

July 2013

Decedent Estate Law § 20--Liabilities of Specific Legatees of Encumbered Personal Property

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Recommended Citation

Connell, John F. (2013) "Decedent Estate Law § 20--Liabilities of Specific Legatees of Encumbered Personal Property," *St. John's Law Review*: Vol. 16: Iss. 1, Article 25.

Available at: <http://scholarship.law.stjohns.edu/lawreview/vol16/iss1/25>

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the evidence?³¹ This will not be so important in the ordinary case in which the adult will be the plaintiff, for both burdens as to all matters including this will then be upon the adult on general principles. It will, however, be important in such a case as one in which the infant is suing upon a rescission, for example, to regain what consideration he gave up under the contract. There the infant's position as a plaintiff places upon him both the burden of producing evidence and the burden of proof as to other matters than those relating to the question of whether the contract is "reasonable and provident". Obviously, the burden of producing evidence that the contract was "reasonable and provident" will be upon the adult defendant.³² But can it also be held that, upon this question, he has the ultimate burden of proof?³³

Ours is the largest and most important business state. It is surprising that it was not³⁴ one of the pioneers in the direction of protecting the business community against the unrestrained exercise by infants of their legal power to disaffirm their contracts.

The historian of the future may find it noteworthy that the same session which enacted the statute under discussion, by making it possible validly to grant land adversely held against the grantor,³⁵ put a practical end to the modern importance of seisin, and completed legal recognition of the fact that in our economy land is a commodity.³⁶

L. DEL VECCHIO.

DECEDENT ESTATE LAW § 20 — LIABILITIES OF SPECIFIC LEGATEES OF ENCUMBERED PERSONAL PROPERTY.—At common law one who was given a specific legacy burdened with a debt, was entitled to have the debt paid out of the general assets of the estate, to the exoneration of the property specifically bequeathed, unless the

³¹ See *Hood v. Webster*, 271 N. Y. 57, 59, 2 N. E. (2d) 43, 44 (1936).

³² *Ibid.*

³³ See *Hood v. Webster*, 271 N. Y. 57, 59, 2 N. E. (2d) 43, 44 (1936). The adult having introduced even slight evidence, will the burden pass to the infant, on the ground that the matter is particularly within his own knowledge? *Perine v. Elmira, C. & W. Ry.*, 184 App. Div. 814, 172 N. Y. Supp. 396 (3d Dep't 1918).

³⁴ The following states have dealt with some phase of the infants' contracts by statute: (1) The Iowa group: Iowa, Kansas, Utah and Washington; (2) The Field Code group: California, Idaho, Montana, North Dakota, Oklahoma and South Dakota; (3) Requirement of a writing: Arkansas, Kentucky, Maine, Mississippi, Missouri, New Jersey, South Carolina and Virginia; (4) Removal of disabilities of infancy: Alabama, Florida, Kansas, Louisiana, Oklahoma, Tennessee and Texas; (5) Miscellaneous: Georgia, Louisiana and Virginia.

³⁵ N. Y. REAL PROP. LAW § 260, amended by L. 1941, c. 317.

³⁶ *Guest, et al. v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570 (1873); *Booth v. Rome, W. & O. T. R. R.*, 140 N. Y. 267, 35 N. E. 592 (1893); *Myers v. Gemmel*, 10 Barb. 537 (N. Y. 1851); *Parker v. Foote*, 19 Wend. 309 (N. Y. 1838); *Mahan v. Brown*, 13 Wend. 261 (N. Y. 1835); 3 KENT'S COMM. 537.

will charged the debt upon that property.¹ Thus, if the gift was a piece of furniture or jewelry which was pledged for a loan, or shares or other securities which were hypothecated,² the debt had to be borne by the residuary personal estate.³ Even where the thing given specifically was pledged for more than its value, although it need not be redeemed by the executor, the legatee could have compensation to the amount of the value of the thing bequeathed.⁴

And where testator bequeathed shares which were not fully paid up and directed that all his debts should be paid out of his estate, and he was, at the date of his death, under a covenant to pay the balance due on his shares, the agreement was held to be a debt for which the testator was personally liable, to be paid out of the personal residuum or out of any fund upon which the testator had charged the payment of debts.⁵ If, however, the interest of the testator was complete at his death, and nothing remained to be done to vest a title in him, the legatee of the shares would bear future calls.⁶

