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Wills--Void Residuary--Intestacy--Right of Nonrenouncing Spouse to Share

B. A. G.

West Virginia University College of Law

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and less the fair rental value of the land. The latter case stated that the vendor may not retain any part of the purchase money greater than the difference between the contract price and the actual value, as he may not profit by the purchaser's misfortune in being unable to complete the agreement.

Illustrating the law's opposition to forfeiture and penalties is the case of *Freedman v. St. Mathias Parish*, 37 Cal.2d 16, 230 P.2d 629 (1951). There it was held that if the denial of part restitution of the down payment would result in the imposition of punitive damages even a defaulting purchaser is entitled to relief.

Cases denying restitution can be justified on one or more of the following grounds: (1) defendant has not rescinded and is ready willing and able to perform; (2) plaintiff has not shown that the injury caused by his breach is less than the installments paid; or (3) there is a genuine and valid liquidated damages provision in the contract stating that defendant may retain money so paid in part performance. If none of these justifications exists--restitution should be allowed. See Corbin, *Right of Defaulting Vendee to the Restitution of Instalments Paid*, 40 YALE L.J. 1013 (1931).

In permitting restitution to a defaulting vendee the courts, of course, should not be unmindful of the rights of the vendor arising out of the contract. On the contrary "every contractual right of the vendor should be scrupulously preserved, but in cutting the pound of flesh no blood must be shed." *Melberg v. Bough*, 62 Utah 331, 218 Pac. 975 (1923).

C. F. S., Jr.

WILLS--VOID RESIDUARY--INTESTACY--RIGHT OF NONRENOUNCING SPOUSE TO SHARE.—Testatrix died leaving a will which devised a life estate in designated realty to her surviving husband, with a remainder over. The husband died without having renounced the will. The administrator of the testatrix sued for a construction of the will. Upon petition, nearest blood relatives of the testatrix were granted leave to intervene and file an answer and cross bill. The trial court, after holding the remainder void, declared that the husband being the paramount heir at law, took the remainder which passed by intestacy. Interveners appealed. *Held*, that a spouse who is a paramount heir under the descent and distribution statutes does not waive his right to intestate property, resulting from failure of the residuary clause, by failing to renounce the will. *Harmer v. Boggess*, 73 S.E.2d 264 (W. Va. 1952).

The case is one of first impression in West Virginia. Therefore, comment will be confined primarily to the purposes of our descent and distribution and renunciatory statutes, the effect of these statutes as interpreted in the light of the present holding, and finally the position which our court has taken in relation to that taken in other jurisdictions.

At first blush there appears to be a repugnancy between and among our statutes of descent and distribution, the statute of renunciation, and provision in lieu of dower. W. VA. CODE c. 42, art. 1, § 1 (Michie, 1949) provides: "When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred, male and female, in the following course: . . . If there be no child, nor descendant of any child, nor father, nor mother, the *whole shall* go to the wife or husband of the intestate. . ." [Italics supplied].

Article 2, section 1 of the same chapter provides: "When any person shall die intestate as to his personal estate or any part thereof, the surplus . . . *shall* pass and be distributed to and among the same persons, and in the same proportions, that real estate is directed to descend, except as follows: (a) If the intestate was a married woman, . . . and if she leaves no issue, . . . her husband shall be entitled to the whole thereof . . ." [Italics supplied].

W. VA. CODE c. 42, art. 3, § 1 (Michie, 1949) provides for renunciation of a will by a wife or husband; and, ". . . if such renunciation be made, or if no provision be made, . . . such surviving wife or husband shall have such share in the real and personal estate of the decedent as such surviving wife or husband would have taken if the decedent had died intestate leaving children: otherwise the surviving *wife or husband shall have no more of the decedent's estate than is given by the will.*" Article 3, section 2 of the same chapter provides, "If a person make provision by will for his or her surviving wife or husband, such provision shall be construed to be in lieu and bar of dower and distributive share . . . and such provision, unless the same be renounced . . . shall be all that such surviving wife or husband shall take of the estate, . . . unless it clearly appears . . . that the testator intended . . ." otherwise. [Italics supplied].

It would appear that the primary purpose of the statute on renunciation is to guarantee a spouse a minimum share of the property, which share cannot be defeated by the will of the other spouse. By its very context it presupposes the existence of a will. *Freeman v. Freeman*, 61 W. Va. 683, 57 S.E. 292 (1907).

