

as is shown to have been attempted. The defendants should account to the plaintiffs for a proportionate amount of the sum realized from the goods so transferred. Decree accordingly.

CHICAGO, B. & Q. R. Co. v. WASSERMAN and others. (Original Bill.)¹

WASSERMAN v. CHICAGO, B. & Q. R. Co. (Cross-Bill.)

(Circuit Court, D. Nebraska. January 12, 1885.)

1. WILL—REVOCATION BY BIRTH OF CHILD—COMP. ST. NEB. P. 229, § 143.

Where a testator devises all of his property to his wife, who is *enccente*, and makes no mention in his will of his unborn child, on its face the will manifests no intention that such child shall not be provided for, and under the Nebraska statute such child will be entitled to the same share in the estate which he would have inherited if the father had died intestate.

2. SAME—EFFECT OF PROBATE—COMP. ST. NEB. CH. 23, § 143.

In Nebraska the probate of a will is conclusive only as to its due execution, and does not determine the title of property claimed under it.

3. SAME—CONDEMNATION OF LAND BY RAILROAD—REMEDY OF CHILD.

Where land in Nebraska has been condemned for right of way by a railroad company, and the award of damages paid to the widow and sole devisee of the deceased owner, whose will is revoked *pro tanto* by the subsequent birth of a child, and the estate has been settled, the rights of such child may be adjudicated in an action to quiet title instituted by the company, in which such child files a cross-bill praying that she be adjudged to be the tenant in common with the company, and a partition and accounting between them be decreed.

The original bill seeks to quiet the title of the railway company, complainant, to a portion of lots 5 and 6, in block 219, in the city of Omaha, Douglas county, in the state of Nebraska, now occupied and used by the railway company for a passenger station. The cross-bill of Anna Wasserman, an infant of the age of about 13 years, who appears by her guardian *ad litem*, prays that it be decreed that she is the owner in fee of an undivided half-interest in said real estate, and that partition thereof may be made between her and the railway company; and that an account, as between tenants in common, may be stated between the parties to the cross-bill.

The following are the agreed facts:

Andrew Wasserman died on the twenty-eighth day of June, 1870, seized of the premises in controversy, and left surviving him, his widow, Maria C., a son, Frank W. X., then five years old, and a daughter, Anna, the complainant in the cross-bill, who was born on July 7, 1870, nine days after her father's death; and these two children are the sole heirs at law of the deceased. Andrew Wasserman, the deceased, 10 days before his death, made his last will, which, after his death, was duly admitted to probate by the county court for said Douglas county, and letters testamentary issued to his widow, the executrix; and omitting the attestation, which is in legal form, the following is a copy of the will:

"I, Andrew Wasserman, of Omaha, Douglas county, Nebraska, considering the uncertainty of this mortal life, and being of sound mind and memory, do

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

make and publish this, my last will and testament, in manner and form following: I give and bequeath unto my beloved wife, Maria Crescentia Wasserman, all the property I possess, real estate, personal property, and moneys, goods, chattels, and property of what kind and nature it may be, and appoint my wife hereby sole executrix of this, my last will and testament; hereby revoking all former wills by me made.

"In evidence whereof, I have hereunto set my hand and seal this eighteenth day of June, one thousand eight hundred and seventy.

[L. S.]

"A. WASSERMAN."

Some three years after the death of Andrew Wasserman, there was instituted in the name of the Omaha & Southwestern Railroad Company, to whose rights in the premises said Chicago, Burlington & Quincy Railway Company have succeeded, certain proceedings before the probate judge of said county, to assess the damages accruing to Maria C. Wasserman by reason of the appropriation of the premises in question for railroad purposes. The following is the record of such proceedings:

"*Maria Crescentia Wasserman v. Omaha & Southwestern R. R. Co.*

"*To Maria Crescentia Wasserman.* You are hereby notified that on the thirtieth day of April, 1873, at 10 o'clock A. M., on the premises herein described, commissioners will proceed to assess the damages accruing to you by reason of the appropriation for depot grounds, side tracks, and railroad purposes, by the Omaha & Southwestern R. R. Co., all that portion of lots five (5) and six, (6,) in block two hundred and nineteen, (219,) in the city of Omaha, county of Douglas, and state of Nebraska, lying south of the Union Pacific Railroad depot grounds in the said city, situate in the city of Omaha, in Douglas county, in the state of Nebraska.

