TALBOTT v. HAMILL, Appellant.

Division Two, July 3, 1899. *

1. **Will: LIFE ESTATE: CONDITION: USE AS HOME.** The will said: "It is my will that my home farm be held by my beloved wife during her natural lifetime, *for a home for her and my children*," and in another clause said: "Should my wife die before my youngest child becomes of age, it is my will that the property before mentioned shall not be sold till the youngest child becomes of age. It is my will that said property be sold and divided between all my children equally." The widow married again, moved to another State, and sold her interest in the farm, the plaintiff at the time his mother left the farm being a minor. *Held*, that the will created a life estate in the widow in the whole farm, and the words, "for a home for her and my children," did not limit that estate, nor was it forfeited by the fact that she ceased to occupy the farm as a home for herself and her children.

2. ——: ——: ——: **COTENANTS: REMAINDER.** This will did not make cotenants of the widow and her children, but vested her with a life estate in the whole farm, and the remainder in the children.

3. ——: ——: ——: **PREMATURE ACTION: EJECTMENT.** And as the purchaser from her took whatever interest she had in the land, the children could not maintain ejectment against him till after her death, and as she was still living when this suit was instituted, it was prematurely brought.

Appeal from Nodaway Circuit Court.—HON. C. A. ANTHONY, Judge.

REVERSED.

WILLIAM C. ELLISON for appellant.

(1) In the will under consideration, the word "children" means such children as remain at the parental home and submit themselves to parental control, and the words "for a

*NOTE.—Decided June 15, 1899. Motion for rehearing filed. Denied July 3.

home for her and my children," at most, limit the life estate in the widow to a use for a home, only so long as the children are under parental care and continue to reside on the "home farm." (2) Whatever construction may be adopted, it is quite certain the plaintiff, being twenty-six years old, and having abandoned the farm as a home for six years before he commenced his suit, the interest he took under the provisions of the will has long since expired and not until the death of the mother, can he assert any right. 1 Perry on Trusts (4 Ed.), sec. 118.

GROWNEY & GROWNEY and J. B. NEWMAN for respondent.

(1) By the clause of the will in question, no active duties were required of the wife, and the use or trust implied was simple or passive and vested the estate conveyed in the *cestuis que trust* as a class, as tenants in common during the life of the widow. R. S. 1889, sec. 8833; Perry on Trusts (4 Ed.), secs. 298 and 306; 2 Minors' Institutes, secs. 180, 962 and 963; 27 Am. and Eng. Enc. Law, pp. 107, 108, 117, 118, 124, 910 and 911; Fleming v. Ray, 12 S. E. Rep. 944. (2) A passive trust or use, where the trustee has no active duty imposed on him, is executed by the statute of uses. Bowman v. Long, 26 Ga. 142; Simonds v. Simonds, 112 Mass. 157; Tappan's Appeal, 55 N. H. 317; Witham v. Brooner, 63 Ill. 344; Riehl v. Bingenheimer, 28 Wis. 84; O'Riley v. McKiernan, 13 S. W. Rep. 360; Pugh v. Hayes, 113 Mo. 424, 432; 3 Jarman on Wills (5 Am. Ed.), pp. 56 and 57. (3) Even if it were conceded that an active trust was created by the will and active duties assigned the wife to maintain a home for herself and testator's children, yet when the widow married and moved to Ohio to live, and sold the "home farm" and put a stranger in the actual and adverse possession, hostile to testator's children, the trust would cease and terminate and the estate become vested in wife and children as tenants in common,

during life of widow. Perry on Trusts, secs. 259, 260 and 920; Colton v. Colton, 6 Am. Prob. Rep. 11; Major v. Herndon, 78 Ky. 123; 27 Am. and Eng. Ency. of Law, 119 and 124. (4) In construing the clause of the will in question, the intention of the testator shall control, as the same may be gathered from the whole instrument, the subject-matter and the surrounding circumstances. R. S. 1889, sec. 8916; 2 Minor's Institutes, pp. 962 and 963; Hall v. Stephens, 65 Mo. 677; Small v. Field, 102 Mo. 104, 122; Nichols v. Boswell, 103 Mo. 151; Long v. Timms, 107 Mo. 512, 519; Murphy v. Calin, 113 Mo. 117.

