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Comment on Sconce v. Neece: Fees Tail, the Rule in Wild's Case, a Sixteen Dollar Question, and Some Coparceners

Dicta Editorial Board

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attributable to property transferred. The former is the preferable view for it is unlikely that it was intended that the wife should be taxed upon the rental value of the property in these circumstances.

ARREARAGES OF ALIMONY

Frequently, the husband will fall behind in his alimony payments and then liquidate the accrued amount by a lump sum payment. It has been held that such payments are to be treated as periodic payments taxable to the wife and deductible by the husband.[61] This rule is also applicable to delinquent installments of a principal sum payable over a period of more than ten years.[62] The ten percent rule is inapplicable in this case and the delinquent and current installments will be taxable to the wife and deductible by the husband in the year payment is made.

CASE COMMENT

COMMENT ON SCONCE V. NEECE: FEES TAIL, THE RULE IN WILD'S CASE, A SIXTEEN DOLLAR QUESTION, AND SOME COPARCENERS.—*Sconce v. Neece* [1] construed this language: "I give, devise and bequeath all my estate, real, personal and mixed, to my daughters, Katie S. Pence and Lulu S. Middleton, and the heirs of their body, share and share alike, provided that, if either of my said daughters shall not be living at the date of my death, without any children surviving her, then, I give, devise and bequeath all my estate aforesaid to the survivor."

Both daughters survived the testatrix and neither had had a child. This circumstance seemed to permit court and counsel to simplify the problem of construction by ignoring the proviso, and upon this basis, the court's application of Chapter 159, section 1, '35 C.S.A. and Chapter 40, section 7, '35 C.S.A. is orthodox, and as to the land, conclusive.[2]

However, it is more usual for the intention of the testator to be sought by an analysis of all the language in the will.[3] What would have been the result if the proviso had been considered? It says, ". . . if either of my daughters shall not be living at the date of my death, without any children surviving her . . ." The first

[61] Gale v. Comm'r, 191 F. (2d) 79 (2d Cir. 1951), affirming 13 T.C. 661 (1949).
[62] Reg. 118, §39.22(k)-1(c)(1) (1953).

[1] 6 Colo. Bar Assoc. Advance Sheets 271, 268 P. 2d 1102 (1954). The case is not stated because it is assumed that the reader of this comment has read the opinion.

[2] Anomalous section 47 of Chapter 40 says that "This article (including section 7) shall not be so construed as to embrace last wills and testaments." This observation was included in a comment on Liebhardt v. Avison, 28 Dicta 216. Since that publication there has been an occasion to subject that comment to careful review, but no occasion for any revision was found.

[3] See, for example, Liebhardt v. Avison, 123 Colo. 338, 229 P. 2d 933 (1951).

question is, "surviving her when?" At her death, or "at the date of my death"? The next clause offers some indication that "surviving her at the date of my death" is meant, because it says, ". . . then I give, devise and bequeath . . .", and in that context "then" would seem to refer to "the date of my death" rather than to the death of a daughter during the lifetime of the testatrix. Also, there would seem to be no be no purpose in making a gift over dependent upon the sequence of the deaths of a daughter and her children if they all died before the testatrix.

But even if this uncertainty as to the time of surviving is resolved by construing the proviso to read, "if either of my said daughters shall not be living at the time of my death, without any children surviving her at the time of my death, then I give, devise and bequeath all my estate aforesaid to the survivor", there is still doubt as to the effect of the proviso. Nothing is expressly given to children who might be surviving their mother at the date of the death of the testatrix. Would they therefore take nothing, or would a gift to them be read into the will by implication.[4]

Or suppose that one of the daughters was not living at the death of the testatrix and that at that date there was no surviving child of such daughter, but that there was a surviving grandchild. Would there be read into the will by implication a gift to that grandchild, even though "children" is usually construed to exclude grandchildren?[5] There are cases in which "children" has been held to mean "descendants" or "issue" or "heirs of the body";[6] and there are likewise cases holding "heirs of the body" to mean children."[7] In this will it would seem that the testatrix probably used the terms interchangeably, and that they should both be taken to mean "heirs of the body" or both be taken to mean "children".

If the former meaning be adopted, the will then reads, ". . . to my daughters . . . and the heirs of their body, share and share alike, provided that, if either of my said daughters shall not be living at the date of my death, without heirs of her body surviving her at the date of my death, I give . . ." Such a construction would confirm the court's reasoning and would make it possible to imply a gift to surviving grandchildren (whether per capita or per stirpes would be a matter for further implication), or the words, "heirs of her body", which are normally words of limitation rather than words of purchase, might be treated in the proviso simply as surplusage, in which case the proviso would relate merely to lapse, and there would be no gift by implication.

If the latter meaning be adopted, the will then reads, ". . . to my daughters . . . and their children, share and share alike, provided that, if either of my said daughters shall not be living at

[4] [5] Restatement of the Law of Property, section 272, comment (f).

[6] [7] 161 A.L.R. Annotation, "Nature of estate created by grant or gift to one and his children." 612, 614 (1946).

the date of my death, without children surviving her at the date of my death, then, I give . . ." In this form the meaning of the proviso as one having to do merely with lapse, is plain, and there is no need to consider supplementing the will by reading into it gifts by implication. Nor would the testatrix's intention have to be changed into something else by Chapter 40, section 7, or by any other statute.

The attractive simplicity of this latter wording is deceptive. It requires a consideration of the first resolution in *Wild's Case,*[8] ". . . and therefore this difference was resolved for good law, that if A. devises his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura,* and by way of remainder they cannot take, for that was not his intent, for the gift is immediate . . ."

