Maryland Law Review

Volume 19 | Issue 3 Article 8

Incumbrances On Devised Land The Doctrine Of Exoneration - Tobiason v. Machen

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Incumbrances On Devised Land — The Doctrine Of Exoneration

Tobiason v. Machen[1]

In 1953 Oliver F. Machen executed his last will and testament. After making a general direction for the payment of all his debts, he devised all his "right, title, and

[1] 217 Md. 207, 142 A. 2d 145 (1958).

interest . . ." in specified realty to Helen Tobiason and the entire residuum to his mother, Mary V. Machen. At the time the will was executed, the testator owned the specifically devised property in fee simple, unincumbered, but subsequently he placed a mortgage thereon, which remained with an unpaid balance until his death in 1957. The only other property owned by Machen at the time of his death was a leasehold interest in one or more lots, also incumbered by a mortgage.

The devisee contended that under the doctrine of exoneration the mortgage on her property should be paid out of the residue of the estate, but the lower court held that the testator's intention was to charge the property devised with the payment of the unpaid balance of the mortgage, and that such mortgage was not payable out of the personal estate. The Court of Appeals, in reversing, *held* that as between a specific devisee of incumbered real estate and a residuary legatee, the devisee was to receive the property exonerated from the burden of the mortgage, unless the testator by express provision or by reasonable implication has shown a contrary intention.

The doctrine of exoneration is a common law rule which operates to discharge an incumbrance upon property passing to an heir,[2] legatee,[3] or devisee,[4] usually at the expense of the personal estate of the decedent. Although the rule has generally been applied in relieving realty from the burden of a mortgage,[5] it has also operated to discharge it from annuities placed thereon by the testator,[6] from ven-

[2] Howell v. Price, 1 P. Wms. 291 (1715); Newhouse v. Smith, 2 Sm. & G. 344, 65 Eng. Rep. 429 (1854). See also discussion of exoneration in Chase v. Lockerman, 11 Gill & J. 185 (Md. 1840).

[3] Lange v. Lange, 127 N.J. Eq. 315, 12 A. 2d 840 (1940); Bothamley v. Sherson, L.R. 20 Eq. 304 (1872); Knight v. Davis, 3 My. & K. 358, 40 Eng. Rep. 136 (1833); Lightfoot v. Lightfoot's Ex'r., 27 Ala. 351 (1855).

[4] Harris v. Dodge, 72 Md. 186, 19 A. 597 (1890); Stieff v. Millikin, 162 Md. 245, 159 A. 599 (1932); Tobiason v. Machen, 217 Md. 207, 142 A. 2d 145 (1958); Gibson v. McCormick, 10 Gill & J. 65, 108 (Md. 1838) — however, here the land was not exonerated of a mortgage because the personalty was insufficient to cover the debts of the testator; Goodfellow v. Newton, 320 Mass. 405, 69 N.E. 2d 569, 168 A.L.R. 698 (1946), involving a discharge of a mortgage from both specific and residuary devises; Equitable Trust Co. v. Shaw, 22 Del. Ch. 47, 194 A. 24 (1937), involving a residuary devise.

[5] The doctrine applies to all incumbrances in the nature of liens. It is generally applied in freeing the realty or a chattel of the burden of a mortgage. Stieff v. Millikin, *ibid.;* Tobiason v. Machen, *ibid.;* Owen v. Lee, 185 Va. 160, 37 S.E. 2d 848 (1946); Equitable Trust Co. v. Shaw, *ibid.;* Goodfellow v. Newton, *ibid.;* Note, *Exoneration of Specific Property from Incumbrances Existing at the Death of the Testator or Ancestor*, 40 Harv. L. Rev. 630 (1927).

[6] Mitchell v. Mitchell, 21 Md. 244 (1864). The case specifically provided that where the annuity was charged to the testator's entire realty which

dor's liens,[7] and from materialmen's liens and other similar incumbrances.[8] In addition the doctrine has been used to justify the exoneration of specifically devised property where the testator had quitclaimed the property to the devisee subsequent to the making of his will,[9] and where the property was held by entireties and the mortgage debt was that of the husband alone.[10] However, the rule is generally limited to debts which are the personal obligations of the testator,[11] and does not extend to incumbrances existing at the time he purchased or acquired the property, unless he subsequently made such debts his own.[12]

In applying the doctrine the courts have followed no single rule. In most instances it has been applied in favor of specific devises,[13] but has also been used for the benefit of residuary devisees,[14] heirs,[15] and specific legatees.[16] As the antithesis of the above, the courts have used the doctrine to the detriment of residuary legatees[17] or next of kin,[18] but in absence of unusual circumstances not against specific devisees.[19] Furthermore, it has been stated that the

consisted of two tracts of equal value, one of which descended and the other of which was specifically devised, the annuity was to be charged to the land which descended, in exoneration of that specifically devised.

