

trade he were, he could not justify his cost differential under this approach. The present, and undoubtedly future, activities of trade associations, may aid greatly in effectuating this type of a statute by giving to state officials, retailers, and courts the criteria by which to judge the level of cost. These activities are in outlining accounting principles applicable to each trade and in conducting cost surveys for different trades in particular localities. Confining trade associations to aiding courts in determining cost, eliminates, on the one hand, the objection to government-dominated associations, as for example, under the N.R.A., and on the other hand, offers the opportunity for modified self regulation to be exercised by the individual trades.

A statute has recently been proposed by the grocers association in lieu of any general unfair practices act applicable to its members. The proposal is to define cost as invoice cost plus a minimum mark-up of 6%. The advantages of such a statute are that it gives the business man a quick method of determining his legally minimum selling price, and the government authorities an easy way of detecting violations. But the percentage fixed as the minimum mark-up must necessarily be an arbitrary figure. Furthermore, such a statute may be stigmatized as legislative price fixing.<sup>12</sup>

Regardless of the type of statute used, however, there is now an unmistakable legislative disposition in the United States to supplement the "vertical" operation of existing resale price maintenance laws with the "horizontal" operation of sales below cost laws.

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**Wills—Election—Devise of Another's Property—[Ohio].**—A husband devised a life estate in several parcels of land to his wife and a remainder in fee to the plaintiff. One of these parcels, the Melish Ave. land, was owned at this time in fee by the wife. After his death, the wife accepted the various life estates under the will and later devised the Melish Ave. land to the defendant. The executor of the wife's will made an application to the probate court for a certificate of transfer<sup>1</sup> of the land to the defendant. The plaintiff thereupon filed suit alleging ownership of the fee under the husband's will. The defendant demurred. *Held*, judgment for the plaintiff since the intention of the husband was to confer benefits, including the life estate, upon his wife only if she relinquished her fee in the Melish Ave. land according to his will. *Foyes v. Grossman*.<sup>2</sup>

The reasoning of the court is unconvincing because it is based upon the assumption that the husband knew that he did not own the Melish Ave. land. In his will, the husband referred to the parcels of land collectively as "my real estate." Moreover, had he known that his wife owned this property, he probably would have adopted the simple method of bequeathing the other property to his wife, upon the express condition<sup>3</sup> that she convey the remainder in the Melish Ave. land to the plaintiff, instead of conveying the wife's property to the plaintiff.

But even though the husband mistakenly believed all the parcels of land to be his

<sup>12</sup> *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932); see *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>1</sup> Throckmorton's Ohio Code 1936 § 10509-102.

<sup>2</sup> 56 Ohio App. 375, 10 N.E. (2d) 930 (1937).

<sup>3</sup> See 36 Col. L. Rev. 439 (1936); *Lundquist v. 1st Lutheran Church*, 193 Minn. 474, 259 N.W. 9 (1935).

own, the decision is nevertheless supported by practically unanimous authority.<sup>4</sup> This authority is phrased in terms of estoppel,<sup>5</sup> one who seeks equity must do equity,<sup>6</sup> one who takes under a will cannot take against it,<sup>7</sup> the intent of the testator,<sup>8</sup> or fairness.<sup>9</sup> Such language, however, is not persuasive. Estoppel rests upon the alleged inconsistency of first claiming the life estate in the disputed property under the will, and later asserting an original title in fee. These assertions are inconsistent, however, only if the real point in issue is assumed, *viz.*, that a devisee whose realty is devised to another cannot both accept the benefits of the will and retain her property. The equitable principle that one who seeks equity must do equity is convincing only if we assume that it would be inequitable for the plaintiff to claim the benefits provided under a will without relinquishing her pre-existing property rights. The phrase that one who takes under a will cannot take against it is but a restatement of the result. The intention of the testator offers no solution, for, as previously indicated, his most likely intent was to devise *his own* property. "General principles of fairness," if not meaningless, is too vague a phrase for application.

