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Wills -- Devises and Bequests by Implication

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The unfortunate plaintiff in the principal case is without a statutory remedy and probably without a common-law remedy. However, the case can serve a much greater purpose than food for torts' thought.

Despite whatever logic there may have been in including the sale of lead compounds used in paint under the "Pharmacy" caption of the *North Carolina General Statutes,* section 90-77 is now in an anomalous position. It would seem to be as much in the public interest and safety to have legislation regulating the sale of lead compounds used as paint ingredients as it is now for public safety that we have legislation regulating the sale of insecticides, fungicides, and rodenticides.[24] The only existing regulatory legislation in the general area of paint products applies to the sale of linseed oil[25] and turpentine.[26] In view of the inherently dangerous quality of lead compounds used as paint ingredients, the slight cost to the manufacturer in placing appropriate labels on containers,[27] and the welfare of the public, it is submitted that the duty to warn should be made statutory.

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Wills—Devises and Bequests by Implication

In *Finch v. Honeycutt*[1] the testator declared in his will: "My estate is a community estate[2] with my wife Georgia Greer Honeycutt and has been held as such for several years when paying Federal and State Income Tax.

"Therefore it is my will that my half of my and her (wife) estate be given to my three children."[3] No further mention of the other half of the estate was made anywhere in the will. *Held,* a half interest of all the real and personal property of the deceased went to the wife in fee under the will by virtue of the doctrine of devises and bequests by implication.

In an earlier North Carolina case, *Burcham v. Burcham,*[4] the testator willed his wife "support" and expressed his desire that she should have

[24] N.C. GEN. STAT. § 106-65.1 (1952). This is the insecticide, fungicide and rodenticide act.

[25] N.C. GEN. STAT. § 106-285 (1952).

[26] N.C. GEN. STAT. § 106-303 (1952).

[27] The insecticide, fungicide, and rodenticide act requires the labeling of the enumerated poisons with a skull and crossbones symbol and a "poison" label in red letters against a differently colored background. N.C. GEN. STAT. § 106-65.3 (3) (1952). This would seem to be an appropriate label to place on containers of lead compounds used as paint ingredients.

[1] 246 N.C. 91, 97 S.E.2d 478 (1957).

[2] The doctrine of community property is given effect in only seven states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Texas. 41 C.J.S., *Husband and Wife* § 462(c) (Supp. 1957).

[3] 246 N.C. at 92, 97 S.E.2d at 480.

[4] 219 N.C. 357, 13 S.E.2d 615 (1941).

anything she wanted, and could live anywhere she wanted to, and have a good time for the remainder of her life so long as she did not marry again. The court found from these expressions of the testator that his intent was that the entire property be used for his wife's benefit during her lifetime or widowhood and found the inference so strong as to necessarily give the widow a power of disposition.[5]

In another case, *Efird v. Efird*,[6] the testator stated in his will that the homeplace where he and his wife lived was owned by them as tenants by the entirety, and that "upon my death . . . she will automatically own" it. In fact, the testator owned the property individually. In later sections of the will the testator made provisions to be carried out "after the above properties shall have been *given* to my wife." (Emphasis added.) The court said this language referred back to the testator's previous statement that the wife would automatically own the homeplace at his death, and held that the will manifested an intent that the homeplace should go to the wife.

In the principal case the testator made no reference to any part of the estate that might be given or allotted to his wife. There were no words sufficient to tie the testator's statement that his wife owned an interest in the estate into an expression of intent that any interest should pass to her under the will, as was found in the *Efird* case. If he were under the impression that his wife owned half the estate in her own right, then it appears illogical that he intended such half to pass to her under his will.

A search of the authorities has revealed only a few holdings from other jurisdictions on this issue. In *In re Boehm's Will*[7] the will stated: "There are other pieces of real estate in my name only . . . . However, the ownership of them represents the joint efforts of my husband and myself in work, savings, improvement, care, and management. It would be fair, I believe to consider and say that his interest is half and mine half, and I so declare."[8] The New York court held that such declaration did not constitute a devise to the husband.[9] The court said that it would be absurd to find that the testatrix intended to dispose of property which she declared she did not own.

In *Hatch v. Ferguson*[10] the testator made a devise to his children of

[5] The testator also made certain provisions for disposal of the property after the wife's death.

[6] 234 N.C. 607, 68 S.E.2d 279 (1951).

[7] 198 Misc. 994, 101 N.Y.S.2d 812 (Surr. Ct. 1951), *aff'd*, 281 App. Div. 1069, 121 N.Y.S.2d 766 (4th Dep't 1953).

[8] 101 N.Y.S.2d at 813-14.

[9] See Williams v. Allen, 17 Ga. 81 (1855), where the court stated that recitals by the testator in his will that erroneously declared title to property to be in a third person, which, in fact, belonged to the testator, did not amount to a devise or bequest of such property by the will.

[10] 68 Fed. 43 (9th Cir. 1895).

all his estate, describing it as "being the one-half interest in the community property now owned by me and my said wife." It was found that the testator owned the property individually, and the court held that his descriptive language could only be regarded as the expression of his opinion and did not convert the property into community property or operate as a devise of half thereof to his wife. The children took all.[11]

By the holding in the principal case it is apparent that the North Carolina Supreme Court has extended the doctrine of devises and bequests by implication further than it had yet done. The result it reaches is in conflict with the holdings of the jurisdictions discussed above. Yet it seems that the result may well be the more desirable one, since it more probably accords with the testator's intent as to whom the property should go.

PAUL MCMURRAY

Workmen's Compensation—Injuries Sustained by Employee While Going to and from Work

In *Hardy v. Small*[1] deceased, a thirteen year old boy, lived with his family on the farm of defendant under an arrangement whereby the family paid no rent, but was allowed to occupy a house owned by defendant in return for farm labor supplied by the family. Deceased lived on the east side of a public highway which ran through defendant's farm, and he had the duty of feeding defendant's livestock at a barn located 350 to 400 feet from his home on the west side of the highway. Deceased was required to feed the livestock twice a day and was paid $1.50 per week for this service. On November 30, 1955, deceased had crossed the highway, gone to the barn, fed the livestock, and was returning to his home when he was struck by an automobile on the highway and killed. Compensation proceedings were instituted.[2] The Industrial Commission found that the death was by accident rising out of and in

[11] See Circuitt v. Perry, 23 Beav. 275, 53 Eng. Rep. 108 (Rolls 1856). Where *X* willed all his real and personal property to *Y* but stated that on his death, part of his father's property would, under his father's will, devolve upon his nephews, when in fact the property then belonged to *X*, held, the property of the father's estate did not pass to the nephews under *X*'s will.

[1] 246 N.C. 581, 99 S.E.2d 862 (1957).

[2] N.C. GEN. STAT. § 97-13 (b) (1950) expressly excepts farm labor from the provisions of the Workmen's Compensation Act, but provides that if any employer of farm labor has purchased workmen's compensation insurance or insurance to cover his compensation liability the employer shall be conclusively presumed, during the life of the policy, to have accepted the provisions of the act. Defendant in this case had such a policy which was active at the time of the death of the decedent.