

Wills--Effect of Penal Law § 511 on Decedent Estate Law § 83 (Matter of Lindewall, 287 N.Y. 347 (1942))

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tioned the proposition that unborn contingent remaindermen had beneficial interests that required their consent to the revocation.⁷ This proposition has often been discussed in the lower courts,⁸ but recent decisions in the Court of Appeals have purposely avoided the issue.⁹ Following the rule set down in the lower courts, it was held here that persons as yet unborn had *no* beneficial interest in the continuation of the trust and that the trust could be revoked with the consent of all parties beneficially interested therein who were in being. The lack of consent of these unborn remaindermen was the primary cause motivating the trustee's opposition to the revocation. No serious objection was raised over the absence of consent of the personal representatives of the settlor. These, of course, could not be ascertained until the death of the settlor, as no one is heir to the living.¹⁰ The difficult question as to whether the settlor reserved a reversion in herself or created a contingent remainder in her personal representatives was not raised. Under the common law, a remainder to the grantor's own heirs created a reversion in him in every instance.¹¹ However, in New York today, this rule has become one of construction and is followed only where there is an absence of clarity and intent in creating the remainder.¹²

P. J. H.

WILLS—EFFECT OF PENAL LAW § 511 ON DECEDENT ESTATE LAW § 83.—In July, 1937, Marguerite Lindewall, the decedent, married one Paul Bathelt in the State of New York. They resided in New York City until June, 1938, when Bathelt pleaded guilty to murder in the second degree and was sentenced to imprisonment for

⁷ In the principal case, Lehman, J., states at p. 504, "The words 'persons beneficially interested' must be strained beyond their usual and natural meaning if construed to include those *not in being* who might in some contingency be entitled to an estate."

⁸ *Bearn v. Central Hanover Bank and Trust Co.*, 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936); *Thatcher v. Empire Trust Co.*, 243 App. Div. 430, 277 N. Y. Supp. 874 (1st Dep't 1935); *Corbett v. Bank of New York and Trust Co.*, 229 App. Div. 570, 242 N. Y. Supp. 638 (1st Dep't 1930); *Cram v. Walker*, 173 App. Div. 804 (1st Dep't 1916).

⁹ *Engel v. Guaranty Trust Co. of New York*, 280 N. Y. 43, 19 N. E. (2d) 673 (1939); see note 6 *supra*.

¹⁰ *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919). *But see Moore v. Littel*, 41 N. Y. 66 (1869).

¹¹ *Co. Litt.* 22b; *Robinson v. Blankenship*, 116 Tenn. 394, 92 S. W. 854 (1906).

¹² *Berlenbach v. Chemical Bank and Trust Co.*, 260 N. Y. 539, 184 N. E. 83 (1932); *Doctor v. Hughes*, cited *supra* note 10. For cases holding that a remainder was created see *Engel v. Guaranty Trust Co. of New York*, cited *supra* note 9; *Whittemore v. Equitable Trust Co. of New York*, 250 N. Y. 298, 165 N. E. 454 (1929); *Gage v. Irving Bank and Trust Co.*, 248 N. Y. 554, 162 N. E. 522 (1928).

life in the Commonwealth of Massachusetts. Decedent continued to reside in New York until her death in March, 1939. She left a last will and testament dated November 8, 1938, and Bathelt, on receiving the notice of probate,¹ appeared by counsel and filed an answer asserting a statutory interest in the estate² and objecting to the probate of the will. A motion to strike out the objection on the grounds that (1) Bathelt was not a "surviving spouse", and (2) that he had abandoned decedent, was granted by the surrogate, who based his decision only upon the first ground. Objectant appealed, contending, firstly, that the rejection of his answer worked a forfeiture of his property; secondly, that he was convicted in Massachusetts and there is no provision in the statutes there similar to Section 511 of the New York Penal Law;³ thirdly, Section 511 does not so operate as to effect a dissolution of the marital relation unless the innocent spouse remarries.⁴ The Appellate Division reversed the order of the Surrogate's Court, and Lorence, as executor, appeals by permission. The following question was certified: "Should the answer be stricken out and the objection to probate dismissed upon the ground that, upon the facts contained in the record the respondent as matter of law was not the husband of the deceased at the time of her death?" *Held*, order of the Appellate Division reversed and that of the Surrogate's Court affirmed. The question certified is answered in the affirmative. *Matter of Lindewall*, 287 N. Y. 347, 39 N. E. (2d) 907 (1942).