Instead of laying the emphasis on the grantee's actions, the result of these cases might be governed by the probable disposition, had the testator known the true state of title. From an examination of the collateral facts of the American cases in point, the most *common* probable dispositions by the testators, had they been informed that the property in question was not theirs, would have been either: (1) a devise to the owner-devisee expressly conditioned upon her relinquishment of all her property rights in the disputed realty to the other devisees; or (2) a devise to the other devisees of only the testator's property, but in an amount which would equal the original bequest plus the value of the relinquished land of the owner-devisee.<sup>10</sup> Either of these approaches give to the owner-devisee and the other devisees the same resultant value of property, though from different sources. Thus the rigid rule enunciated by the courts in all but

<sup>4</sup> Note 10 *infra*.

<sup>5</sup> *Craven v. Caviness*, 193 N.C. 311, 136 S.E. 705 (1927); *Schouler, Wills, Executors, and Adm'rs.* § 3200a (6th ed. Supp. 1926).

<sup>6</sup> *Lewis v. Carver*, 140 Md. 721, 117 Atl. 108 (1922); 1 *Pomeroy, Equity Jurisprudence* § 465 (4th ed. 1918).

<sup>7</sup> *Job Haines Home v. Keene*, 87 N.J.Eq. 509, 101 Atl. 512 (1917); 1 *Jarman, Wills* 511 (7th ed. 1930).

<sup>8</sup> *Beetson v. Stoops*, 186 N.Y. 456, 79 N.E. 731 (1906); 2 *Story, Equity Jurisprudence* § 1077 (12th ed. 1877); but see 45 *Yale L. J.* 1146 (1936).

<sup>9</sup> *Beetson v. Stoops*, 186 N.Y. 456, 79 N.E. 731 (1906).

<sup>10</sup> *Shanley v. Shanley*, 22 App. Div. 375, 48 N.Y. Supp. 32 (1897); *Waggoner v. Waggoner*, 4 Ind. App. 115, 30 N.E. 629 (1892); *Beetson v. Stoops*, 186 N.Y. 456, 79 N.E. 731 (1906); *Cavin v. Little*, 213 Ky. 482, 281 S. W. 480 (1926); *Job Haines Home v. Keene*, 87 N.J.Eq. 509, 101 Atl. 512 (1917); *Kinnaird v. William's Adm'r.*, 35 Va. (8 Leigh.) 415 (1837); *Baker v. Litton*, 311 Ill. 453, 143 N.E. 64 (1924). *Pure speculation*: *West v. West*, 131 Miss. 880, 95 So. 739 (1923); *Craven v. Caviness*, 193 N.C. 311, 136 S.E. 705 (1927); *Exchange and Deposit Bank of Owingsville v. Stone*, 80 Ky. 109 (1882); *Weeks v. Potten*, 18 Me. 42 (1841); *Fitts v. Cook*, 5 Cush. (Mass.) 596 (1850); *Wilbanks v. Wilbanks*, 18 Ill. 1 (1856); *Noe v. Splivalo*, 54 Cal. 207 (1880); *Moore v. Harper*, 27 W. Va. 362 (1886); *Morrison v. Bowman*, 29 Cal. 337 (1865); *Gaskin v. Gaskin*, 2 F. (2d) 931 (App. D.C. 1924).

a few rare cases<sup>11</sup> reaches substantially the same result as that indicated by this more realistic approach.

A possible objection to the result of these cases is that they permit a testator to effect a conveyance of another's property.<sup>12</sup> This is no hardship upon the owner, however, since he may always elect to retain his land, rather than accept a life estate in his and other property, as a donee under the will. An analogous doctrine, that of estoppel by deed, has for centuries made valid a conveyance of another's property to a third person when the grantor subsequently acquired title.<sup>13</sup> A second objection may be the lack of a deed from one devisee to the other. However, the formalities surrounding the execution of a will make the transfer definite, and guard against fraud; while probating the will assures against any irregularity in the chain of title.

<sup>11</sup> *Lewis v. Carver*, 140 Md. 121, 117 Atl. 108 (1922); *Hibbs v. Ins. Co.*, 40 Ohio 542 (1884).

<sup>12</sup> *Beard v. Knox*, 5 Cal. 252 (1855); dicta criticized and case distinguished in *Morrison v. Bowman*, 29 Cal. 337 (1865).

<sup>13</sup> Bigelow, *Law of Estoppel* 418 (16th ed. 1913).