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EQUITY-POWER TO RESCIND CONVEYANCE FOR FRAUD-SURVIVAL

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EQUITY—POWER TO RESCIND CONVEYANCE FOR FRAUD—SURVIVAL[1]—Defendants obtained a deed from plaintiffs' testator shortly before he died. Plaintiffs, his residuary devisees, filed a bill seeking cancellation of the deed, alleging that it was procured by undue influence. Defendants demurred on the ground that undue influence is a species of fraud and the power to rescind a conveyance for fraud does not survive the grantor's death. The demurrer was overruled. On appeal, *held,* affirmed. The power to rescind was not extinguished by the grantor's death. *Glojek v. Glojek,* (Wis. 1948) 35 N.W. (2d) 203.

In reaching this conclusion the court has withdrawn from its former position, assumed in strong dicta,[2] that since the power to rescind for fraud is personal, an action for cancellation of a deed obtained by undue influence does not survive to the grantor's residuary devisees. The view that the power to rescind is personal

[1] A discussion of other aspects of this subject is found in 30 MICH. L. REV. 420 (1932).

[2] Zartner v. Holzhauer, 204 Wis. 18, 234 N.W. 508 (1931); Krueger v. Hansen, 238 Wis. 638, 300 N.W. 474 (1941); Riedi v. Heinzl, 240 Wis. 297, 3 N.W. (2d) 366 (1942).

to the grantor stems from an English case,[3] supported by American writers and decisions,[4] indicating that a contrary holding would encourage champerty and maintenance. However justifiable this reasoning has been when applied to prevent inter vivos assignments,[5] it was most inadequate as applied to survival.[6] Nevertheless, assignability has generally been one test for determining survival,[7] and this was the basis of the former Wisconsin position.[8] While the power to rescind is not assignable per se, it has been held that if a second conveyance of the land is made by the grantor, the right to a cancellation of the first deed passes with it.[9] This view has been used to justify rescission by the heir of the grantor, the theory being that, although the naked power to rescind did not survive, the heir took by succession all the interest in the land which would have passed by a second conveyance.[10] The artificiality of this approach has been pointed out by the California court, which said, "the conveyance of the property in its then status is neither more nor less than an assignment of a right of action for the fraud. For at that time the grantor had no other interest in or pertaining to the property."[11] In holding that the power to rescind does survive, the court has taken a sound position, for if survival were denied, the retention of land by a fraudulent grantee would turn not upon the justice of such retention but upon the grantor's state of health. The general approach of other courts to this problem is in accord with this case. When the grantor dies intestate, the heirs are entitled to rescind;[12] when the grantor leaves a will, the residuary or sole devisee may rescind.[13] The administrator or executor, in absence of statute, may maintain a bill for cancellation only upon showing that disposal of the property is necessary in order to satisfy the debts of the estate.[14]

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[3] Prosser v. Edmonds, 1 Y. & C. Exch. 481, 160 Eng. Rep. 196 (1835).

[4] 3 STORY, EQ. JURIS., 14th ed., §1400 (1918); Pattiz v. Semple, (D.C. Ill. 1926) 12 F. (2d) 276 at 277.

[5] This reasoning is largely obsolete today. See 10 AM. JUR., Champerty and Maintenance, §7.

[6] White v. Bailey, 65 W.Va. 573 at 579, 64 S.E. 1019 (1909).

[7] Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W. (2d) 935 (1940); 1 AM. JUR., Abatement and Revival, §80.

[8] Zartner v. Holzhauer, 204 Wis. 18, 234 N.W. 508 (1931).

[9] 110 A.L.R. 849 at 856 (1937).

[10] Zartner v. Holzhauer, 204 Wis. 18 at 23, 234 N.W. 508 (1931). See also Walling v. Thomas, 133 Ala. 426, 31 S. 982 at 983 (1902).

[11] Whitney v. Kelley, 94 Cal. 146 at 150, 29 P. 624 (1892).

[12] 2 A.L.R. 431 (1919); 33 A.L.R. 51 (1924).

[13] Pepper v. Truitt, (C.C.A. 10th, 1946) 158 F. (2d) 246; Floyd v. Green, 238 Ala. 42, 188 S. 867 (1939); Feeney v. Runyan, 316 Ill. 246, 147 N.E. 114 (1925). See also 1 C.J.S., Abatement and Revival, §164.

[14] Ecklor v. Wolcott, 115 Wis. 19, 90 N.W. 1081 (1902); Reed v. Brown, 215 Ind. 417, 19 N.E. (2d) 1015 (1939). 21 AM. JUR., Executors and Administrators, §§908, 1007. See also Moran v. Beson, 225 Mich. 144, 195 N.W. 688 (1923), where the administrator was substituted for the grantor, who had begun in his lifetime an action to rescind for failure of consideration.