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Wills -- Dissent Statute -- Constitutionality of Husband's Right to Dissent From Wife's Will

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difficulties of an advanced society. As our community continues to develop, the individuals of which it is composed become more interdependant. This creates the necessity for liberality in the field of law concerning liability for injuries caused by harmful instrumentalities. Early in the twentieth century the law of implied warranties was forced to yield to the realities of modern life.[54] The time may now be ripe for a similar advance in the doctrines of implied negligence. Where circumstantial evidence appears in such an abundance as to show probable negligence of a defendant, it would seem improper to remove a plaintiff from court solely on the ground that he alone was in control of a harmful device. Although plaintiff was in physical possession and perhaps had ownership, he may not have had such control as would alter a hidden defect caused by the defendant's negligence.

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Wills—Dissent Statute—Constitutionality of Husband's Right to Dissent From Wife's Will

Prior to July 1, 1960 a husband could not by will deprive his widow of her dower and other intestate rights in his estate if, pursuant to the privilege given surviving wives by legislation originating in 1784, she duly filed a dissent to his will.[1] On the other hand, no right of dissent was extended to the husband, and his wife could make a will disinheriting him from any share in her estate.[2]

The General Assembly at its 1959 session enacted new laws governing intestate succession by which the estates of dower and curtesy were abolished.[3] Correlated sections permitted either husband or wife to dissent from the will of the deceased spouse where the survivor does not receive one-half or more in value of all the property passing upon the death of the testator.[4] The latter enactments were

[54] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[1] N.C. Pub. Laws 1868-69, ch. 93, §§ 37, 38. A history and explanation of this legislation will be found in Hunter v. Husted, 45 N.C. 97 (1852).

[2] Gomer v. Askew, 242 N.C. 547, 89 S.E.2d 117 (1955); Hallyburton v. Slagle, 132 N.C. 947, 44 S.E. 655 (1903). See DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA §§ 18, 48, 158 (1948).

[3] N.C. GEN. STAT. § 29-4 (Supp. 1961).

[4] N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1961). These sections were rewritten and amended by the 1961 amendment, effective July 1, 1961, for the most part in particulars not material here, except that the right of a surviving spouse to dissent was limited by N.C. GEN. STAT. § 30-1(a) (Supp. 1961)

designed to guarantee to the surviving spouse, whether husband or wife, absolute title to an equal forced share in the other's estate.[5] The survivor is entitled upon dissent to receive his intestate share up to a maximum of one-half of the estate[6] except that where the dissenter is the second or successive spouse of a decedent who is survived by issue, none of whom are also issue of the dissenter, he or she may only take one-half of what they would have received had there been no will.[7]

In *Dudley v. Staton*,[8] the first case to arise under the new dissent statute, the testatrix devised all her property, consisting of four tracts of land, to her only son by a former marriage and his wife to the exclusion of her husband. The husband duly filed a dissent from the will of his deceased wife, and commenced a special proceeding for partition, alleging that by virtue of his dissent he was the owner of a one-fourth undivided interest in the four tracts of land.[9] The clerk of the superior court adjudged the husband and son to be tenants in common and ordered an actual partition of the land. On appeal to the superior court judge, the parties stipulated that the sole issue was whether the provisions of article I, chapter 30 of the General Statutes of North Carolina,[10] insofar as it permits a husband to dissent from his deceased wife's will and take a share of her real and personal property, is in conflict with the provision of article X, § 6 of our state constitution. The constitution provides:

> The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts,

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to those instances where (1) he receives less than his intestate share, or (2) in event the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, he receives less than one-half of the net estate. Otherwise the substance and effect of the 1959 act was not altered for purposes of the question herein discussed. See generally Bolich, *Election, Dissent and Renunciation*, 39 N.C.L. REV. 17 (1960).

[5] N.C. GEN. STAT. § 29-14 (Supp. 1961).

[6] N.C. GEN. STAT. § 30-3(a) (Supp. 1961).

[7] N.C. GEN. STAT. § 30-3(b) (Supp. 1961).

[8] 257 N.C. 572, 126 S.E.2d 590 (1962).

[9] Petitioner is entitled only to a one-fourth interest in the land because the respondent son was issue of the decedent by a prior marriage. N.C. GEN. STAT. § 30-3(b) (Supp. 1961).

[10] N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1961).

> obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried.

The judge held that the right of dissent given by the statute was in all respects constitutional, and affirmed the clerk's order.