[7] In re Riegelman's Estate, 174 Pa. St. 476, 34 A. 120 (1896).

[8] 40 Harv. L. Rev. 630.

[9] Jacobs v Button, 79 Conn. 360, 65 A. 150 (1906).

[10] Stieff v. Millikin, 162 Md. 245, 159 A. 599 (1932). Here, the will though ineffective to pass title, was used by the court as evidence of intent.

[11] Stieff v. Millikin, *ibid.;* In re Taylor's Estate, 30 N.J. Super. 65, 103 A. 2d 268 (1954); Campbell v. Campbell, 140 N.J. Eq. 144, 53 A. 2d 630 (1947).

[12] Stieff v. Millikin, *supra* n. 10; Equitable Trust Co. v. Shaw, 22 Del. Ch. 47, 194 A. 24 (1937); Owen v. Lee, 185 Va. 160, 37 S.E. 2d 848 (1946); Steiglitz v. Migatz, 182 Ind. 549, 105 N.E. 465 (1914); Higinbotham v. Manchester, 113 Conn. 62, 154 A. 242, 79 A.L.R. 85 (1931); 4 PAGE, WILLS (Lifetime ed. 1941).

[13] Chase v. Lockerman, 11 Gill & J. 185 (Md. 1840); Stieff v. Millikin, *supra* n. 10; Tobiason v. Machen, 217 Md. 207, 142 A. 2d 145 (1958); French v. Vradenburg, 105 Va. 16, 52 S.E. 695 (1906); Morris v. Higbie, 53 N.J. Eq. 173, 32 A. 372 (1895); Todd v. McFall, 96 Va. 754, 32 S.E. 472 (1899).

[14] Equitable Trust Co. v. Shaw, 22 Del. Ch. 47, 194 A. 24 (1937); Goodfellow v. Newton, 322 Mass. 405, 69 N.E. 2d 569, 168 A.L.R. 698 (1946).

[15] Howell v. Price, 1 P. Wms. 291 (1715); Newhouse v. Smith, 2 Sm. & G. 344, 65 Eng. Rep. 429 (1854); Chase v. Lockerman, 11 Gill & J. 185 (Md. 1840).

[16] Lange v. Lange, 127 N.J. Eq. 315, 12 A. 2d 840 (1940); Bothamley v. Sherson, L.R. 20 Eq. 304 (1872); Knight v. Davis, 3 My. & K. 358, 40 Eng. Rep. 136 (1833).

[17] Ruston v. Ruston, 2 Dallas 243 (U.S. 1796); Stieff v. Millikin, 162 Md. 245, 159 A. 599 (1932).

[18] Pockley v. Pockley, 2 Vern. 36, 23 Eng. Rep. 290 (1869).

[19] In re Porter, 138 Cal. 618, 72 P. 173 (1903); In re Hodgkin's Estate, 110 Or. 381, 221 P. 169 (1923), reheard on another point 223 P. 738 (1924); Raines v. Shipley, 197 Ga. 448, 29 S.E. 2d 588 (1944); Scott v. Currie, 144 Tex. 1, 187 S.W. 2d 551 (1945). It is noted that specific devises and specific legacies have been abated to exonerate a general legacy to a widow, Addison, Adm'r. v. Addison, 44 Md. 182 (1876).

rule also will not apply against residuary devisees,[20] or specific legatees.[21]

The doctrine of exoneration has generally been justified on two theories. First, that the personal estate has benefited as a result of the incumbrance, and should, therefore, bear the burden of removing it.[22] While valid in some cases, this is hardly applicable to purchase money mortgages, or improvement loans. The second theory is one of construction of the will, working on the premise that the testator by making a specific legacy or devise intended that the property should pass free of all incumbrances, and that such incumbrances, as may exist, were intended to be paid out of the personalty in the estate.[23] Thus, the issue boils down to one of the intent of the testator, and the doctrine is offered as a means of satisfying that intent.