BURGESS, J.—This is an action of ejectment by plaintiff to recover the possession of an undivided tenth part of a large tract of land in Nodaway county, of which plaintiff's father, Dr. Perry H. Talbott, was the owner, and upon which he and his wife and children resided at the time of his death in October, 1880.

The petition is in the usual form and the answer a general denial. The case was tried to the court, a jury being waived. Plaintiff recovered judgment for one undivided twelfth interest in the land, and $820 damages. Defendant appeals.

Plaintiff is one of the children and heirs at law of Perry H. Talbott and claims title to the land in question under the provisions of a will duly executed by his father on the 18th day of September, 1880. The provisions of the will bearing upon the issues involved in this litigation are as follows:

"First. It is my will that my home farm and personal property be held by my beloved wife during her natural lifetime, for a home for her and my children." . . .

"Third. Should my wife die before my youngest child becomes of age, it is my will that the property before mentioned shall not be sold until my youngest child becomes of

age. It is my will that said property be sold and divided between all of my children equally."

Some seven or eight years after the death of Perry H. Talbott, his widow, the mother of plaintiff, married a man by the name of Draper, and moved to Ohio where she has since resided. When she left the farm all of the Talbott children were married except two, viz., Cicero and John, the plaintiff, and all of them had left home except these two who were then minors.

In 1890 the defendant acquired by purchase the interest of the widow and all of the children who were then of age, the plaintiff retaining his interest derived from the will of his father, and for which he prosecutes this suit.

Defendant asked and the court refused to declare the law to be as follows:

1. The court, sitting as a jury, declares the law to be that by the will in evidence, the widow of deceased is now seized of a life estate, and the plaintiff is not entitled to recover.

2. The court declares that under the evidence, plaintiff is not entitled to recover.

3. The court declares the law to be that under the will in evidence, the life estate is vested in the widow, subject to a trust in the will raised, and the plaintiff is not entitled to recover in this action.

The question is, can the plaintiff, under the provisions of the will, recover, during the lifetime of his mother, the interest in the land devised to him by the will against defendant who acquired title from her?

It is clear that by the provisions of the will Mrs. Talbott took a life estate in the land, and unless that estate is made conditional upon its use as a homestead by her and her children, by the words, "for a home for her and my children," plaintiff is not entitled to recover in this action nor will he be during her lifetime. These words do not, we think, qualify

the estate, nor was it forfeited because of the fact that she ceased to occupy it as a home for her and her children, or because of the fact that she sold and conveyed her interest therein to the defendant. She was not obliged at the risk of forfeiting her life estate in the land, to occupy it as a home for her and her children, but the words quoted, were only expressive of the wishes of the testator, and in no way imposed as a condition to the life estate granted to Mrs. Talbott, the occupancy of the land by her.

In discussing a similar subject in 1 Jarman on Wills (5 Am. Ed.), p. 694, it is said: "We are to consider whether in cases where words are added, expressing a purpose for which a gift is made, such purpose is to be considered obligatory. When the purpose of the gift is the benefit solely of the donee himself" [which is the case here after the children married and left], "he can claim the gift without applying it to the purpose, and that, it is conceived, whether the purpose be in terms obligatory or not."

In passing upon Crockett v. Crockett, 2 Phil. 553, the same author announces the rule to be that when property is by will left to the disposal of the wife for herself and children, the children do not become joint tenants, and their interest is subject to a life estate in the wife. [Id., p. 699.] "But here, as the case of precatory trusts, if the property is given in the first instance for the absolute benefit, or to be at the disposal of the donee, especially if such donee be the parent, no trust will be created by subsequent words showing that the maintenance of the children was a motive of the gift." [Id., p. 700.]

In Thorp v. Owen, 2 Hare 608, the testator, by his will, provided that everything during the life of his wife should remain as it was for her use and benefit and after her decease he gave his real estate to his male heir, and his personal estate to his children; adding that he gave the above devise to his wife, that she might support herself and her children according to

her discretion and for that purpose. It was held that the widow took an absolute interest for her life in the real estate.

The first clause of the will does not provide that the personal property and farm shall be held jointly by the wife and the children of the testator during the natural life of the wife, for a home for her and them, but that it shall be held by her during her natural life, for a home for her and the children of the testator. The possession was hers exclusively and she might at any time have rented or otherwise disposed of it during her lifetime.