The North Carolina Supreme Court reversed, holding that the language of the constitutional provision left no room for interpretation and clearly showed an intention not only to remove the common law incapacity of a married woman to dispose of her property by will, but also to secure to her the right to dispose of her property by will as if she were unmarried, so as to put it beyond the power of the General Assembly to impair or abridge such right.[11]

The court in *Dudley* expressly relied on a dictum[12] in *Tiddy v. Graves*[13] in which the court, after concluding that a husband may only be a tenant by the curtesy after the death of his wife intestate, stated: "With this explicit provision in the Constitution, no statute and no decision could restrict the wife's power to devise and bequeath her property as fully and completely as if she had remained unmarried."[14] It was acknowledged by the court in *Tiddy* that in the absence of constitutional inhibition the legislature can abrogate the power to devise inasmuch as it is not a natural right; however, the court felt that since the constitution of 1868 gave married women the unrestricted power to devise and bequeath their property such power could not be limited.

By following the rationale of *Tiddy* the court in effect overruled the more recent case of *Flanner v. Flanner*[15] where it was contended

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[11] Prior to this decision North Carolina had held that since the grant of testamentary capacity to married women in the constitution of 1868, a wife could by will deprive her husband of this common-law right of curtesy in her separate estate. Watts v. Griffin, 137 N.C. 572, 50 S.E. 218 (1905); Hallyburton v. Slagle, 132 N.C. 947, 44 S.E. 655 (1903); Walker v. Long, 109 N.C. 510, 14 S.E. 299 (1891); see I MORDECAI, LAW LECTURES 387-89 (2d ed. 1916).

[12] The court stated: "Even if we concede that the statement in *Tiddy v. Graves* . . . is *obiter dictum*, it is sufficiently persuasive to be followed here." 257 N.C. at 581, 126 S.E.2d at 597.

[13] 126 N.C. 620, 36 S.E. 127 (1900).

[14] *Id.* at 623, 36 S.E. at 128.

[15] 160 N.C. 126, 75 S.E. 936 (1912). The court in *Dudley* said: "When the opinion in the *Flanner* case was filed, the writer of the opinion in *Tiddy v. Graves* . . . was *Chief Justice*. Why that case and *Walker v. Long* . . . were not mentioned in the *Flanner* case, we can never know." 257 N.C. at 580, 126 S.E.2d at 596.

that a statute, which provides that a testatrix dies intestate as to an after-born child who is not provided for in the parent's will, was an unconstitutional abridgment of a married woman's right to dispose of her property by will as if she were unmarried. In holding the statute constitutional the court in *Flanner* pointed out that the will was valid except as to such after-born child. After declaring that the defendant's contention involved a misconception of the meaning of article X, § 6, the court stated:

> [The] right to dispose of property by will is a conventional rather than an inherent right, and its regulation rests largely with the Legislature except where and *to the extent* that same is restricted by constitutional inhibition . . . .
>
> Being properly advertent to this principle, a perusal of the section relied upon will disclose that its principal purpose in this connection was to remove *to the extent stated* the common-law restrictions on the right of married women to convey their property and dispose of same by will, and was not intended to confer on them the right to make wills freed from any and all legislative regulation. The right conferred is not absolute, but qualified.[16]

Whatever might be said about the apparent conflict between *Tiddy* and *Flanner,* the decision in *Dudley* raises serious questions as to the constitutionality of the after-born child statute as it applies to married women.[17] That section is as much an abridgment of the wife's constitutional power to make a devise as if feme sole as is the statute giving both husband and wife reciprocal rights of dissent, subject to certain statutory qualifications. The effect of either is to diminish her estate disposed of by her will to the extent of the intestate share of the person in whose favor the statute operates; but in other respects the will stands.[18] On the other hand, it would

[16] *Id.* at 129, 75 S.E. at 937. (Emphasis added.)

[17] N.C. GEN. STAT. § 31-5.5(a) (Supp. 1961) provides: "A will shall not be revoked by the birth of a child to or adoption of a child by the the [sic] testator after the execution of the will, but any such after-born or after-adopted child shall be entitled to such share in testator's estate as it would be entitled to if the testator had died intestate . . . ."

[18] See N.C. GEN. STAT. § 31-5.5(a) (Supp. 1961) (quoted in note 17 *supra*), and N.C. GEN. STAT. § 30-3(c) (Supp. 1961) which provides: "If the surviving spouse dissents from his or her deceased spouse's will and takes an intestate share as provided herein, the residue of the testator's net estate . . . shall be distributed to the other devisees and legatees as provided

indeed be sad if the language in *Dudley* has the effect of barring an after-born child, inadvertently left out of its mother's will, from sharing in the estate of the deceased parent.

