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RECENT DECISIONS

DECEDENT ESTATE LAW—IMPAIRMENT OF CONTRACT—RIGHT OF ELECTION TO TAKE UNDER WILL.—Proceedings brought by the executors of the last will and testament of John McGlone, deceased, against the executors of the last will and testament of Helena Day McGlone, deceased, for determination of her right to elect under § 18 of the Decedent Estate Law to take against the provisions of the last will and testament of said John McGlone. It is contended that an unacknowledged written instrument by which Helena McGlone voluntarily and irrevocably renounced all rights which she might subsequently be entitled to in any estate her husband-to-be, John McGlone, might realize, is a contract and a property right which was impaired by the provisions of § 18 of the Decedent Estate Law.¹ The federal question upon appeal is whether § 18 of the Decedent Estate Law works an impairment of the obligation of contract or a deprivation of property without due process.² The waiver was executed in London, England, but the parties removed to New York where, at the time, a wife had dower rights in her husband's real property. Later, the husband executed a will, reciting the waiver but leaving his wife two thousand dollars as a token of affection. New York Decedent Estate Law § 18 became effective September 1, 1930, and on July 6, 1934, the husband executed a codicil which, though it did not disturb the provisions of the will, had the effect of bringing the entire will within the provisions of the new law. The wife sought to exercise her right of election. Appeal from a decree of the Surrogate's Court, Kings County, State of New York, in favor of the defendant. *Held*, affirmed. *Irving Trust Company v. Chase L. Day*, 314 U. S. 556 (1942).

The dead hand rules succession only by sufferance. The legislature of a state has the right to limit, condition or abolish the power of testamentary disposition over property within its jurisprudence.³ Expectations of succession to the property of a living person do not vest until the death of that person. A living person can have no heirs.⁴ Before the death of the ancestor an expectant heir or dis-

¹ N. Y. DEC. EST. LAW § 18 gave right of election to surviving spouse to take under the will, or the difference between such aggregate and the amount of the intestate share. It permitted waiver but to be effective it was required to be by an instrument subscribed and duly acknowledged.

² U. S. CONST. ART. I, § 10, "No state shall pass any law impairing the obligation of contracts . . ."; U. S. CONST. AMEND. XIV, § 1, ". . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

³ *Hernandez v. Becker*, 54 F. (2d) 542 (C. C. A. 10th, 1931); *Dolbeer's Estate*, 226 N. Y. 623, 123 N. E. 381 (1919); *In re Germaine*, 244 App. Div. 374, 280 N. Y. Supp. 460 (1935); *In re Killough's Estate*, 148 Misc. 73, 265 N. Y. Supp. 301 (1933).

⁴ *Morsman v. Commissioner of Internal Revenue*, 90 F. (2d) 18 (C. C. A. 8th), 113 A. L. R. 441 (1937).

tributee has as such no interest, estate or rights in the property which he may subsequently inherit.⁵ The husband made a voluntary legacy to his wife, despite her waiver. If the obligation of the waiver suffered impairment it was only because he exercised further testamentary privileges with a condition attached and thereby brought those consequences unwittingly or intentionally upon himself or his estate.⁶ The state could have given the right of election to a spouse regardless of a waiver, or it could condition recognition upon acknowledgment as a desirable safeguard.⁷ In states in which the subject of descent and distribution is covered by statute, it is generally declared that the right to take by descent, or inherit, is wholly the creature of, and regulated by, statute.⁸ The right has been granted by law out of consideration of public policy.⁹ The right to take property by descent has been held or declared to be a mere creature of the law and not a natural right.¹⁰

E. F.

CONSTITUTIONAL LAW—STERILIZATION.—X was imprisoned at the Oklahoma State Penitentiary for his participation in an armed robbery. He had once before been sentenced for such a crime and had also been convicted for the theft of chickens. These crimes, all being felonies, the Attorney General of the state, acting under the provisions of the Habitual Criminal Sterilization Act,¹ passed subsequent to the commission of the third conviction, brought proceedings to obtain a judgment to render the felon sterile. Section 195² specifically exempts embezzlers although embezzlement has been defined as a felony by statute in Oklahoma.³ Though the petitioner was

⁵ Newman v. Dore, 250 App. Div. 708, 294 N. Y. Supp. 499, *aff'd*, 275 N. Y. 371, 9 N. E. (2d) 966, 112 A. L. R. 643 (1937).

⁶ Compare with Restatement of Law of Contracts § 45, "A duty under a unilateral or independent contractual obligation is discharged by a manifestation by the obligee to the obligor at or before the time when performance is due of unwillingness to receive the performance when due or of assent to its omission, if the manifestation is not withdrawn before the expiration of a reasonable time after performance becomes due."

⁷ See *supra* note 1.

⁸ Jones v. Jones, 234 U. S. 615, 34 Sup. Ct. 937 (1914).

⁹ Stone v. Elliott, 182 Ind. 454, 101 N. E. 309 (1913).

¹⁰ Magoun v. Illinois Trust etc. Bank, 170 U. S. 283, 18 Sup. Ct. 594 (1898); Dawson v. Godfrey, 4 Cranch 321, 2 L. ed. 634 (U. S. 1808).

¹ OKLA. STAT. ANN. tit. 57, §§ 171 *et seq.*; L. 1935, pp. 94 *et seq.* (A habitual criminal is a person who having been convicted two or more times for crimes amounting to felonies . . . is thereafter convicted of such a felony in Oklahoma).

² *Ibid.*

³ OKLA. STAT. ANN. tit. 21, §§ 1704.