This position seems to find support in the fact that the only restriction placed upon the alienation of the property is by the third clause of the will, by which it is provided that in the event of the death of the wife before the youngest child became of age that the property should not be sold until the last named event occurred, when it was to be sold and the proceeds divided equally among the testator's children. By taking these two clauses together there was we think a clear intention upon the part of the husband to give the whole of the property to the wife during her natural life with remainder to the children.

Under the statute the wife upon the death of her husband was entitled to the rents and profits of the farm until her dower was assigned, and as dower to one-third of the land during her natural life which she could dispose of by deed if she chose, and certainly the testator in this case did not intend to give his wife a less estate than she was entitled to by law, but that he did intend to enlarge such interest, and to give her the entire farm during her lifetime, and, it is equally clear that he did not intend to deprive her of the right to dispose of her life estate therein, for no such prohibitory clause is contained in the will. But plaintiff relies upon Bland v. Rhodes' Adm'r, 30 S. W. Rep. (Ky.) 957, as announcing an adverse rule, but this we think a misconception of the ruling in that case, and is authority for the position taken by us rather than

against it. In that case the will provided that "I bequeath to my wife the house and lot upon which I now live . . . as a homestead for her and my children by her," and it was held that the wife took a life estate, with remainder to the testator's children by her. The court said: "It seems to be the general current of decisions in this State for quite a number of years to construe both wills and deeds made by husbands in favor of and to their wives and children, or to the wife for the use and benefit of herself and children, or to the wife in trust for the use and benefit of herself and children, all, in the absence of some express intent that they should hold differently, to indicate an intention that the wife should take a life estate, that she may thus manage and control the estate, and thereby raise and educate the children, the children taking at her death the remainder."

In Davis v. Hardin, 80 Ky. 672, it is said: "When a husband makes provision for his wife and children, he should be presumed to do so with the intention to give the whole to the wife for life, remainder to the children, unless a contrary intention is manifest from the terms of the provision, or from the facts and circumstances attending it." While the question involved in these cases was as to whether the wife took a life or a fee simple estate in the land, they tend to show that under wills containing similar provisions to the will involved in this litigation, the wife takes the entire estate in the land during her natural life, with remainder in fee to the children of the testator.

The well established rule in regard to the construction of wills in this State is, that they must be so construed as to conform to the intention of the testator, and when this rule is observed there is no escape from the conclusion that the testator intended to give the farm to his wife for and during her natural life, for the benefit of herself and children, and this being the case she had the right to dispose of her life estate in

the land, which was acquired by defendant by the deed thereto from herself and husband.

We therefore reverse the judgment. GANTT, P. J., and SHERWOOD, J., concur.

TALBOTT v. SCHNEIDER, Appellant.

Division Two, June 26 1899.

Premature Action. Following Talbott v. Hamill, to be found on page 292, of this volume, it is held that this action was prematurely brought.

Appeal from Nodaway Circuit Court.—HON. C. A. ANTHONY, Judge.

REVERSED.

WILLIAM C. ELLISON for appellant.

GROWNEY & GROWNEY and J. B. NEWMAN for respondent.

GANTT, P. J.—This is an action of ejectment for an undivided one-twelfth of what is known in Nodaway county as the "Home Farm" of the late Dr. P. H. Talbott.

Plaintiff is one of eleven children of said deceased. Defendant pleaded in his answer the last will of Dr. Talbott as set out in case of Talbott v. Hamill considered and decided by this court at this term and reported on page 292 of this volume. Plaintiff admitted the will and also that Mrs. Talbott, the widow of Dr. Talbott, was still alive.

The evidence in all substantial respects was like that in Talbott v. Hamill. Plaintiff recovered judgment for one-twelfth part of the said lands and defendant appeals.

The same points are made and the same authorities cited as in Talbott v. Hamill.

For the reasons assigned by Judge BURGESS in Talbott v. Hamill, we hold that the widow of Dr. Talbott took an estate for life and his children a remainder in fee, to be divided when his youngest child becomes of age, if that shall not happen until after the widow's death.

As the particular estate for life has not yet terminated this action is premature and accordingly the judgment is reversed. SHERWOOD and BURGESS, JJ., concur.