In this case the daughters had "not any issue at the time of the devise". Therefore, under the first resolution in *Wild's case* they would have taken estates in fee tail at common law. And so the circle of legalisms is completed, the same result is reached, a fee tail in the daughters, whether the proviso be ignored or construed in the way now under consideration. But the proviso was a part of the will, and it was before the court as one of the facts in the case, and it would seem proper therefore to consider the decision as one that comes close, at least, to an application of the first resolution in *Wild's case,* even though it was not mentioned in the opinion.

It may be objected that it is absurd to construe "heirs of their body" in this will to mean "children", and then to apply the first resolution in *Wild's case* to change "children" back into "heirs of the body". The answer is that the apparently absurd result is due not to the method of construction, but to the circumstances of the case. Under other circumstances, the second resolution in *Wild's case* would have been applicable: ". . . but if a man devises land to A. and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case, they shall have but a joint estate for life . . ." (Under our statutes A and his children would not take a joint estate for life, but rather as tenants in common in fee simple.) Under such other circumstances the legalisms would not have gone in a circle back to a fee tail at common law.

It has been stated above that the court's construction of Chapter 40, section 7, '35 C.S.A. is orthodox and conclusive as to the

[8] 6 Coke's Reports 16b, 17a, (1599).

land, but it is not so as to Susan A. Soper's personal property.[9] The court was evidently aware of this, for the last paragraph of the opinion states, "While this opinion has been written in the language of real-property law, the conclusions of our Court apply with equal force to both the real and personal property . . ." It will be noted that the court says that its "conclusions", not its "reasons" apply with equal force to both real and personal property. What reasons should have been applied to the personality? Obviously Chapter 40, section 7, does not apply because it relates only to "lands, tenements, and hereditaments". Nor could there be at common law, an estate in fee tail in personality. The language which would have created an estate in fee tail in land, created in personalty a complete interest analogous to an estate in fee simple in land.[10]

Would such reasoning have changed the outcome of the case? No, as the court said, its conclusions would have been the same, because upon the death of the testatrix, her daughter, Katie S. Pence acquired a complete interest in the personalty, and upon her death it passed as intestate property to her administrator and then to Lulu S. Middleton, and upon her death it passed to her executor. It should be remarked, however, that these different lines of reasoning, applicable respectively to land and to personalty, would, under other circumstances, lead to decisively different conclusions, and that it might mean more than sixteen dollars.

Perhaps a few more comments or quibbles may be justified. In the course of its opinion rejecting the contention that an estate in fee simple conditional had been created, the court says, "It is almost inconceivable that Susan A Soper, when she made her will in the year 1911, intended to create an estate of a type which was abolished by the Statute De Donis more than six hundred years ago . . ." What if she had so intended? What if she had expressly declared it to be her intention to create in each of her daughters an estate in fee simple conditional? It might be inferred from this quotation that her intention would prevail, and yet in answer to the question, "Should the interest in land, known in the old common law of England as an estate in fee simple conditional be recognized in this jurisdiction?", the court said, "The question is answered in the negative." In other words, Susan A Soper's intention should, in this matter, have been treated as entirely irrelevant.

There is another sentence in the opinion from which some questionable inferences might be drawn. In speaking of the reversion left in the heirs of the testatrix the court says that it ". . . was

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[9] The answer brief of the defendants in error states, "Insofar as the personal property is concerned, although it does not appear in the record, there was ready to be introduced into evidence, the inventory in the Estate of Susan A. Soper which showed as personal property the sum of approximately $16.00 in a bank account, and nothing else."

[10] 161 A.L.R., *supra*, 615.

vested in the two daughters as tenants in common, and was transferable or subject to intestate succession in all respects as other vested interests in property." What about the transferability of interests that are not vested? The inference is that they are inalienable, as at common law, in spite of the general terms of Chapter 40, section 1, '35 C.S.A. ("any interest in real estate whatever"), Chapter 176, section 1, '35 C.S.A. ("any real estate or property having the nature of legal character of real estate, or personal estate"), and section 36 of the same chapter ("any or all the estate, right, title and interest in possession, reversion or remainder").

Also it may be noted that when, in the above quoted sentence the court says, "as tenants in common", it has overlooked the language of Chapter 176, section 1, '35 C.S.A., which says, " . . . shall descend . . . in parcenary . . ." Why quibble? The difference might be decisive in another case. If devisees seem to take by will as tenants in common the same estates in quantity and quality which they would have inherited as tenants in common, then the doctrine of worthier title applies, and they take not by the will, but by inheritance, which might be of importance in the marshalling of the assets of an insolvent estate, or in the distribution of the intestate property of an adopted child. But if those who take by inheritance, take in parcenary, as the statute says they do, then the doctrine of worthier title cannot apply to testamentary gifts to tenants in common, because even though the estates which they take under the will may be the same in quantity as those which they would have inherited, they are not of the same quality, because of the difference in the kind of tenancy.[11]

And finally, lest the authority of the law dictionaries be shaken, it may be worth noticing, just as a matter of nomenclature, that while at common law, daughters were merely "heirs presumptive" because a son might be born, under our statute daughters should be called "heirs apparent" because there can be no nearer heir. T.G.M.

[11] Harper and Heckel, "The Doctrine of Worthier Title", 24 Ill. L. Rev. 627,-639. (1930).

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"I hereby give and bequeath to THE COLORADO BAR FOUNDATION, Inc., a Colorado not for profit corporation, the sum of $....., to be used by it for its general purposes."

Your own interest in the activities of the Foundation will help you to determine the appropriate figure to put in the blank after the dollar sign.

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