation, although the testator does not die until afterwards. . . While the foregoing seems to be the general rule, the authorities are not entirely harmonious on the subject; some applying the law existing when the testator died; others the law as it was when the will was made . . . The conflict in the decisions arises largely, not as to what the general rule is, but in the construction of subsequent statutes, and in determining whether or not they were so worded as to be deemed prospective or retrospective." This is the most incisively reasoned opinion in a great welter of cases. It indicates that the first step is to determine the precise legislative intent as well as the precise testatorial intent. Some statutes expressly declare that they shall become effective only in respect to wills made after the law goes into operation, or that they shall not extend to wills made before the act is in force. Examples of cases involving such statutes are: Smith v. Thomas, 317 Ill. 150, 147 N. E. 788 (1925) and Re Lavine, 167 Misc. 879, 4 N.Y.S. 2d 923. Other statutes provide that they shall apply to wills executed prior to a specified date. *See,* for example, In Re Goldberg's Estate, 275 N. Y. 186, 9 N. E. 2d 829 (1937). It cannot be stressed too strongly that the initial problem is construction of the statute.

[15] There is a conflict here too. In some jurisdictions the will must be executed and attested as required by the law in force at the death of the testator. Houston v. Houston, 3 McCord L. (S. C.) 491, 15 Am. Dec. 647 (1826); Lorieux v. Keller, 5 Iowa 196, 68 Am. Dec. 696 (1857). In other jurisdictions it is held that the validity of a will should be determined by the law as it stood at the time of the actual execution.

It is a cardinal rule of construction that the testator's intention must fail if there is an irreconcilable conflict between that intention and established laws or public policy; the Florida Supreme Court has repeatedly asserted this view, qualifying that other cardinal rule of construction that the intent of the testator is to prevail.[16]

For it to be consistent with its own precedents, it is to be concluded that the court must have omitted the two material facts of time solely for the purpose of limiting the scope of the controversy. An alternative conclusion fails to note the grain of the court's prior decisions.[17]

Packer v. Packer, 179 Pa. St. 580, 36 A. 344, 57 Am. St. Rep. 615 (1897); Barker v. Hinton, 62 W. Va. 639, 59 S. E. 614, 13 Ann. Cas. 1150 and note (1907). Either view is sound on principle. Again, reference should be had first to legislative intent.

16 "The cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law." Floyd v. Smith, 59 Fla. 485, 51 So. 537, 37 L.R.A. (N.S.) 651, 138 Am. St. Rep. 133, 21 Ann. Cas. 318 (1910). Apparently, then, whether or not the testator intended to make a valid disposition is not too material; the question is as to what provision the testator intended to make. Once the court finds that intention, it will then proceed to determine whether the provisions in which that intention is expressed are valid in the light of the pertinent statutes and public policy.

17 *Idem.* And see Lee, *Is the Rule in Shelley's Case Abolished As To Wills?*, 25 Mich. L. R. 215. Is the poin tmade that since the Rule in Shelley's Case overrides the testator's intention, a statute abolishing the rule should do so similarly?

ADMINISTRATIVE LAW—REVIEW, ON APPEAL, OF DISMISSAL FROM CIVIL SERVICE

The Florida Courts, in their consideration of the case of Kennett v. Barber,[1] have established a precedent which, commenced in the case of Hammond v. Curry,[2] stands out as contrary to the well established principles of administrative law, and will probably result in the consideration by Florida courts of many cases and appeals which would meet with summary dismissal in the majority of jurisdictions. The Circuit Court, in the Barber case, granted a petition for a peremptory

1 31 So. 2d 44 (Fla., 1947).

2 153 Fla. 245, 14 So. 2d 390 (1943).