"OMAHA & SOUTHWESTERN R. R. Co.,

"By CLINTON BRIGGS, its Attorney."

"Received April 18, 1873; and the next day I delivered a true copy of this notice to Maria C. Wasserman in person, in the city of Omaha, Douglas county, Nebraska.

HENRY GREBE, Sheriff,

"By C. H. RYME, Deputy."

"We, the undersigned, disinterested freeholders and commissioners, residents of Douglas county, Nebraska, appointed by the probate judge of said county to appraise the damages accruing to Maria Crescentia Wasserman by reason of the appropriation of all that part of lots five (5) and six, (6,) in block two hundred and nineteen, (219,) lying south of the Union Pacific Railroad depot grounds, in the city of Omaha, in Douglas county, in the state of Nebraska by the Omaha & Southwestern Railroad Company, for depot grounds, side tracks, and railroad purposes, having been duly qualified, and having each personally examined said premises on the day and at the time mentioned in the notice hereto attached, do, at the office of said probate judge in said county, assess such damages at the sum of four thousand and five hundred dollars, (\$4,500.)

"In testimony whereof, we have hereunto set our hands this fourteenth day of May, A. D. 1873, at said office in Omaha.

"E. L. EMERY,

"HENRY DURNALL,

"MILTON RODGERS,

"WILLIAM STEPHENS, JR.,

"R. A. BROWN,

"J. R. HYDE,

"Commissioners."

"*State of Nebraska, County of Douglas—ss.*: I, Robert Townsend, probate judge in and for said county, do hereby certify that the above is the original report of the commissioners appointed to assess the damages sustained by the owner of the real estate in said report described, as therein specified; and I do further certify that said Omaha & Southwestern Railroad Company has deposited with me for said owner the sum of forty-five hundred dollars, the total amount of the said appraisalment.

"Witness my hand and official seal this seventeenth day of May, 1873.

[Seal.]

"ROBERT TOWNSEND, Probate Judge."

"Filed May 15, 1873.

"ROBERT TOWNSEND, Probate Judge.

"Recorded May 17, 1873, at 2:30 o'clock P. M.

"WM. H. IJANS, County Clerk."

The use of said real estate for railroad purposes was convenient and necessary for the company. The \$4,500 was deposited as required by law. From said assessment of damages said Maria C. Wasserman appealed to the district court for said county, and, pending said appeal, on October 1, 1873, made a settlement with the railway company and gave the following receipt:

"*Omaha and Southwestern Railroad Company in Nebraska to Maria C. Wasserman*: For \$1,525, fifteen hundred and twenty-five dollars, as money due on settlement over and above the amount allowed the said Wasserman by commissioners for the appropriation of the use of said railroad company for the following real estate, to-wit: That part of lots five and six, in block two hundred and nineteen, in the city of Omaha, and state of Nebraska, lying south of the U. P. depot grounds, for the Omaha & Southwestern Railroad Company in Omaha, adjoining the U. P. depot.

"Received fifteen hundred and twenty-five dollars, in full of the above account.
MARIA C. WASSERMAN."

Thereupon the said appeal was dismissed. The said railroad company never received any deed of conveyance for the property so appropriated. The plaintiff, in the original bill, claims right through the foregoing proceedings. As shown by the inventory and appraisalment of his estate, Andrew Wasserman left at his death personal property worth about \$250, the premises in controversy, and also the east half of lot 1, in block 135, in Omaha; which last parcel his widow has since sold as her own, and conveyed to one Barker, and has received the purchase money.

The Statutes of Nebraska (see Comp. St. 229) provide as follows: "Sec. 143. When any child shall be born after the making of his parent's will and no provisions shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be assigned to him as provided by law in cases of intestate estate unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child."

T. M. Marquette, for the railroad company.

Albert Swartzlander, for Anna Wasserman.

BREWER, J. In this case, the primary question I am reluctantly compelled to decide in favor of the complainant Wasserman. I say reluctantly; for when a man, on the eve of death, having a child five years of age, and living with a wife to be delivered of a second child within 20 days, makes a will giving all his property to his wife, I think the common voice will say that he intended no wrong to either