In addition to the above theories courts have cited the common law rule which presumes that the personalty in the testator's estate is the primary source from which his debts are to be paid, rather than the property upon which the incumbrance may constitute a lien. This priority remains the accepted rule in Maryland,[24] as stated in the instant case:

> "It is now well-established law in Maryland that the personal estate of a testator is the natural and primary fund for the payment of debts; and, even when the real estate is expressly charged with their payment, no resort can be made to it, until the personalty is exhausted, unless it has been exonerated by the terms of the will."[25]

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[20] Morris v. Higbie, 53 N.J. Eq. 173, 32 A. 372 (1895); Note, 40 Harv. L. Rev. 630, 632, *op. cit. supra*, n. 5

[21] Ruston v. Ruston, 2 Dallas 243 (U.S. 1796); O'Neal v. Mead, 1 P. Wms. 693, 24 Eng. Rep. 574 (1720). Nonetheless there can be found cases in which a specific or residuary devise has been exonerated at the expense of residuary devisees or specific legatees. See: Towle v. Swasey, 160 Mass. 100 (1870); Morgan v. Walkins, 214 Ala. 671, 108 So. 561 (1926); Lightfoot v. Lightfoot's Ex'r., 27 Ala. 351 (1855). However, in each of these cases the testator designated in his will that, if it should be necessary for the settlement of his debts, certain residuary realty or specific legacies should be abated for that purpose.

[22] Keene v. Munn, 16 N.J. Eq. 398 (1863); Appeal of Beard, 78 Conn. 481, 62 A. 704 (1906); PAGE, *op. cit. supra*, n. 12, 631.

[23] Note, 40 Harv. L. Rev. 630.

[24] Chase v. Lockerman, 11 Gill & J. 185 (Md. 1840); Van Bibber v. Reese, 71 Md. 608, 18 A. 892 (1889); Harris v. Dodge, 72 Md. 186, 191, 19 A. 597 (1890); Tobiason v. Machen, 217 Md. 207, 142 A. 2d 145 (1958); Reno, *The Maryland Order of Abatement of Legacies and Devises*, 17 Md. L. Rev. 285 (1957).

[25] Tobiason v. Machen, *ibid.*, 211.

Most of the courts have treated exoneration as a rule of construction, using the above rule of priority to raise a presumption that the testator intended to have the debt paid by his personal estate unless a contrary intention appears in the will. This has resulted in a multitude of decisions based, in some cases, upon purely arbitrary standards and often conflicting in their application. For example, a general direction to pay debts has been held to indicate an intention to pay a mortgage out of the general estate;[26] however, other cases have held that such a direction does not show an intention to exonerate the realty, or that the words were merely form and do not indicate any specific intention.[27] The Maryland Court in the subject case, placed emphasis upon the fact that the testator incumbered the property subsequent to the execution of his will,[28] but other courts have treated this as irrelevant.[29] A devise "subject to incumbrances" has been exonerated,[30] but a devise *outright* or *absolutely* was held not to show any intention on the part of the testator to exonerate it.[31] This principle of construction has evolved in Maryland more from dicta than decisions. In *Harris v. Dodge*,[32] although the doctrine itself was not applied, the Court said:

> ". . . it is a well established general rule, that where a debtor has a portion of his real estate under mortgage . . . , and he makes his will devising the mortgaged estate, (and there be no intention to the contrary either express or implied), in such case, as between the devisee and the residuary legatee, though not to disappoint either general or specific legatees, the personal assets are the primary fund to be applied for the payment of the mortgage debt, in exoneration of the land."[33]

When applied in cases of intestacy, the use of the doctrine as a rule of construction breaks down completely.

[26] O'Meara v. Shreve, 26 F. 2d 998 (D.C. App. 1928); In re Metcalfe's Estate, 199 Cal. 716, 251 P. 202, 204 (1926) (dictum).

[27] Kella. 's Ex'rs. v. Jacob, 152 Va. 725, 148 S.E. 835 (1929); In re Keil's Estate, ... 'el. ..., 140 A. 2d 139 (1958); PAGE, *op. cit. supra*, n. 12, 306.

[28] Tobiaso. '. Machen, *supra*, n. 24.

[29] In re Kei. . Estate, *supra*, n. 27.

[30] Serle v. St. Eloy, 2 P. Wms. 386, 22 Eng. Rep. 319, 436 (1726), where the testator had charged certain lands with the payment of debts and general legacies. For cases *contra*, see: Jackson v. Bevins, 74 Conn. 96, 49 A. 899 (1901); Guthrie v. Guthrie, 130 Kan. 433, 286 P. 195 (1930).

[31] Creesy v. Willis, 159 Mass. 249, 34 N.E. 265 (1893); In re Reynold's Estate, 94 Vt. 149, 109 A. 60, 63 (1920); PAGE, *op. cit. supra*, n. 12, § 1490.

[32] 72 Md. 186, 19 A. 597 (1890).

[33] *Ibid.*, 191.

Obviously, if the decedent left no will there is nothing to which this *construction* can be applied, unless the court is merely speculating upon testamentary intent from the non-testamentary acts of the decedent during his lifetime. This is not to imply, however, that such intent cannot be construed from partial intestacy.

