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Wills - Revocation - Effect of Contract for Sale of Previously Devised Real Property

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any change in the immunity doctrine should come from the legislature and not the courts;⁹ (3) one court has reasoned that charitable institutions derive no personal or private gain from the acts of their servants and therefore they should not be subjected to liability for their acts;¹⁰ (4) still other courts apply the implied waiver theory that the patient assumes the risk of the employees negligence, if reasonable care was used in the selection of the employees;¹¹ (5) Louisiana favors the use of the public function theory, arguing that such institutions are engaged in the performance of a public function, and therefore should be awarded the same privileges as other governmental agencies.¹² It has also been held that attendants in charitable hospitals are not the servants of the hospital under the master servant rule, but are the servants of the patient while in his attendance.¹³

The minority ruling is that a charitable institution is answerable for the negligence of its employees and servants by the ordinary rules of agency, including the principles of respondeat superior.¹⁴ It is apparent that this minority rule is becoming the modern trend.¹⁵ The major reason for this transition is that charitable institutions are more financially solvent today than they were when the immunity doctrine was instituted;¹⁶ thus stare decisis is not standing in the way of progress.

A logical result was reached by the Illinois Supreme Court,¹⁷ holding that charitable institutions were liable for the torts of their employees, and that the judgment could not be collected from the trust fund, but must be levied on the profits. This decision could seemingly satisfy both the immunity and non immunity arguments by taking the "middle of the road" approach.

A case similar to the instant case has never been before the North Dakota courts, but in view of the Supreme Court's opinion in the case of *Rickbiel v. Grafton Deaconess Hospital*¹⁸ it is suggested that they may follow the minority rule.¹⁹

ROGER L. HOLTE.

WILLS — REVOCATION — EFFECT OF CONTRACT FOR SALE OF PREVIOUSLY DEVISED REAL PROPERTY. — Decedent executed a will in which he made specific devises of real property to the defendants. Subsequently he executed a contract for deed of the devised property. A declaratory judgment action was brought by the executor to determine whether the devisees or the residuary legatees receive the proceeds of the contract for deed. In reversing the Dis-

9. *Forrest v. Red Cross Hospital*, 265 S.W.2d 80, 82 (Ky. 1954) (dictum); *Smith v. Congregation of St. Rose*, 265 Wis. 393, 61 N.W.2d 896, 898 (1954) (dictum).

10. See *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 173 (1916).

11. *St. Vincent's Hospital v. Stine*, 195 Ind. 350, 144 N.E. 537, 540 (1924) (dictum); *Williams v. Randolph Hospital*, 237 N. C. 387, 75 S.E.2d 303, 305 (1953) (dictum).

12. See *Jurjevic v. Hotel Dieu*, 11 So.2d 632 (La. 1943).

13. See *Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120 (1912).

14. See, e. g., *Swigerd v. City of Ortonville*, 246 Minn. 339, 75 N.W.2d 217 (1956); *St. Paul Mercury Indem. Co. v. St. Joseph's Hospital*, 212 Minn. 558, 4 N.W.2d 637 (1942); *Foster v. Roman Catholic Diocese of Vermont*, 116 Vt. 124, 70 A.2d 230 (1950).

15. See, e. g., *Noel v. Menninger Foundation*, 175 Kan. 75, 267 P.2d 934 (1954); *Pierce v. Yakima Valley Memorial Hospital Ass'n.*, 43 Wash.2d 162, 260 P.2d 765 (1953). (Since 1950 eight states have repudiated the immunity doctrine).

16. *Hayes v. Presbyterian Hospital Ass'n.*, 241 Iowa 1269, 45 N.W.2d 151 (1950); *Durney v. St. Francis Hospital*, 46 Del. 350, 83 A.2d 753, 758 (1950).

17. *Moore v. Moyle*, 405 Ill. 555, 92 N.E.2d 81 (1950).

18. 74 N. D. 525, 23 N.W.2d 247 (1946).

