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Divorce as an Implied Revocation, Wills

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thirty-year provision, if valid, operating merely to postpone the enjoyment.

Possibly the theory of those opposed to the result reached in the principal case was based upon a ratio decidendi such as appears in the New York case⁵ where the court said of a limitation to trustees to divide and pay at a future time, that there was no vesting until that time arrived. But this rule would seem plainly inapplicable where, as here, the limitation is to children by name⁶ and where the postponement of distribution is only for the convenience of the fund or property and not for reasons personal to those who are to take.⁷

ELMER M. LEESMAN.

SALES—SUBSTITUTION OF ONE CARGO CARRYING VESSEL FOR ANOTHER.—[Federal] In *Matthew Smith Tea, etc., Co. v. Lamborn*¹ the same question is raised which was considered in a comment in a recent number of this REVIEW.² In a contract calling for the sale of a certain quantity of sugar and for its shipment from Java within a specified time by steamer to Philadelphia, is the seller who has designated a given steamer, which thereafter meets with an accident, at liberty then to designate another steamer which was loaded at the same time with the same sort of sugar, and if he is, is the designation bad if it names a steamer not originally meant for Philadelphia but destined for New York when it sailed from Java? The case previously commented on³ allowed such a redesignation, but held that the steamer originally bound for New York was not a proper one for such a redesignation. The comment referred to disagreed on both points, holding that no new designation should be allowed, but that if it were allowed, then a proper substitute had been chosen. The instant case deals almost solely with the latter point, and it is interesting to note that in an opinion by Hough, C.J., it reaches a conclusion entirely opposed to the earlier case and fully along the lines taken in the comment.

E. W. PUTTKAMMER.

WILLS—DIVORCE AS AN IMPLIED REVOCATION.—[Michigan] The deceased married the proponent of the will in 1912 and in 1918 executed the will in question, by which she was made sole beneficiary. In 1921 at the wife's suit a decree of divorce was granted. The husband made no defense, there was no property settlement and no alimony was granted or asked. The testator took no action regarding his will, and died in 1923. Probate was contested on the ground that the divorce constituted such a change in the testator's

5. *Clark v. Clark* 23 Misc. 281.

6. *People v. Allen* 313 Ill. 157, 158.

7. *People v. Allen* 313 Ill. 159; *McComb v. Morford* 283 Ill. 589; *Thomas v. Thomas* 247 Ill. 546.

1. 10 F. (2d) 697.

2. March, 1925, at p. 570.

3. *National Bank of Commerce v. Lamborn* (1924) 2 F. (2d) 23.

circumstances as to constitute an implied revocation. The probate court however admitted the will to probate. The Supreme Court ordered a new trial in an opinion¹ based on two independent lines of argument. It was pointed out that by previous Michigan cases divorce and a property settlement ipso facto revoked a will, and that no mere rebuttable presumption was raised. It was then said that there was actually a property settlement here, since the refusal to ask for alimony constituted a willingness to take nothing as her share and hence operated as in fact a settlement.² Thus having the combination of divorce and settlement, the reader would expect an ipso facto revocation. Instead a new trial was ordered, an inconsistent result due to the influence of the other line of argument pursued. In this part of the opinion the court stated that whether or not there was a presumption of revocation depended on all the circumstances, that the presence of a settlement was only one fact out of many, and that "counsel had placed too much importance on the absence of a settlement." The opinion then referred to some of these other facts, such as that there were no children, that the proponent had not helped earn the bulk of the property but that it had been inherited from the deceased's father, that deceased had an aged mother and a young sister living, etc. The directing of a new trial therefore must have been to enable all these circumstances to be duly evaluated and because the question was not automatically settled one way or the other.

In this new trial the proponent took the Supreme Court at its word and produced evidence to show that the facts and circumstances referred to as possibly justifying a presumption of revocation could be overcome, and as a result of this evidence the will was sustained by the jury's verdict. The contestants again carried the case to the Supreme Court, which declared³ that all such evidence from the proponent was erroneously admitted, that the presumption of revocation was conclusive, and that judgment should be entered disallowing the provisions in the will in favor of the proponent.

