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Wrongful Death--Liability of Husband if Wife Sole Beneficiary

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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 *Cain 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

wife against her husband which is contrary to the public policy of West Virginia. *Held,* that a cause of action for wrongful death, being created by statute and given only to the personal representative of the deceased, does not accrue to the beneficiary of the estate, and therefore, the action is not one brought by a wife against her husband. *Morgan v. Lueck,* 72 S.E.2d 825 (W. Va. 1952).

The dissenting judge stated that the action was really one by a wife against her husband, as the administrator was merely a formal party suing on behalf of the wife.

At common law, no right of action existed for damages for death by wrongful act. The right was first created by an English statute known as Lord Campbell's Act in 1846. West Virginia's first wrongful death statute had the same purpose and effect as the English statute, providing for the amount recovered to be for the exclusive benefit of the widow and next of kin. The express purpose was to compensate such persons as were pecuniarily injured by the death caused by the wrongful act. In 1882, the statute was amended to give any recovery to the next of kin by omitting the word "widow", distribution to be made according to the statute of distribution. The pertinent portion of the act as it appears today, W. VA. CODE c. 55, art. 7, § 5 (Michie, 1949) reads as follows: "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every case, the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, . . . "

In the present case, the deceased, had he survived his injury, would have been entitled to manitain an action against his son-in-law; so it would seem that the administrator should be able to sue. The court said that not to permit him to do so would in effect "disregard the plain terms of Code, 55-7-5, as amended." However, in *Swope v. Keystone Coal & Coke Co.,* 78 W. Va. 517, 89 S.E. 284 (1916), the negligence of the sole beneficiary in permitting his eleven-year old son to work in a coal mine barred recovery by the administrator under the death statute, even though, had the son survived, he could have recovered for the injury. The court there recognized that such an interpretation was a departure from the letter of the statute, but it justified its departure by adhering to the spirit and intent of the statute and interpolating an exception by implication. See *Dickinson v. Colliery Co.,* 71 W. Va. 325, 76

S.E. 654 (1912). The court in the *Swope* case seems to have applied the venerable maxim, *cessante ratione legis cessat ipsa lex* (with the reason of law ceasing, the law itself ceases). Did the reason for the law cease in the principal case?

Here, any recovery by the administrator would go to the defendant's wife. It has been long the policy of this state and of the common law to prohibit tort actions between spouses. To allow such actions for personal injuries would, it is claimed, impair and disturb the tranquility of marital felicity. *Poling v. Poling,* 116 W. Va. 187, 179 S.E. 604 (1935). The same rule was the basis for preventing an unemancipated child from suing his parent for injury caused by the parent's negligence. *Securo v. Securo,* 101 W. Va. 1, 156 S.E. 750 (1931).

In *Fetty v. Carroll,* 118 W. Va. 401, 190 S.E. 683 (1937), the court held that the death act is for the exclusive benefit of the decedent's next of kin, and while the decedent's administrator alone may sue, his relation to any recovery is not that of decedent's representative, but that of trustee for the next of kin. "The action is founded on mere justice and conscience, is in the nature of a bill in equity, and consequently, is subject to any defense which in equity and good conscience would preclude a recovery." As was explained in that case, the administrator has the right of action only for the benefit of the distributees and any defense good against them should be good against him. It is left to the reader to determine whether the fact that the sole beneficiary was the wife of defendant would be a defense in equity and good conscience.

The existence of beneficiaries is a requisite to the right to sue under the death statute, and any release or compromise by the beneficiaries, prior to the action, bars any recovery by the administrator. In view of this and the holding in *B. & O.R.R. Co. v. Evans,* 188 Fed. 6 (3d Cir. 1911), where the court, in interpreting the West Virginia statute, said the administrator was a mere formal party suing on behalf of the real parties in interest, the court in the instant case appears to be permitting the wife to do indirectly that which she is precluded by public policy from doing directly; this being in essence an action by the wife against her husband.

J. L. A.

WRONGFUL DEATH—LIABILITY OF PERSONAL REPRESENTATIVE FOR COSTS.—*D,* administrator, brought separate actions for the wrongful death of his two decedents, under W. VA. CODE c. 55, art. 7, §§ 5, 6