19. *Id.* at 258, 259, 260.

trict Court's reversal of the County Court, it was *held*, that under the N. D. Rev. Code § 56-0411 (1943)¹ the sale did not revoke the provision of the will and that the devisees receive the remaining balance on the contract at the death of the testator. *Shure v. Dahl*, 80 N.W.2d 825 (N. D. 1957).

At early common law, if a testator devised realty, and then entered into a contract to sell that realty, the contract transferred the equitable interest to the purchaser which, consequently, altered the testator's estate; and in equity, operated as a revocation of the devise.² This alteration occurred under the doctrine of equitable conversion, which left the testator with a bare security title.³ As a result the devisees received the testator's legal interest and the residuary legatees, received the proceeds of the contract as personalty.⁴ A similar result followed at common law, where a deceased's estate devolved by intestate rules. There the heirs at law would receive the bare legal title and the next of kin⁵ would take the proceeds of the contract as personalty.⁶

In 1837 England adopted the Wills Act⁷ which contained specific provision regarding the revocation of wills.⁸ The general provision on revocation specifically stated that revocation should take place only in certain specified ways.⁹ Thereafter it is specifically provided that a conveyance would not revoke a will.¹⁰ However, some English courts continued the practice of declaring a will revoked by alteration of the estate,¹¹ until 1861 when the English Wills Act was construed to prohibit revocation of wills, except by the specified methods.¹²

New York enacted its version of the Wills Act with the same intent of eliminating implied revocation of devisees.¹³ An early New York case held

1. "An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal, but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors if the same had passed by succession."

2. See *Mayer v. Cowland*, Dick. 563, 21 Eng. Rep. 389 (Ch. 1779); 3 American Law of Property, § 11.26 (Casner ed. 1952); Atkinson, *Wills* § 85 (2d ed. 1953).

3. See American Law of Property, *supra* note 2; Stone, *Equitable Conversion By Contract*, 13 Col L. Rev. 369 (1913).

4. See *Farrar v. Winterton*, 5 Beav. 1, 49 Eng. Rep. 476 (Rolls Ct. 1844); *Mayer v. Cowland*, Dick. 563, 21 Eng. Rep. 389 (Ch. 1779); 3 American Law of Property, § 11.26 (Casner ed. 1952); 1 *Tiffany, Real Property*, § 310 (3d ed. 1939).

5. See N. D. Rev. Code § 56-0104 (1943) (there appears to be no distinction between heirs at law and next of kin.) See 3 Page, *Wills* §§ 1009, 1018 (3d ed. 1941) (for the common law distinctions between heirs at law and next of kin):

6. See *Farrar v. Winterton*, 5 Beav. 1, 49 Eng. Rep. 476 (Rolls Ct. 1844); 3 American Law of Property, § 11.26 (Casner ed. 1952); McClintock, *Equity* § 104 (1936).

7. Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26.

8. *Id.* §§ 19-23.

9. *Id.* § 20. ("No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.")

10. Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26 § 23. ("No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.")

11. *Farrar v. Winterton*, 5 Beav. 1, 49 Eng. Rep. 476 (Rolls Ct. 1844).

12. *Ford v. De Pontes*, 30 Beav. 572, 54 Eng. Rep. 1012 (Rolls Ct. 1861) ("... I am of opinion that this question is concluded by the Wills Act . . . One great object of that statute was to put an end to all those questions which previously arose where a devise was destroyed by the alteration of the estate of the testator.")

13. N. Y. Decedent Estate Law, art. 2 (1950).

that devises were revoked where there had been only a temporary alteration of the estate.¹⁴ That case was apparently overruled by a construction of the New York statute¹⁵ which is similar to the N. D. Rev. Code § 56-0411 (1943). The court held that the New York statute under consideration prevented a revocation of a devise of land later sold under an executory contract for deed.¹⁶ This New York decision seems to have been followed by virtually all jurisdictions having a similar statute.¹⁷

In jurisdictions having a general revocation statute such as North Dakota,¹⁸ New York,¹⁹ and England,²⁰ a specific revocation statute appears to be unnecessary. Presumably the several legislatures adopted such statutes as safeguards to avoid judicial declarations of revocation when there had been an inter vivos alteration of the testator's estate.²¹

The respondents in the instant case relied heavily upon the North Dakota case of *Clapp v. Tower*,²² in which the court applied the doctrine of equitable conversion and treated the proceeds of the contract for deed as personalty. However, in that case the decedent's will was void and unenforceable as to realty. Therefore, the court did not have occasion to consider N. D. Rev. Code § 56-0411 (1943) and the proceeds being personalty, were awarded to the residuary legatees.

