

PERKINS & WIFE APPELLANTS *v.* JOHN H. GEORGE EX'R. APPELLEE.

Where the wife of a judge of probate of the county where a testator had his domicile, is interested in the estate both as heir and legatee, the testator having died since the act of July 4, 1860, it was *held* that the judge was not interested as heir or legatee, within the provisions of the Revised Statutes, ch. 152, secs. 10 and 11, and that consequently the judge of probate of an adjoining county had no jurisdiction of the probate of such will.

It was also *held* that the interest of such judge disqualified him to sit in the probate of that will; but that, upon appeal from his decree declining to act, the whole case would be brought within the jurisdiction of the Supreme Court of Probate.

It was further *held* that the construction and effect of the will, in respect to the husband's interest in a legacy to his wife, or in her distributive share, must be determined by the laws in force at the testator's death, when the will took effect, and not when the will was made.

THIS is an appeal from the decree of the Judge of Probate of Hillsborough county, approving the will of Paul R. George, late of Hopkinton, in the county of Merrimack, deceased, and whose domicile was there at the time of his death. The will had been duly presented for probate to the Judge of Probate of Merrimack county, who declined to take jurisdiction, upon the ground that his wife was interested in the estate of the deceased, both as heir and legatee, and thereupon the will was presented to the Judge of Hillsborough county, to be approved and lowed.

The other material facts sufficiently appear in the opinion of the Court.

*Foster*, for appellants.

*Caleb Cushing* and *Tappan*, for appellee.

BELLOWS, J. The first question in this case is, whether the judge of probate for the county of Merrimack was interested as *heir* or *legatee* within the meaning of the Rev. St. ch. 152, secs. 10 and 11, so as to give jurisdiction to a judge of an adjoining county. If not, then the decree of Judge Cross has no validity, and this appeal must be dismissed; and in that case the whole matter is properly before this court in the appeal of John H. George from the decree of Judge Perkins, declining to entertain jurisdiction of the probate of the will in question.

Section 10 of the law referred to provides that "no judge of probate shall act as such in the settlement of any estate wherein he is interested as heir or legatee, executor or administrator, or as guardian or trustee of any person." And section 11 gives to the judge of probate of an adjoining county jurisdiction in every such case.

It is clear that Judge Perkins himself was, strictly speaking, neither heir nor legatee, and the question is, whether the fact that he was the husband of one who was both heir and legatee would make him so interested within the meaning of that provision. At common law he would undoubtedly be disqualified by this connection; but it is only when he is interested in one of the modes pointed out, that a judge of an adjoining

county has jurisdiction. In all other cases of disqualification by reason of relationship, having acted as counsel, and the like, the judge should decline to sit, and upon appeal the whole case would be brought within the jurisdiction of the Supreme Court of Probate. This was held in *Moses & al. Ex'rs. v. Julian & ux. Appts.*, Rockingham County, December Term 1863, where the judge of probate was held to be disqualified by reason of having written the will.

In this way jurisdiction is obtained by the Supreme Court, and, therefore, as there can be no failure of justice, there is no ground for saying, that, by implication, the judge of probate is empowered to sit, notwithstanding at common law he would be disqualified, though not interested in the manner pointed out in the statute.

Upon the point of interest it will be perceived, that, by the law of July 4, 1860, it is provided that every married woman shall hold to her own use, free from the interference or control of her husband, all property inherited by, bequeathed, given or conveyed to her; and, by section third of that act, she may by will devise any real estate so held by her, and even to her husband, in the same manner as if she were sole and unmarried, and may sue or be sued in her own name, as though sole, in all matters pertaining to said property, and upon all debts contracted by her before marriage. Similar provisions were made by the law of 1846 Comp. St. ch. 158, sec. 15; and under that it has been decided that the wife had full power over property thus held by her, to sue, lease and otherwise dispose of it to whomsoever she chooses, as if she had never been married; and that, so far as such property is concerned, she is to be treated and regarded to all intents and purposes as a *feme sole*; and upon these principles it would seem that she might lease it to her husband. *Albin v. Lord*, 39 N. H. 203. The same principles must apply equally to property held by the wife under the law of July 4th, 1860.

In fact, these provisions were borrowed from the well established principles of courts of equity, where it has long been held, in respect to antenuptial agreements for securing to the wife her separate property, that she has the full power of disposing of it, whether real or personal, by any suitable act or instrument in her lifetime, or by her last will, in the same manner, and to the same extent, as if she were a *feme sole*. 2 Story Eq. Jur. sec. 1390, and cases cited; Chancey on Husband and Wife, 358, 365.

Under our laws, then, the husband cannot be regarded as having any interest in the property held by the wife to her sole and separate use; but, in respect to that, her rights, remedies and responsibilities are substantially the same as if she were sole and unmarried. It is true, that, although he has no marital rights over the property, yet, as he is bound to maintain his wife, he is indirectly interested in her acquiring property by inheritance, devise, or otherwise; but this, we think, is not the interest contemplated by the statute under consideration. The same may be said in respect to his children, and even to his parents for whose support he is sometimes bound, and therefore he would be indirectly interested in their acquiring the means of their own support.

