



Perkins v. Isley

224 N.C. 793 (1945) | Cited 6 times | Supreme Court of North Carolina | January 3, 1945

This appeal may be determined by answering the following questions: 1. Did Irene Perkins Isley renounce and refuse to take under the last will and testament of her mother, Mrs. Lalah Ross Perkins? 2. If so, did the renunciation have the effect of a conveyance which required the written assent of her husband, as provided in Art. X, sec. 6, of the Constitution of North Carolina, unless she was a freetrader under the provisions of G.S., 52-6? We think the first question must be answered in the affirmative and the second in the negative.

The weight of authority is to the effect that a legatee or devisee under a will is not bound to accept a legacy or devise therein provided, but may disclaim or renounce his right under the will, even where the legacy or devise is beneficial to him, provided he has not already accepted it. 69 C.J., Wills, sec. 2168, p. 674; 28 R.C.L., Wills, sec. 351, p. 352; Thompson on Wills, sec. 479, p. 567; Page on Wills, Vol. 4, secs. 1402 through 1404, p. 140, et seq.; Sanders v. Jones, 347 Mo., 255, 147 S.W.2d 424; People v. Flanagan, 331 Ill., 203, 162 N.E., 848, 60 A.L.R., 305; In re Vasgaard's Estate, 62 S.D., 421, 253 N.W., 453; Greely v. Houston, 148 Miss., 799, 114 So., 740; Schnoover v. Osborne, 193 Iowa, 474, 187 N.W., 20, 27 A.L.R., 465; Chilcoat v. Reid, 154 Md., 378, 140 A., 100; Albany Hospital v. Hanson, 214 N.Y., 435, 108 N.E., 812; Peter v. Peter, 343 Ill., 493, 175 N.E., 846, 75 A.L.R., 890; In re Hodge's Estate, 20 Tenn. App., 411, 99 S.W.2d 561; Coomes v. Page 798} Finegan (Iowa) (1943), 7 N.W.2d 729; Strom v. Wood, 100 Kan., 556, 164 Pac., 1100; Bouse v. Hull, 168 Md., 1, 176 A., 645; Seifner v. Weller (Mo.) (1943), 171 S.W.2d 617; Daley v. Daley, 308 Mass., 293, 32 N.E.2d 286.

The right to renounce a devise or legacy is a natural one and needs no statutory authorization. "An heir-at-law is the only person who, by the common law, becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir, without any regard to his wishes or election. He cannot disclaim it if he would." 3 Washburn on Real Property (5th Ed.), sec. 4, p. 6; In re Kalt's Estate (Cal.) (1940), 102 Pac.2d 399; S.c., 108 Pac. (2nd), 401; In re Mahlstedt's Will, 250 N.Y., 628.

A beneficiary is presumed to have accepted a testamentary legacy or devise which is beneficial to him, but the presumption is rebuttable, and where the legatee or devisee renounces or disclaims the legacy or devise in clear and unequivocal terms, in the absence of fraud, the renunciation or disclaimer is effective as of the date of the death of the testator. In such cases the devise or legacy is lapsed or void, and the gift passes under other provisions of the will, if there be any covering such contingency, otherwise it passes to the heirs at law under the statutes of intestacy. G.S., 31-42; Reid v. Neal, 182 N.C. 192, 108 S.E., 769; Bradford v. Leake, 124 Tenn., 312, 137 S.W., 96; Sanders v. Jones,



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supra; Greely v. Houston, supra; Schnoover v. Osborne, supra; Peter v. Peter, supra.

When a devisee accepts a devise, his title relates back to the death of the testator, but when there is a renunciation the devise never takes effect and title never vests in the devisee. In *re Johnston's Will*, 298 N.Y., 957; *Schnoover v. Osborne*, supra. In most jurisdictions, however, it is held that a renunciation must be made within a reasonable time after the probate of the will. What is a reasonable time is usually left for judicial determination in the light of the facts and circumstances involved in each case.

The appellant contends that she did not have the right to renounce the gift under her mother's will, since the Security National Bank was appointed administrator c.t.a., at her suggestion. We do not so hold. We are advertent to the decisions of this Court, which hold that ordinarily where a beneficiary under a will, who is under the necessity of making an election, is presumed to have made the election by offering the will as executor and procuring its probate. *Benton v. Alexander*, post, 800, and the cases there cited. Even though a widow is estopped in this jurisdiction from claiming dower, where she, as executrix, procures the probate of her deceased husband's will, nothing else appearing,

she could still renounce the gift under the will and take nothing from her husband's estate if she so desired. *Brown v. Routzahn*, 63 F.2d 914, 290 U.S., 641, 78 Law Ed., 557. In the instant case, the appellant was under no obligation to make an election, and the mere fact that she requested the appointment of an administrator c.t.a., in lieu of the executor named therein, who had been adjudged incompetent, is insufficient to estop her from renouncing her rights under the will.

The appellant renounced her rights under the will of her mother, Mrs. Lalah Ross Perkins, in a clear and unequivocal manner and within a reasonable time. She filed a verified petition in the office of the clerk of the Superior Court of Guilford County, in which she alleged that she was the sole beneficiary under the last will and testament of her mother, Mrs. Lalah Ross Perkins, that she did not wish to take under the will, and further stated therein that "She hereby does renounce all her rights under said will." The renunciation set forth in the petition was sufficient to justify the orders of the clerk and the judge of the Superior Court approving her renunciation and directing the Security National Bank, administrator c.t.a., after paying the debts of the estate and all proper charges against it, to distribute all the property remaining in its hands as such administrator between Irene Perkins Isley and Wachovia Bank & Trust Company, Trustee for Aubrey A. Perkins, in equal shares, in accordance with the intestate laws of North Carolina.

The appellant's renunciation became effective upon the filing of her verified petition in the office of the clerk of the Superior Court renouncing her rights under said will and said renunciation related back to the death of her mother. The will of Mrs. Lalah Ross Perkins contained no residuary clause, or other provisions disposing of her property in the event of a renunciation by the beneficiary therein, therefore the plaintiff and the defendant herein are tenants in common in all the real property of which Mrs. Lalah Ross Perkins died seized.



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The appellant may have made a mistake when she renounced her rights under her mother's will, but she has not shown upon this record any reason, legal or otherwise, why she should now be permitted to retract or revoke her renunciation.

Whether or not the right to renounce a testamentary gift is superior to the right of a judgment creditor, is not presented or decided.

In the trial below, we find

No error.

Disposition

No error.