The common law rule in New York appears to have been unsettled or uncertain and there was some doubt whether in all cases the specific legatee took the property free of any charge, or subject to the encumbrance.⁷ This doubt probably arose because in the ab-

¹ *Lange, et al. v. Lange, et al.*, 127 N. J. Eq. 315, 12 A. (2d) (1940); see *Matter of Tabbagh*, 167 Misc. 156, 3 N. Y. S. (2d) 542 (1938); *Johnson v. Goss*, 128 Mass. 433 (1880); *Bothamley v. Sherson*, L. R. 20 Eq. 304 (1875); *Ellis v. Eden*, 25 Beav. 482 (1858); *Brainerd v. Cowdrey*, 16 Conn. 1 (1843); *Knight v. Davis*, 3 My. & K. 361 (1833); 2 JARMAN, WILLS (5th ed.) 589; 1 UNDERHILL, WILLS § 393.

² *Bothamley v. Sherson*, L. R. 20 Eq. 304 (1875) (whether to secure a debt of the testator or that of another).

³ UNDERHILL, WILLS, *supra*.

⁴ *Bothamley v. Sherson*, L. R. 20 Eq. 304 (1875).

⁵ *Armstrong v. Burnet*, 20 Beav. 424, 433 (1855). " * * * testator had contracted to take shares in a railway to acquire a title to which the whole amount of each share would be required. It seems to me that it is reasonable to assume that the testator intended to give the whole share for which he had subscribed to his legatee and that the accident of his death occurring sooner or later ought not to affect the bequest." Cf. also *Clive v. Clive*, Kay 600 (1854); *Jacques v. Chamber*, 2 Coll. 435, 11 Jur. 295 (1846); *Blount v. Hipkins*, 7 Sim. 51, 55 (1834); 1 UNDERHILL, WILLS § 394.

⁶ *Armstrong v. Burnet*, 20 Beav. 424, 433 (1855). "But in other cases the full amount of the share subscribed for is not intended to be paid or expected to be required. The first payment is supposed to be also the last and the testator sees no prospect of any further liability at his decease. As for example, the common instance of a company for insurance will illustrate my meaning. In these cases the share subscribed for may be Pds 100 each. This amount is specified to meet the liability which the company may possibly incur. Pds 5 per share is paid up, the company goes on realizing large profits, which are divided year after year in the shape of dividends. Many years after the death of the testator, in consequence of some great and unforeseen loss, a further call becomes necessary * * *"; cf. also *Day v. Day*, 1 Drew & S. 261, 264 (1860); *Adams v. Ferick*, 26 Beav. 384 (1859); 1 UNDERHILL, WILLS § 394.

⁷ Note of Commission, MCKINNEY, DEC. EST. LAW (1941) supp. 29: " * * * Under existing law relating to personal property specifically bequeathed there appears to be some doubt whether in all cases the specific legatee takes the property subject to the charge or incumbrance * * *."

sence of controlling precedents, courts of original jurisdiction in New York, limiting their decisions to the particular issue at hand had not treated the question in its entirety⁸ and other courts had made broad statements of the law on the question, which obviously were too extensive in scope and consequently led to confusion.⁹

In *Matter of Adams*, where the subject of the specific bequest was in pawn at the time of testator's death, the court decided that since the charge against the thing was not a valid claim against the estate of the deceased, the specific legatee took the gift with the burden.¹⁰ In *Matter of Tabbagh*, where there was a subsequent pledge of securities which had been bequeathed in trust by a previously executed will, the court said: "Prior to the enactment of the Revised Statutes, a debt secured by a pledge of personal property was required to be paid out of the general estate and a devisee or legatee of the property mortgaged or pledged took it free of the debt or charge * * * the common law rule in New York was changed in respect of a devise of real property subject to a mortgage and now a devisee takes real property *cum onere*."¹¹

Matter of Tabbagh was decided on the basis that since there was a subsequent pledge of property specifically bequeathed in a previously executed will, Decedent Estate Law § 38 requiring the legatee to take the property *cum onere*, was applicable.¹² From the decisions in *Matter of Adams* and *Matter of Tabbagh*, the inference was possible that the statement of the common law, as rendered in the latter case, was to be limited to bequests which had been encumbered

⁸ *Matter of Tabbagh*, 167 Misc. 156, 163, 3 N. Y. S. (2d) 542 (1938); *Matter of Adams*, 159 Misc. 827, 829, 288 N. Y. Supp. 924 (1936); cf. *Matter of Columbia Trust Co.*, 186 App. Div. 377, 381, 174 N. Y. Supp. 576 (1919).

