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WILLS - ELECTION TO TAKE A BEQUEST OR DEVISE

WILLS—ELECTION TO TAKE A BEQUEST OR DEVISE—The testator made a bequest of $2,000 to the First Lutheran Church. This bequest was to be paid by the testator's sons, who were made residuary legatees on condition that they pay the $2,000. The sons asserted a constitutional provision that no man shall be compelled to erect, support or maintain any religious order against his consent as a defense to any payment required of them. *Held,* the bequest was valid on the theory that there was no compulsion to pay as the sons could elect not to take under the will. However, if the sons did take, they would be personally liable. *Lundquist v. First Lutheran Church,* 193 Minn. 474, 259 N. W. 9 (1935).

The holding here is well supported by the decisions and text writers. As a rule, the doctrine of election (an equity concept) is applied to cases where there is a conflict of claims and rights. In wills it occurs largely in cases involving the rights of a widow. The case here is therefore unique in that it involves sons and does not involve any conflicting claims. The theory here is that the bequest to the sons is a bare offer. The beneficiary under a will has the right to elect whether or not he will take a bequest or devise, especially when it is onerous.[1] Some decisions advance the idea that the gift vests on the testator's death, but may be renounced later. Still, whether it is treated as an offer that has to be accepted or as a vested gift subject to be renounced,[2] the fact still remains—there is no absolute compulsion to take. He need not take, but, "He who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it."[3] The only limitation on this rule is that the provision may not be illegal or against public policy. The right of election is so fixed that in a recent case a beneficiary was allowed to make a final and unconditional renunciation of all benefits under the will and by so doing to exclude his creditors even after the creditors had levied upon, sold and obtained a sheriff's deed.[4] Another interest-

[1] 69 C. J. 967 (1934).

[2] Acceptance of a beneficial devise is presumed, but if it is renounced in time it relates back to death of testator. When a beneficiary renounces he takes nothing, but on the other hand, he incurs no obligations and is released from all obligations which an acceptance would have imposed. Strom v. Wood, 100 Kan. 556, 164 P. 1100 (1917).

[3] 1 JARMAN, WILLS, 7th ed., 510 (1930).

[4] Lehr v. Switzer, 213 Iowa 658, 239 N. W. 564 (1931); Robertson v. Schard, 142 Iowa 500, 119 N. W. 529 (1909).

ing case is one which clearly brings out the theory that a testamentary gift is a mere offer which the "offeree" may accept or reject. A beneficiary was allowed to accept beneficial legacies and to reject burdensome legacies.[5] The basis of the holding was that they were separate offers and could be accepted or rejected independently. The doctrine of election is beneficial, therefore, because it allows the beneficiary to exercise his own free will. At the same time it allows the testator to dispose of his property as he most desires and upon conditions that may not be overlooked or avoided. It prevents one from taking under a will and also disappointing it. That the testator may set conditions on his bequest is very well settled: a bequest conditioned on attendance of regular meetings of church was held valid in a state having a constitutional provision similar to that of the principal case; [6] a bequest conditioned on education in the Roman Catholic faith was held valid; [7] a devise conditioned on withdrawal from the priesthood was also held good.[8] All these are based on the theory of election and its attendant maxim that a beneficiary is under no legal obligation to accept a bequest.[9] It prevents an imposition on an unwilling legatee and it gives the testator protection if the election is exercised. It would seem then to be good policy so long as kept within its present limits, which exclude illegal conditions or acts against public policy. The acceptance of the devise creates the obligation [10] and not the testamentary act. Hence, there is no obligation or compulsion unless a free use of the legatee's will is exercised by an acceptance of the bequest.

A. M. B.

[5] Brown v. Routzahn, (C. C. A. 6th, 1933) 63 F. (2d) 914.
[6] Paulson's Will, 127 Wis. 612, 107 N. W. 484 (1906).
[7] Magee v. O'Neill, 19 S. C. 170, 45 Am. Rep. 765 (1883).
[8] Barnum v. Mayor of Baltimore, 62 Md. 275 (1884).
[9] Ditch v. Sennott, 117 Ill. 362, 7 N. E. 636 (1886), one need not take, but if he does he takes according to all terms of will; Greely v. Houston, 148 Miss. 799, 114 So. 740 (1927), devise or bequest not effective until accepted by devisee or legatee who has a right to accept or reject.
[10] Fuller v. Fuller, 84 Me. 475, 24 A. 846 (1892).