At common law, civil death followed as a consequence of attainder for commission of a felony.⁵ Since life imprisonment was un-

¹ SURROGATE'S COURT ACT § 146.

² DECEDENT ESTATE LAW § 18 provides: "1. Where a testator dies after August thirty-first, nineteen hundred and thirty, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, . . ."

³ N. Y. PENAL LAW § 511 reads as follows: "Consequence of sentence to imprisonment for life.—A person sentenced to imprisonment for life is thereafter deemed civilly dead."

⁴ There has been *dicta* in several lower court cases in New York to the effect that the marriage is terminated only if and when the innocent spouse so elects. See *Jones v. Jones*, 249 App. Div. 470, 472, 292 N. Y. Supp. 705, 707, *aff'd*, 274 N. Y. 574, 10 N. E. (2d) 558 (1937); *Brookman v. Brookman*, 161 Misc. 741, 742, 292 N. Y. Supp. 918, 920 (1937); *Matter of Gargan v. Scully*, 82 Misc. 667, 670, 144 N. Y. Supp. 205, 207 (1913).

⁵ The incident of civil death attended every attainder of treason or felony, whereby the attained person "is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civilliter mortuus*." Co. Litt. 130a; *Avery v. Everett*, 110 N. Y. 317, 324, 18 N. E. 148, 150, 6 Am. St. Rep. 368, 371 (1888); *Civil Death as Affecting the Marriage Status*, N. Y. L. J., Feb. 11, 1937, p. 726, col. 1; in *Platner v. Sherwood*, 6 Johns. Ch. 118 (N. Y. 1822), Ch. Kent terms the above quoted passage *dictum* and declares that this strict rule was confined to those cases of civil death arising from abjuration, banishment, or profession, and is not to be taken "in the full latitude of expression."

known to the common law⁶ and was first prescribed in 1796,⁷ it was originally thought, "for greater caution", to specifically attach the attribute of civil death⁸ and thus conform the new penalty to the common law rule.⁹ It seems clear that at common law civil death was not given the same effect as actual death,¹⁰ nor did it operate to dissolve the marriage, except insofar as was necessary for the protection of a wife or child.¹¹ As regards the obligation to support, this rule appears to express the present legislative attitude,¹² but, for at least the purpose of freeing the property of the innocent spouse from all *property* obligations arising out of the marital relation, the *sentence* of life imprisonment, rather than a subsequent *election* by the innocent spouse,¹³ *ipso facto* terminates the marriage.¹⁴ Property passes after

⁶ In *Troup v. Wood*, 4 Johns. Ch. 228, 248 (N. Y. 1820), Ch. Kent stated that the statute of March, 1799 (see *infra* note 10), prescribing civil death as a consequence of life imprisonment was "only declaratory of the existing law." In the later case of *Platner v. Sherwood*, 6 Johns. Ch. 118, 128 (N. Y. 1822), the Chancellor overruled that statement and declared that one sentenced to imprisonment for life prior to the statute could not be deemed civilly dead.

⁷ N. Y. Laws 1796, c. 30.

⁸ N. Y. Laws 1799, c. 57.

⁹ *Jones v. Jones*, 249 App. Div. 470, 292 N. Y. Supp. 705, *aff'd*, 274 N. Y. 574, 10 N. E. (2d) 558 (1937); *Troup v. Wood*, 4 Johns. Ch. 228, 248 (N. Y. 1820).