⁹ *Matter of Tuck*, 171 Misc. 37, 39, 11 N. Y. S. (2d) 790 (1939).

¹⁰ *Matter of Adams*, 159 Misc. 827, 829, 288 N. Y. Supp. 924 (1936). "The amount loaned on the pawned rings was not a debt of the decedent (Surr. Ct. Act § 314, subd. 3) and is not a valid claim against her estate."

Matter of Tabbagh, 167 Misc. 156, 153, 3 N. Y. S. (2d) 542 (1938). "In *Wagner v. Thieriot* (203 A. D. 757, aff'd on opinion below, 236 N. Y. 588), the question arose over the amount of loans upon the security of life insurance policies. The widow, beneficiary of the policies, claimed the loans were ordinary debts of the insured and were payable out of his estate. The court held that under the insurance law contract [Insurance Law § 101, subd. 7] the insurance company could not have filed a valid claim against the estate, and since deceased was under no obligation to pay the loan to the company, it was not a debt to be paid by the estate."

See *Matter of Columbia Trust Co.*, 186 App. Div. 377, 381, 174 N. Y. Supp. 576 (1919). "I am of the opinion, however, that on principle the executor is not obliged to take possession of property specifically bequeathed or to bring it to or collect it at the domicile of the testator, unless it is needed in the administration of the estate, and that, therefore, unless the executor take possession of it the legatee, in whom the title is vested, must care for it at his peril, and must take it as and where it is." Here the specific bequest was of personal property abroad. *Held*, executor not required to take possession and bring it to the United States for the specific legatee.

¹¹ 167 Misc. 156, 161, 3 N. Y. S. (2d) 542 (1938).

¹² *Ibid.*

prior to the execution of the will and which were a valid claim against the estate.¹³

Nevertheless, in *Matter of Tuck*, a case where specific legatees were forced to accept proportionate abatement of their legacies since the testator had pledged the subject of the gifts before his death, the court said: "Title to a specific legacy passes directly to the legatee and he takes the property in such condition and subject to all charges in existence at the date of the testator's death."¹⁴

As we have seen, in *Matter of Tabbagh*, the inference was possible that the common law was the same as before the Revised Statutes to the extent that it had not been modified by the provisions of Decedent Estate Law § 38 and Real Property Law § 250. In *Matter of Baker*,¹⁵ a later decision, the same court as in *Matter of Tuck* limited the decisions in *Matter of Adams* and *Matter of Columbia Trust Company* to cases where the existing charges were not based on a personal promise of the testator.¹⁶ Further, Decedent Estate Law § 38, by its own terms, is applicable only to cases where there was a subsequent charge placed on property specifically devised or bequeathed in a previously executed will.

Hence it is very probable that the statement as rendered in *Matter of Tuck*, when considered in the light of the previous decisions, created some uncertainty as to the law in New York.

There also appeared to be some doubt whether the rule of assimilation was applicable, in the absence of a statute governing the rights of specific legatees of encumbered personal property. Although in several cases in the Court of Appeals, certain provisions of the Real Property Law had been assimilated and applied to personal property,¹⁷ inferior courts have been hesitant, in cases of the first instance, to apply the rule of assimilation in a like manner.¹⁸

¹³ Cf. *Lange, et al. v. Lange, et al.*, 127 N. J. Eq. 315, 321, 12 A. (2d) 840 (1940). "In this state the exoneration of real estate so devised has been abolished (P. L. 1924, p. 375, 1937 R. S. 3:26A-1, N. J. S. A. 3:26A-1) but, by its own language, the statute applies only to real estate, therefore leaving the common law unchanged as to the exoneration of personal property."

¹⁴ 171 Misc. 37, 39, 11 N. Y. S. (2d) 790 (1939). The Surrogate cited as authorities for the statement, the cases of *Matter of Tabbagh*, *Matter of Columbia Trust Co.*, and Decedent Estate Law § 38.

¹⁵ 174 Misc. 93, 19 N. Y. S. (2d) 875 (1940).

