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IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE	)	
OF	)	Filed December 28, 1977
ELMER A. HERRING, DECEASED.	)	$\frac{342}{2-58881}$

Appeal from Johnson District Court - Ansel J. Chapman, Judge.

Residuary legatee appeals decision that testator's share of crop as landlord becomes property of tenant, to whom he devised the farm by application of the doctrine of merger, instead of becoming assets of estate and part of residue. -
Reversed.

Robert W. Jansen, of Trott & Jansen, Iowa City, for Appellant.

Daniel W. Boyle, of Shulman, Phelan, Tucker, Boyle & Mullen, Iowa City,
for Appellee.

T. E. Lyon, of Honohan, Epley & Lyon, Iowa City, for Estate of Elmer A.
Herring Estate, Deceased.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

SNELL, J.

Elmer A. Herring died unmarried, without issue, and testate on September 16, 1974. His will devised a 352 acre farm to his tenant, Fred Swanson. The residue of his estate was left in trust, the sole beneficiary being the John L. Munn American Legion Post of Lonetree, Iowa. Fred Swanson died September 3, 1975.

Swanson had farmed the land since 1952 on an oral lease under which Swanson and Herring each received one half the crop and paid one half the expense. The 1974 crop of corn and beans was not harvested when Herring died on September 16, 1974. A killing frost occurred on September 22, 1974, and ended the growing process. The crop was harvested from October through December 1974, and sold. The one-half share of Herring, as landlord, amounted to \$26,217.79.

The question raised here is who gets Herring's share--the executor of his estate or the executor of the estate of Swanson, his tenant. The trial court determined Swanson's executor was entitled to the share because by the doctrine of merger Swanson's interest as tenant and his interest as devisee under Herring's will became one on Herring's death. The court found there was no evidence of express intent of the testator regarding the crop and it was reasonable that he would have desired his tenant to receive it. Moreover, since the crop was unmaturing on the date of Herring's death it passed as real estate to Swanson. The rent was not owed then because the one-half share of the crop was payable at maturity.

This appeal was taken by the residuary legatee, the John L. Munn American Legion Post of Lonetree, Iowa. Appellee is Elsie Swanson, executor of the estate of Fred Swanson. The executor of the Elmer A. Herring estate is Farmers and Merchants Savings Bank of Lonetree, Iowa. Our review in this equity case is de novo. Rule 4, Rules of Appellate Procedure.

Section 633.351 provides:

If there is no distributee of the real estate present and competent to take possession, or if there is a lease of such real estate outstanding, or if the distributees present and competent consent thereto, the personal representative shall take possession of such real estate, except the homestead and other property exempt to the surviving spouse.

Section 633.352 provides:

Unless otherwise provided by the will, the personal representative shall collect the income from the property of which he has possession, pay the taxes and fixed charges thereon and apply the balance of such income to general estate obligations. Unless otherwise provided by will, any unexpended portion of such income shall become a part of the general assets of such estate.

The language of § 633.351 requires the personal representative to take possession if there is a lease outstanding. See Webster, Decedents' Estates: Succession and Administration, 49 Iowa L. Rev. 638, 658-9 (1964), for a general discussion of the Probate Code provisions. Possession does not depend upon whether rent is owed at the date of testator's death. When possession by the executor occurs he is then charged with the responsibility under § 633.352 to collect the income from the property. We find that on September 16, 1974, when Herring died, a crop share lease was outstanding which entitled Herring's executor to possession under the statutory wording unless that result is altered by other rules discussed infra. Collection of the rent thereafter by the executor would be authorized whenever it became due.

Herring's executor contends the doctrine of merger should not alter this result because the doctrine is not favored in equity and should not occur when it would prejudice one who is not a party to the transaction. In *Sherlock v. Thompson*, 167 Iowa 1, 13, 148 N.W. 1035 (1914), the court refused to permit a merger of legal and equitable estates stating:

The union of two estates in one person does not necessarily result in a merger. The merging of two estates by their union in a single individual is purely a matter of theory. The two estates are conceived as remaining separate wherever that view is to the advantage of their holder. There is more reason that they should be kept apart when their merger would operate to the prejudice of one who is not a party to the transaction.

The one who is not a party to the transaction in this case is Herring's executor. If merger occurs, the executor's right of possession never exists because the fee devolves instantly on testator's death to Swanson and is merged into Swanson's leasehold as tenant. *DeLong v. Scott*, 217 N.W.2d 635 (Iowa 1974). Thus the one-half share of the crop would not be available to Herring's executor. This result obviously is prejudicial to Herring's executor and those beneficiaries who,

under the statutory scheme, are entitled to the residue. This alone is sufficient reason not to apply the merger doctrine. We also note, however, the merger doctrine would create a distinction between a devisee of a farm who was tenant and one who was not, a result without support from statutory language or logic. We hold the doctrine of merger should not have been applied by the trial court in this case as it results in a distribution of property contrary to the statutory scheme established by §§633.350 through 633.352.

Swanson's executor asserts, in any event, the crop proceeds should be distributed to her since the money was not needed for payment of estate debts. She quotes § 633.352: "Unless otherwise provided by will, any unexpended portion of such income shall become a part of the general assets of such estate." She claims the will "otherwise provided" by devising the fee to Swanson.

Without undertaking to determine the range of meanings provided by that phrase, we are satisfied it does not stretch that far.

Reversed.