

## ADVISORY COMMITTEE

### Probate Law Revision

March 13, 1965

#### Minutes

Meeting convened at 9:00 A.M., Saturday, March 13, 1965, in Judge Dickson's courtroom, Portland. Allison and Frohnmayer absent. Committee on Probate Law and Procedure present - Schnitzer, Bettis, Lovett, Rhoten and Tassock absent.

#### 1. SMALL ESTATES ACT

Dickson reported Martin had talked to Lundy, his office is reviewing revisions. As soon as completed, Lundy will turn Act over to Chairman of House Judiciary Committee, who will appoint subcommittee to handle bill and thus speed up its consideration. Since Law Improvement Committee has approved Act in principle, it is possible it will be designated as Judiciary Committee Bill, introduced at request of Law Improvement Committee. Martin to keep in contact with Dellenback. Lundy will send copy of Bill in form it leaves his office to all Committee members.

#### 2. GUARDIANSHIP BILL

By letter of March 1, 1965, corrected Bill was transmitted to Lundy.

#### 3. SENATE BILL 308

To be considered Monday, March 15, 1965 by Senate Judiciary Committee, Room 113. Richardson and Bledsoe to appear. Keller mentioned Arthur Goldsmith very interested, Dickson to telephone him.

#### 4. BILL NO. 7

Zollinger read his "Random Thoughts on Bill #7" (copies of which have previously been distributed to Committee) and Schnitzer's responsive letter of January 11, 1965 (also previously distributed).

Zollinger commented it is difficult to feel you are arriving at decision testator wanted when he hasn't said what he wants. Jaureguy stated Nawrocki decision (providing for exoneration from the estate where mortgage has been placed on specifically devised property subsequent to execution of will) does not by any means express universal intention of testators; the need is for a consistent rule whereby the issue may be determined with certainty. Zollinger believed would probably come closer to testator's intention in majority of cases if rule is broken down into categories: (1) devise of real property, (2) legacy of personal property, and (3) bequest of tangible personal property.

Dickson reported on New York law, which provides where real property subject to a mortgage or other lien descends to an heir or passes to a devisee (R.P.L. §250) or personal property subject to a mortgage, pledge or other lien is specifically bequeathed (D.E.L. §20), the heir, devisee or legatee must satisfy the lien out of his own property without resorting to the executor or administrator unless decedent's will directs, expressly or by implication, that the lien be otherwise satisfied. Where real property is devised to two or more persons their interest shall bear its proportionate share of the total lien.

Zollinger noted if the holder of a mortgage presents a claim to the personal representative for a note, secured by the mortgage, it is a good claim and must be discharged from the assets of the estate.

Carson stated a distributee should take subject to a mortgage, and not be forced to pay it. Zollinger agreed, but believed the estate should be held harmless; that an executor or administrator should be subrogated to the rights of the mortgagee, that he should distribute his rights by subrogation among the distributees of the estate.

Dickson noted the matter is an important one, to be covered at the earliest possible opportunity; that he would like something done at this session. Dickson asked whether both real and personal property should be dealt with.

Butler suggested differentiation in personal property between tangible and intangible, as often intangibles are pledged as collateral; Dickson pointed out tangibles, however, are often unpaid for

Richardson stated he would like to approach problem from the standpoint of intent of the average person; that there are two distinctions: (a) encumbrances created before execution and those created after execution, and (b) purchase money encumbrances and other types of encumbrances. He believed before a will is executed the average person intends property to go subject to the encumbrance; and after the will is executed probably has no intention that the property will go subject to the encumbrance; and that there is not much difference between real and personal property.

Keller believed there is a distinction between real and personal property, and a further distinction as to whether it is a purchase money mortgage. The length of the term of the debt varies between real and personal property; normally a real property mortgage is a long term debt, the purchaser considers what he owns is his equity. Whereas, with personal property, e.g., a pledge of accounts receivable or a mortgage of one's furniture, you have a short-term debt. The normal intent on short-term debt is that exoneration would apply. On a long-term debt, as with real property, the probable intent is that exoneration would not apply. It was noted, however, that a manufacturer's security interest given on machinery and equipment in a manufacturing plant might be just as much a long-term debt as a mortgage on real property.

McKay believed personal and real property go hand-in-hand. When a farm is mortgaged, equipment and livestock go with it, and the same instrument includes both. Zollinger disagreed, stating there would be a long-term mortgage on the land, whereas a crop mortgage on crop and livestock would be a one-year mortgage. McKay stated on FHA loan on farm for crops is at least three years, that it will keep on for years, may finance the farmer for life. Gooding agreed that refinancing is a continuing process for expansion, diversification or operating capital.

Shetterly noted under an intestate situation bills are paid, the distributees take what is left; queried whether there was anything wrong in statute providing where there is a will the devisees and legatees take subject to any encumbrance existing at the date of death. There would then be certainty, and the testator would be required to change his will if he later encumbers the property and desires exoneration from his estate. A testator can now specifically bequeath property, sell it the next day.

Dickson agreed that this is probably the testator's intent when he makes a will, that he intends to give no more than he owns at the time of his death. Carson agreed, suggested concentrating first on real property; believed devisee should take specifically devised real property with any encumbrance--whether created before or after execution of a will; that the probable intent of the testator on a mortgage existing at the time of executing his will is to give the property as is, and where mortgage is made after will executed--then this is testator's latest act and it must be presumed he knows what he is doing.