¹⁶ *Matter of Baker*, 174 Misc. 93, 103, 19 N. Y. S. (2d) 875 (1940). "In these cases the property specifically bequeathed passed as of the date of death of the testator and subject to existing charges which were not founded upon a personal promise of the testator."

¹⁷ *Overheiser v. Lackey*, 207 N. Y. 236, 100 N. E. 738 (1913); *Mills v. Husson*, 140 N. Y. 99, 104, 35 N. E. 422 (1893), "This conclusion is fortified by the decisions of the courts in analogous cases in which it has been quite uniformly held that the rules governing estates or interests in lands, whether founded upon statutes or upon general principles of law, should, as far as practicable, be applied to estates or interests of a like character in personal property"; *Matter of Kimberly*, 150 N. Y. 90, 91, 44 N. E. 945 (1896); *Cook v. Lowry*, 95 N. Y. 103 (1884).

¹⁸ *Matter of Baker*, 174 Misc. 103, 19 N. Y. S. (2d) 875 (1940). "No

The uncertainty or dissatisfaction over the law in New York appears to have culminated with the opinion in *Matter of Baker*, wherein the Surrogate, after ascertaining the intent of the testator, from the contents of the will and also from extrinsic sources, decided that a specific bequest of personal property to charitable organizations and which had been pledged as collateral for a loan of \$7,500,000.00, prior to the execution of the will, should nevertheless, be redeemed by the residuary estate and then suggested that it would be desirable for the Legislature to enact a section of the Personal Property Law with provisions similar to those contained in Real Property Law § 250.¹⁹

Prior to the enactment of Real Property Law § 250 and its subsequent amendment,²⁰ the common law rule was that the devisee of real property upon which subsisted any encumbrance put on it during the testator's lifetime, was entitled to have such encumbrance satisfied out of the testator's personal estate.²¹ The effect of Section 250 and its subsequent amendment is, in the absence of an express direction in the will to the contrary, that the devisee takes the property with the encumbrance.²²

The questions 1. whether the claim against the testator's estate was valid; 2. whether the charge was one based on a personal promise of the testator; 3. whether the charge was placed prior or subsequent to the execution of the will and 4. whether the rule of assimilation was applicable, have been eliminated by the enactment of Decedent Estate Law § 20.²³ Under this statute, and in the absence of a direction in the will to the contrary, either expressly or by necessary implication, the specific legatee takes the property *cum onere*. And where the gift has been pledged with other property, the specifically bequeathed property bears a proportionate share of the total charge.

reported decision has, however, specifically held that the provisions of Section 250 of the Real Property Law apply to personalty, within the rule of assimilation. The section has been strictly limited to a mortgage even in its application to real estate. It required an amendment made by the Legislature in 1937 to extend it to forms of liens other than a mortgage on the real estate."

¹⁹ *Matter of Baker*, 174 Misc. 93, 104, 19 N. Y. S. (2d) 875 (1940). "To the student of improvements in the law of inheritance, it would appear that the Legislature might well enact a section of the Personal Property Law with provisions similar to those contained in Section 250 of the Real Property Law so that in the absence of any express direction in the will, a specific bequest, like a specific devise, should pass subject to a charge or lien upon it whether imposed before or after the execution of the will. Such an enactment would eliminate the question as to the effect of a subsequently-executed will and would accord with the modern trend of treating the disposition of realty and personalty in the same manner. The distinction between them is archaic and is without logical or practical foundation."

²⁰ N. Y. Laws 1937, c. 75.

²¹ *Lange, et al. v. Lange, et al.*, 127 N. J. Eq. 315, 12 A. (2d) 840 (1940); *Matter of Noyes*, 3 Dem. 369 (1885); *Richardson v. Hall*, 124 Mass. 228 (1878); *Wright v. Holbrook*, 32 N. Y. 587 (1865); *Mosely v. Marshall*, 27 Barb. 45 (N. Y. 1858); *ROPER, LEGACIES* 732.

²² *Matter of Hackett*, 171 Misc. 139, 11 N. Y. S. (2d) 987 (1939).

²³ N. Y. Laws 1941, c. 104.

Decedent Estate Law § 20 is another step in the achievement of the elimination of the distinction between real and personal property, which for the sake of uniformity is desirable insofar as the laws of descent and distribution are concerned, as evidenced by the Report of the Commission to Investigate Defects in the Laws of Estate, 1928-1933.²⁴

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²⁴ LEGIS. DOC. NO. 70 (1928).