It will be perceived that in this case the will was made before the act of July 4, 1860, but it did not take effect until after, and therefore the construction of it, according to the adjudged cases in this State, is to be governed by the law in force at the death of the testator. *Loveren v. Lamprey*, 22 N. H. 434, and cases cited. There it was held that after-acquired real estate would pass by a will made before the passage of the Revised Statutes,—the death of the testator being since,—although, by the law in force when the will was made, such estate would not pass. The same doctrine is recognized in *Pierce v. Richardson*, 37 N. H. 306, where it was held that the capacity of the wife to make a will must depend on the law in force at her death, and not at the making of the will; and the devise to her husband was held invalid, she having died after the law of 1854, although the will was made in 1850, when such a devise might have been valid. A similar doctrine is held in New York and Massachusetts. *De Peyster v. Clendenning*, 8 Paige Rep. 295; *Bishop & al. v. Bishop*, 4 Hill, 138, where it was held that an estate devised to the son who died before the testator, vested in the son's children by virtue of a law passed after the making of the will and before the testator's death, although by the law in force when the will was made the devise would have lapsed on the death of the son. The same general doctrine is recognized in *Cushing & al. v. Aylwin*, 12 Met. 169, and *Pray & al. v. Waterston & al.* 12 Met. 262.

In some States a different rule prevails, as in Connecticut and Pennsylvania, upon ground that it would be giving the statutes a retrospective effect; but if the will is regarded as taking effect not until the death of the testator, as is held in New Hampshire, this objection would not apply.

A question of a like character arises where a man, having made a will of personal property, changes his domicil to a place where by the local law the will would be invalid, and dies there. In such cases it is held that the law of his domicil at the time of his death, and not at the time of the making of his will, must govern. 1 Jar. on Wills, 4, note 1; *Hyman v. Gaskins*, 5 Iredell, 267; 2 Greenl. Ev. sec. 668; Story on Conflict of Laws, 473, and cases cited; and *Ibid.* sec. 468, citing *Desesbats v. Berquiers*, 1 Binney's Rep. 306, where it was decided that a will of goods must be valid by the law of the testator's domicil at the time of his death, and this is said by Story to be the law of the American courts.

In regard to the *interpretation* of wills in the case of such change of domicil, it has been said that the law is not fully settled. 6 Greenl. Cruise Dig. 167, note and cases; 2 Greenl. Ev. sec. 671. Upon this point there might be cases where the construction to be given to terms used in a will would follow the meaning of such terms in the place of the testator's domicil when the will was made; but we think the principle of the New Hampshire cases before cited, is decisive that the law in force at the death of the testator in the case before us must determine the interest acquired by the wife of Judge Perkins by the bequest to her.

We are therefore of the opinion that the judge of probate of the coun-

ty of Merrimack had no interest in this estate within the meaning of the statute before cited, and consequently that a judge of an adjoining county had no jurisdiction, and *the appeal, therefore, must be dismissed.*

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H. S. GEORGE, ADMR. OF ESTATE OF LEWIS F. EATON v. ELIJAH JOHNSON, IN EQUITY.

Where all the heirs beneficially interested in the estate of a deceased person, being of age and otherwise capable, agree upon a board of arbitrators to adjust for themselves the affairs of the estate, and the arbitrators hear the parties in relation to all matters in dispute, and make their award in the premises, and the parties proceed to settle among themselves according to the terms of said award, a court of equity will not go behind the award or open the accounts examined by the arbitrators, unless in cases of manifest mistake, fraud or misconduct of the arbitrators, or some party to the settlement.

Generally, a court of equity will not open an account by their decree, after six years of delay unaccounted for.

THE alleged object of this bill in equity was to effect a settlement of the company affairs of the late firm of Johnson & Eaton. From the bill, answer and evidence filed in the case, we derive the following leading facts: That, as early as A. D. 1834, the defendant Johnson and John Q. Eaton and Lewis F. Eaton formed a copartnership for the purpose of carrying on the business of carriage-making in the town of Weare in this State; the said Johnson to derive one-half of the profits of the firm, and the two Eatons, the other half. In this way the business of the firm was conducted until it was dissolved by the death of John Q. Eaton, which occurred on the 4th day of July, A. D. 1845. The interest of said John was afterwards sold by his legal representatives to his surviving brother, Lewis F. Eaton. The partnership then continued in the name of Johnson & Eaton, to December, A. D. 1846, when it was dissolved, and the defendant Johnson removed to Manchester. On the 28th day of January, A. D. 1848, the said Lewis F. Eaton died without children, and intestate, leaving, as representatives, his widow Cassan D. Eaton, his mother Jane Eaton, his brother Jeremiah S., and three sisters, viz: Mrs. Elvira J. Dow, Mrs. Lavina A. Johnson wife of defendant, and Mrs. Helen M. Preble wife of Thomas M. Preble.

The defendant alleges in his answer, that, after the decease of said Lewis, the heirs met, and agreed that the defendant and said Thomas M. Preble should go on and finish up the work, and settle up the share of said Lewis. The parties met for this purpose, but could not agree upon the terms; but it was finally agreed to refer all matters in controversy between the estate of said Lewis and the defendant, to three arbitrators. Accordingly, on the 30th day of March, A. D. 1848, an arbitration bond was signed and executed by said Johnson, Cassan D.