In *Cunningham v. Cunningham*[34] the Court held that the principle was not applicable where the burdened property passed to a surviving tenant by the entirety and not by devise, and that the personal estate was liable only for proportionate constribution as a co-principal. However, the Court in *Stieff v. Millikin*,[35] cited the *Cunningham* case but, in effect, rejected its decision and held that the property, which passed to a surviving tenant by the entirety, was exonerated from the entire burden of the mortgage. There is a clear distinction between these two cases, since in the *Stieff* case the mortgage was executed to secure a pre-existing debt of the testator, and therefore, it was held to be his personal debt and not that of his wife while in the *Cunningham* case it was a joint debt. Furthermore, in the *Stieff* case the Court found in the testator's will, which was ineffective to pass title to the property in question, that it was his intention that the property should pass to his surviving spouse free of all incumbrances.

In applying the doctrine of exoneration in the instant case, the Court, relying heavily upon the principle that the personalty of the testator is the natural and primary fund for the payment of his debts, rejected the appellee's contention that the use of the words "all my right, title and interest" indicated an intent on the part of the testator for the devisee to take the property *cum onere*.[36] To support its position the Court cited Miller as follows:

> " 'Very clear expressions are required in order to fasten the incumbrance on the property. Thus a devise of land "subject to a mortgage", or any other incumbrance, does not per se exonerate the personal property, for these terms are merely a description of the real property devised * * *' "[37]

On the other hand, a further examination of Miller indicates that this is a "construction which 'it is probable gen-

[34] 158 Md. 372, 148 A. 444 (1930).
[35] 162 Md. 245, 159 A. 599 (1932).
[36] Subject to an incumbrance or charge. BLACK'S LAW DICTIONARY (4th Ed. 1951) 455.
[37] Tobiason v. Machen, 217 Md. 207, 211, 142 A. 2d 145 (1958), citing MILLER, CONSTRUCTION OF WILLS (1927) § 387.

erally *defeats the intention*'."[38] The Court did have some additional authority for finding as it did. In *Equitable Trust Co. v. Shaw*,[39] the Delaware Court found that of necessity the testator by devising "all my interest in real estate whatsoever and wherever situate" intended that the devisee take free from all mortgages on such property. However, the Court might have referred to two contrary cases which dealt with this problem of intent being expressed in the words "right, title and interest". In *Howell v. Ott*,[40] the Mississippi Court said:

> "The testator [sic] having used these words, [all my right, title and interest], it is manifest that she intended the devise . . . to be of such estate as she had in the lands at her death, and it was her intention, we think, that the devisee should take the same cum onere."[41]

The same view was taken by the Court of Appeals of Kentucky in *Taylor's Ex'r. v. Broadway Methodist Church*.[42] By analogy to the construction placed on deeds which convey the grantor's "right, title, and interest" (generally being only a quitclaim deed), the view taken by the Mississippi and Kentucky Courts seems to be the most logical.

In modern times, the influence of the doctrine of exoneration has been waning. It is unpopular among the text writers[43] on the ground that it does not properly execute the true intention of most testators. Furthermore, in some jurisdictions it has been narrowed by statute and judicial decision or abolished altogether.[44] In light of these developments, it might have been preferable for the Court to have restricted the application of the doctrine rather than to have extended it beyond the existing case law in Maryland.

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[38] MILLER, *ibid.*, 1065. Italics added.

[39] 22 Del. Ch. 47, 194 A. 24 (1937).

[40] 182 Miss. 252, 180 So. 52 (1938), suggestion of error overruled, 181 So. 740 (1938).

[41] *Ibid.*, 63.

[42] 269 Ky. 108, 106 S.W. 2d 69 (1937). It should be noted, however, that neither this nor the Howell case, *supra*, n. 40, was conclusive upon the question of "right, title, and interest". The Howell decision was also based upon a failure to probate the debt strictly in accordance with the terms of the will, and the Taylor case held that the testatrix was only secondarily liable and therefore, the debt was not her personal obligation during her lifetime.

[43] PAGE, *op. cit. supra*, n. 12, § 1490; ATKINSON, WILLS (2nd ed. 1953) 766; 3 AMERICAN LAW OF PROPERTY (1952), § 14.25.

[44] Statutes such as those of Massachusetts and New York abolish the doctrine as a rule of construction without eliminating the possibility of exoneration. The effect is a reversal of the common law rule, *e.g.*, the devisee takes the property *cum onere* unless a contrary intent appears in the will.

This could have been done by refusing exoneration on the grounds that the testator by devising "all [his] right, title, and interest" in the property did not intend that it was to pass free of incumbrances, and by distinguishing *Stieff v. Millikin*[45] altogether or overruling it on this point. As a result of this decision, however, curtailment or abolition of this archaic and often inequitable doctrine rests squarely with the Maryland Legislature.

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[45] 162 Md. 245, 159 A. 599 (1932).