N. D. Rev. Code § 56-0411 (1943) appears to effectively prevent the doctrine of equitable conversion from working an implied revocation of a devise, but the doctrine appears fully operative in every other respect.²³ The majority of the jurisdictions construing similar statutes have given the doctrine of equitable conversion full effect when dealing with interstate devolution of the

14. *Walton v. Walton*, 7 John Ch. 258, 2 N. Y. Ch. 256 (1823). (Where the testator entered into a written contract for the sale of previously devised property and that contract notwithstanding the testator reacquired the property.)

15. *Knight v. Weatherwax*, 7 Paige Ch. 182, 4 N. Y. Ch. 180 (1838); N. Y. Decedent Estate Law, § 37 (1950). (A bond, agreement, or covenant, made for a valuable consideration, by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.)

16. *Knight v. Weatherwax*, *supra* note 15.

17. *E. g.*, In re *Erskine's Estate*, 84 Cal. App.2d 323, 190 P.2d 659 (1948); *Chadwick v. Taten*, 9 Mont. 354, 23 Pac. 729 (1890); *Sells v. Needles*, 78 Ohio App. 251, 69 N.E.2d 770 (1946); *Washington Escrow Co. v. McKinnon*, 40 Wash.2d 423, 243 P.2d 1044 (1952). *Contra*, *Ostrander v. Davis*, 191 Fed. 156 (8th Cir. 1911). (This court construed South Dakota statutes identical to N. D. Rev. Code §§ 56-0411, 56-0414 (1943) and reached the opposite result from the instant case.)

18. N. D. Rev. Code § 56-0401 (1943). ("Except as is otherwise provided in this chapter, a written will, in whole or part, can be revoked or altered only: 1. By a written will or other writing of the testator, declaring such revocation or alteration and executed with the same formalities with which a will should be executed by such testator; or 2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by some other person in his presence and by his direction.")

19. N. Y. Decedent Estate Law § 34 (1950).

20. *Wills Act*, 1837, 7 Will. 4 & 1 Vict. c. 26 § 20.

21. *Ford v. De Pontes*, 30 Beav. 572, 54 Eng. Rep. 1012, 1020 (dictum).

22. 11 N. D. 556, 93 N.W. 862 (1903).

23. See, *Thompson Yards v. Bunde*, 50 N. D. 408, 196 N.W. 312 (1923); (Buildings placed on land after signing of executory contract are also deemed personalty under doctrine of equitable conversion.); *Woodward v. McCollum*, 16 N. D. 42, 111 N.W. 623 (1907), (Vendee bears the risk of loss.); *Semmler v. Beulah Coal Mining Co.*, 48 N. D. 1011, 188 N.W. 310, 312 (1922) (The assignee of the vendor has rights of specific performance.) (dictum).

proceeds of an executory contract for deed.²⁴ The result of such holdings is that a devisee takes the proceeds from a contract for deed, while in absence of a will, the next-of-kin succeed to such proceeds as personalty and the heirs at law receive the bare security title.

PAUL J. PFEILSTICKER.

24. *Williams v. Haddock*, 29 N. Y. Supp. 199, 39 N.E. 825 (1895); *Berndt v. Lusher*, 40 Ohio App. 130, 178 N.E. 14 (1931); *In re Reid's Estate*, 26 Cal. App. 362, 79 P.2d 451 (1938) (dictum); *cf.* cases cited note 17 *supra*.