The doctrine of election is the medium through which a renunciation is effected, and is predicated on the assumption that a widow or widower who by asserting a right to take under the will confirms the will and should not be permitted to claim a right inconsistent with its provisions which would operate to disaffirm and defeat it. *Shuman v. Shuman*, 9 W. Va. 595 (1876); *Jacob v. Jacob*, 100 W. Va. 595, 131 S.E. 449 (1926).

It would seem, therefore, that the basic purpose of guaranteeing a minimum share of the property would not prevent a surviving spouse from succeeding to intestate property. Nor would the doctrine of election operate to defeat the will, in that it has reference only to property covered by the will, since by claiming property not covered by the will the spouse does not in any way disaffirm or defeat the will; since under the election statute the surviving spouse either takes under the will or if he elects to renounce, takes that which is bestowed by virtue of the marital rights. In contrast there is no election as to property passing under the statutes of inheritance. As expressed in *Rau v. Krepps*, 101 W. Va. 344, 133 S.E. 508 (1926), "One entitled to any benefit under a will or other instrument, must if he claims that benefit, abandon every right and interest the assertion of which would defeat even partially any provision of that instrument." This language is indicative of an alternative right to property disposed of by a will, and not otherwise. It is submitted that the design of these sections is confined in function and application to a will.

American statutes of inheritance have as their purpose the equitable transmission of title to property among the heirs upon the death of the owner intestate, or partially intestate. *Daniel v. Whartenby*, 17 Wall. 639 (U.S. 1873). This is considered to be as much as the intestate would have given had he contemplated the disposition. *Garwols v. Bankers' Trust*, 251 Mich. 420, 232 N.W. 239 (1930).

Our court cited *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075 (1891), as purporting to state the minority view. The court there held that the surviving spouse had no interest in intestate property, reasoning that, "It was plainly not the intention of the testator that . . . [his widow] should have any other share in his estate, for he evidently did not contemplate that any part of it would become intestate estate." The Connecticut court has since said that when the will is equally susceptible of two constructions, one in favor of the heir and the other in favor of some more distant relative, the one in favor of the heir will be preferred. *Pendleton v. Lar-*

rabee, 62 Conn. 393, 26 Atl. 482 (1892). As was said in *Walker v. Parker*, 13 Pet. 166 (U.S. 1839), every reasonable construction in the will must be made in favor of the heir at law; an heir can only be disinherited by clear and express terms.

In *Jackson's Appeal*, 126 Pa. 105, 17 Atl. 535 (1899), where the wife died without electing to take under the will, the court denied her the right to the intestate property, reasoning that since she did not elect she must be presumed to have taken under the will, and as to her there was no intestacy of any portion. Although this case was not cited, our court intimates by its opinion that a similar argument was proposed, which in effect would leave the surviving husband without any right as to intestate property. In *Gain v. Barnell*, 124 Miss. 860, 87 So. 484 (1921) where the survivor did renounce, the court held such a renunciation statute applies only to property devised and bequeathed under the will, and does not limit the survivor's right to inherit property not disposed of by the will. It is submitted that any other result would be punitive and unjustified.

If there is a conflict in the statutes, there is nothing in the statutes themselves which would indicate that one should prevail over the other in such event, nor any provision that if the spouse take under the will, he will be barred from sharing in intestate property. When the statutes are doubtful, they ought to be interpreted to reach a result most consonant to equity. In the light thereof, the legislature, it seems, would not capriciously nullify such a basic right of inheritance without distinct specification of their intent to do so.

It would seem that our court was correct in its holding that a surviving spouse who is paramount heir takes the intestate property under the statutes of inheritance; and, that this basic and fundamental right is not to be defeated by other statutes dealing with renunciation and intention of the testator, unless such statutes clearly state otherwise.

B. A. G.

WRONGFUL DEATH—LIABILITY OF HUSBAND IF WIFE SOLE BENEFICIARY.—Action by *P* as administrator of deceased for wrongful death caused by *D*'s negligence. *D*, the son-in-law of deceased, claims that any recovery would go to his wife, as sole beneficiary of the deceased's estate, and that the action is in reality one by a