Dickson noted the modern trend on long-term mortgages is to carry mortgage insurance with a named beneficiary so mortgage will be paid off.

Unanimous agreement with Shetterley's rule as to real property--that devisee and legatees under a will take subject to any encumbrance existing at date of death.

With regard to personal property, Zollinger stated in the case of a pledge of securities, the borrower commonly incurs a short-term debt--e.g., a 90 day note with securities pledged as collateral. In most cases it would not be a testator's intent that the effect of his will should be modified, regardless of whether the will was executed previously or subsequent to the execution of his note. There should be a right of exoneration in favor of specific legatees of securities.

Butler believed there is a distinction between tangibles and intangibles. Frequently one will pledge a block of securities to the bank and leave it there year after year, e.g., to finance a fleet of logging trucks. Should the stock be bequeathed to someone, testator would intend distributee would take subject to the indebtedness. Shetterley stated there would be nothing difficult about writing into a will direction to exonerate. Dickson believed burden of requiring exoneration should be on the testator.

Richardson distinguished between tangible and intangibles--where one pledges either real or tangible personal property as security, it is usually in connection with the purchase or with the operation of the property; whereas, with intangibles the loan is usually not connected with the property secured. There would thus be a difference in intent. Agreed with Butler that when pledging intangibles the testator probably has no intent with regard to the operation of his will. In many cases there would be a violation of the testator's intent if a gift of intangible property was subjected to exoneration.

Gilley noted the more exceptions and distinctions there are, the more uncertainty there will be. Suggested simple rule that a devise or bequest is subject to encumbrances.

Zollinger did not agree intent of testator could be accomplished by applying same rule to personal property as to real property.

Motion carried on being put to vote to apply same rule to personal property as to real property.

Dickson queried whether Committee wanted to consider intestate as well as testate situation. Swift believed should stay with testate for this statute.

Zollinger suggested two sections to statute, one to cover real and personal property, other to make provision for subrogation of an estate to the rights of the holder of the encumbrance if the holder presents a claim which is paid from

the other assets of the estate. There should be acquisition of a note by subrogation so the note and mortgage could be distributed. Riddlesbarger suggested two statutes. Zollinger believed if providing a statute which says specific legatee or devisee should not be entitled to exoneration of the encumbrance from the estate, then there must be a provision that the holder of the encumbrance has a claim against the estate and is paid from the estate. The two cannot be separated. Cannot say the holder of the encumbrance has no claim. If mortgagee insists on payment, there is no reason why he should not be paid. There must be recourse against someone.

Keller stated he preferred Bill No. 7 to New York's statute, which apparently imposes personal liability on the devisee.

Zollinger suggested insertion of a new section 2 to the effect that if the holder of any encumbrance presented a claim on the debt thereby secured the executor or administrator would be subrogated to the debt and encumbrance to the extent of any payments made from the assets of the estate other than rents and profits of property specifically devised.

Dickson appointed Riddlesbarger to revise Bill No. 7.

Keller noted his notes indicate the January 8, 1965 draft refers to a mortgage, trust deed or security agreement. At one time it was suggested, "or other lien or encumbrance except a judgment against the decedent." Mechanic's line- presumed intent that there be no exoneration. On other hand there is judgment lien.

Gilley pointed out placing a mortgage on property is a conscious, voluntary act; whereas, neglect could cause a mechanic's lien to be imposed. From standpoint of testator's intention there is a distinction.

General discussion followed as to whether distinction should be made between voluntary and involuntary liens. Gilley suggested there are three categories: a mortgage, which is a voluntary, conscious act, a general lien which is an involuntary judgment, and a mechanic's lien which is involuntary, but still applies to specific property.

On being put to vote it was determined liens should be separated.

Keller suggested adding pledge to mortgage, trust deed and security agreement, that these together with mechanic's and materialmen's liens could be treated alike, everything else should be exonerated.

After discussion as to possibility of referring to Code section by number it was noted scope of chapter is too broad, including even attorney's lien.

Carson suggested providing for encumbrance created by reason of labor and materials furnished to or upon, or in respect of, the property bequeathed.

Riddlesbarger stated intent to include pledge, some statutory liens, and a separate section for subrogation and dealing with ORS 116.165, giving executor or administrator right to redeem real property subject to a mortgage which he might pay in cash and then be subrogated.

On being put to vote, there was no contrary view.

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Gilley queried whether language in Bill No. 7 "When any property subject to a mortgage . . . is specifically bequeathed or devised" was sufficient to cover an encumbrance originating after the date of the will, assuming will speaks from the date of death.

Riddlesbarger to finalize, forward to Carson, Chairman of Law Improvement Committee. Legislative follow-up assigned to Riddlesbarger and Carson.

#### 5. REVISION OF PROBATE CODE

After discussion as to best method of approach, determined Dickson to assign various sections to members, McKay to assign members of his Committee to assist. Suggestions for revision of all sections to be in writing, considered at next meeting.

Next meeting - April 10, 1965, 9:00 A.M., Judge Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Meeting adjourned at 10:55 A.M.