So far as Michigan can now be said to have any rule at all in the matter, it is a highly favorable one for contestants. While divorce per se may not operate to revoke, a property settlement is not essential. Any one of a multitude of other miscellaneous facts, which happens to impress the reviewing court, will do, and whatever it may be, however easily it might be met, the vague doubt that it sets up at once becomes unassailable, the presumption is conclusive. It is difficult, indeed, to find any justification for such an indefinite result. Practically it turns the whole matter over to the reviewing court to decide as it wishes. What then the fate of any

1. In re *McGraw's Estate* (1924) 228 Mich. 1.

2. The weakness of this process of finding a settlement where in fact there was none is rendered more striking by the facts of the case. The bill for divorce was filed in Rhode Island, while the husband was in Michigan. Service on him was by copy of the bill. It is difficult to see what rights to alimony the wife gave up, which it was in the power of the Rhode Island court to confer.

3. In re *McGraw's Estate* (1926 Mich.) 207 N. W. 10.

given case may be no one can foretell. The objectionable feature of this result lies in the uncertainty of outcome, not in the increased tendency toward implying a revocation. It is at the very least arguable that the best rule would be to make divorce per se a revocation in all cases,⁴ and that the failure to do so is only a survival of the law's hostility toward any loosening of the bonds of marriage. Whether or not there should be any such loosening, it is anomalous to allow it and yet to reject the collateral results therefrom. But it is even stranger to leave it to the whim and chance sympathies of a reviewing court to decide whether the collateral result of revocation of a will has or has not occurred.

E. W. PUTTKAMMER.

ZONING LAWS AND THE VALIDITY OF ZONING ORDINANCES.—

The article of Mr. Newman F. Baker on "The Constitutionality of Zoning Laws," in the last November number of the REVIEW¹ maintained that zoning statutes authorizing municipalities to subdivide by ordinance their territory into specified districts limiting the character of buildings to be constructed in the several districts were constitutional as a valid exercise of the police power, and that the validity or invalidity of an ordinance passed in pursuance of the statutory power so conferred, was to be tested by its reasonableness or unreasonableness. These views have since that article was written received ample confirmation in decisions of courts of highest resort in a number of states. The Supreme Court of Illinois has, in two cases, sustained the validity of the Illinois Zoning Act,² and of the ordinances of the cities of Aurora and Evanston, so far as the provisions thereof involved in those cases are concerned. The constitutionality of zoning statutes has also been upheld by the highest courts of appeal in California,³ Louisiana,⁴ Minnesota,⁵ New York,⁶ Ohio,⁷ Oregon,⁸ and Rhode Island.⁹ The Supreme Court of Florida overthrew a zoning ordinance because it found no statute empowering municipalities to pass such ordinances; but said that such ordinances, if passed pursuant to statutory authority, would be valid.¹⁰ The Supreme Court of Delaware while admitting the power of the legislature to pass zoning laws held the zoning ordinance of the City

4. It has been suggested that such a result is less likely to have been actually intended where the testator was the defendant in the divorce suit than where he was the plaintiff, and that therefore the implication might be a different one. No case has been found making such a distinction, while several have disregarded it, wisely, it would seem.

1. ILL. LAW REV. 20:213.

2. *City of Aurora v. Burns* 319 Ill. 84, 149 N. E. 784; *Deynzer v. City of Evanston* 319 Ill. 226, 149 N. E. 790.

3. *Fourcade v. City etc. of San Francisco* 238 Pac. 934.

4. *State v. City of New Orleans* 106 So. 549.

5. *State v. Houghton* 204 N. W. 569.

6. *Wulfsohn v. Burden* 241 N. Y. 288, 150 N. E. 120.

7. *Pritz v. Messer* 149 N. E. 30.

8. *Kroner v. City of Portland* 240 Pac. 536.

9. *Richard v. Zoning Board of Review* 130 Atl. 802.

10. *State v. Fowler* 105 So. 733.