¹⁰ Except perhaps in those cases where one "entered into religion,—that is, went into a monastery, and became there a monk professed,—in which case he was absolutely dead in law, . . ." 1 BL. COMM. 132; *Platner v. Sherwood*, 6 Johns. Ch. 118, 128 (N. Y. 1822).

¹¹ *Osborn v. Nelson*, 59 Barb. 375, 381 (N. Y. 1871); *Chapman v. Lemon*, 11 How. Pr. 235 (N. Y. 1855); *Gregory v. Pierce*, 4 Metc. 478 (Mass. 1842); *Abbot v. Bayley*, 6 Pick. 89 (Mass. 1827); *Gregory v. Paul*, 15 Mass. 31 (1818); *Robinson v. Reynolds*, 1 Aiken's Rep. 174 (Vt. 1826). In *Kynmaird v. Leslie*, L. R. 1 C. P. 389, 400 (1866), the court, noting the distinction between the effects of civil death under the common law of England and the Code Napoleon, indicated that while under the latter civil death *ipso facto* produces a divorce, such was not the law in England.

¹² N. Y. CORRECTION LAW §§ 320, 322, provide in substance that, when any person has been sentenced to life imprisonment, a committee may be appointed to take charge of such person's property and the court may direct payment, from the convict's property, for the support of such persons as the convict would be legally liable to support if he had not been convicted.

¹³ In the principal case, the New York Court of Appeals expressly rejected the *dicta* to the contrary as enunciated in *Jones v. Jones*, 249 App. Div. 470, 472, 292 N. Y. Supp. 705, 707 (1936), *aff'd*, 274 N. Y. 574, 10 N. E. (2d) 558 (1937); *Brookman v. Brookman*, 161 Misc. 741, 742, 292 N. Y. Supp. 918, 920 (1937); *Matter of Gargan v. Scully*, 82 Misc. 667, 670, 144 N. Y. Supp. 205, 207 (1913). See note 4 *supra*.

¹⁴ In the principal case the court indicated that the New York Legislature has, by certain statutory provisions, evidenced an intention that life imprisonment *ipso facto* terminates the marriage. DOMESTIC RELATIONS LAW § 6 provides: "A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either: . . . 2. Such former husband or wife has been finally sentenced to life imprisonment." PENAL LAW § 341, referring to Section 340 which defines bigamy, provides: "The last section does not extend: . . . 4. To a person whose former husband or wife has been sentenced to imprisonment for life."

death only by reason of statute,¹⁵ and if one is *civilter mortuus* as a result of life imprisonment, the automatic dissolution of the marriage precludes one from becoming a surviving *spouse* within the meaning of the Decedent Estate Law. Although the conviction be had in another state, where there is no similar statutory provision,¹⁶ it matters not since each state has the right to fix the marital status of its citizens.¹⁷

N. W.

¹⁵ N. Y. DEC. EST. LAW § 83. Cf. Matter of Donnelly, 125 Cal. 417, 58 Pac. 61 (1899).

¹⁶ Accord, Jones v. Jones, 249 App. Div. 470, 472, 292 N. Y. Supp. 705, 707, *aff'd*, 274 N. Y. 574, 10 N. E. (2d) 558 (1937); cf. Sims v. Sims, 75 N. Y. 468 (1878). *Contra*: Vedin v. McConnell, 22 F. (2d) 753 (C. C. A. 9th, 1927), wherein the court indicated that the Alaska civil death statute was only local in its application, and could not operate upon a conviction in another jurisdiction. At common law, attainder had no extraterritorial effect. Kynnaid v. Leslie, L. R. 1 C. P. 389 (1866); see RESTATEMENT, CONFLICT OF LAWS (1934) § 120, comment a; *Civil Death Statutes—Medieval Fiction in a Modern World* (1937) 50 HARV. L. REV. 968.

¹⁷ Haddock v. Haddock, 201 U. S. 562, 569, 26 Sup. Ct. 525, 50 L. ed. 867 (1905); Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794 (1900); May v. May, 233 App. Div. 519, 253 N. Y. Supp. 606 (1931).