Married women in North Carolina had no general power to make a will prior to the constitution of 1868, except when such a power was given them in the same instrument by which the property was vested in them.[19] It seems manifest that the specific purpose of article X, § 6 was to remove the common law incapacity of a married woman and, as respects the disposition of her property by will, place her on a par with men and femes sole. The language of the stated provision professes to go no further than its clear import. It is the view of the writer that such language does not confer on married women the right to make a will free of any or all legislative regulation; but rather, inherent therein is recognition that the Legislature is sovereign over the disposition of a decedent's property, except *to the extent* that same is restricted by constitutional inhibition, and that it can abridge, qualify or restrict the power of a married woman to devise her separate estate.[20] That this is so seems clear since the framers of our constitution have bestowed testamentary capacity on married women only *to the extent* of that possessed by femes sole,[21] and there is little doubt that the legislature may, at its pleasure, regulate the power of an unmarried woman to dispose of property by will.[22] Seemingly the only constitutional inhibition on the power of

in the testator's last will, diminished pro rata unless the will otherwise provides."

[19] Newlin v. Freeman, 23 N.C. 514 (1841); see MORDECAI, *op. cit. supra* note 11, at 371.

[20] *In re* Garland's Will, 160 N.C. 555, 76 S.E. 486 (1912); Hodges v. Lipscomb, 128 N.C. 57, 38 S.E. 281 (1901). The court in the principal case distinguished Thomason v. Julian, 133 N.C. 309, 45 S.E. 636 (1903) from *Flanner* on its facts; however, the general rule that the right to make a will is given by statute and may be modified or revoked by statute, for which this case was apparently referred to in *Flanner* was not dealt with.

[21] Article X, § 6 expressly provides that a married woman may devise and bequeath her property and, with the written assent of her husband, convey the same "as if she were unmarried." N.C. CONST. art. X, § 6; restated in N.C. GEN. STAT. § 52-1 (1950).

[22] *E.g.*, Peace v. Edwards, 170 N.C. 64, 86 S.E. 807 (1915) citing with approval the leading case of Pullen v. Commissioners of Wake County, 66 N.C. 361 (1872) where the court said: "The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government, and which no government can rightfully impair. There was a time, at least as to gift by will, it did not exist; and there may be a time again when it will seem wise and expedient to deny it. These are the uncontested powers of the Legislature upon which no article of the Constitution has laid its hands to impair them. If the Legislature may destroy this right,

the General Assembly in this respect is that the right of a married woman to make a will cannot be abrogated since it is conferred upon her by the constitution.[23]

However, article X, § 6 contains not only a grant of testamentary disposition to married women but also an explicit constitutional prohibition against conveyance by the wife of her separate property without the joinder of her husband.[24] The holding of the principal case is difficult to reconcile with the construction given by the North Carolina Supreme Court to statutes dispensing with the necessity of the husband's joinder in conveyances by the wife of her property and making her a free trader in certain instances.[25] These enactments have been upheld as valid legislative limitations on article X, § 6 on the grounds that this was a beneficent provision and not intended to disable, but rather to protect the married woman.[26] This interpretation, in the face of such a specific prohibition, would seem to dispel any notion that all legislative power to regulate the separate property rights of married women was withdrawn by this constitutional provision. Yet, the court in *Dudley* distinguished the instant statute from the free trader acts and condemned the former for the reason that it was not a protection, but rather an abridgment of the widow's constitutional right.[27] This seems to be a rather specious ground on which to base the constitutionality of a statute. Especially is this so in view of the fact that the court could easily have saved

may it not regulate it?" *Id.* at 363-64. It is interesting to note that this pronouncement was made just four years after the adoption of the Constitution of 1868. See generally 57 AM. JUR. *Wills* § 52 (1948); 94 C.J.S. *Wills* § 3 (1956); II MORDECAI, LAW LECTURES 1138 (2d ed. 1916).

[23] It could be argued that despite the right given married women to make a will by Article X, § 6, such right in no way exceeds that extended to femes sole which, subject to the grace of the Legislature, may be regulated to the point of destruction.

[24] N.C. CONST. art. X, § 6 states: "The real and personal property of any female in this State . . . may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

[25] N.C. GEN. STAT. § 52-5 (1950) (where separated by divorce or deed; where husband declared insane); N.C. GEN. STAT. § 52-6 (1950) (where wife abandoned or turned out of doors by husband).

[26] Where the husband is a lunatic, the wife may convey her separate estate without the joinder of her husband for the free trader statutes are a valid exercise of legislative power. Lancaster v. Lancaster, 178 N.C. 22, 100 S.E. 120 (1919). If a husband abandons his wife, there is no constitutional inhibition on the power of the legislature to declare where and how she may become a free trader. Keys v. Tuten, 199 N.C. 368, 154 S.E. 631 (1930); Bachelor v. Norris, 166 N.C. 506, 82 S.E. 839 (1914); Hall v. Walker, 118 N.C. 377, 24 S.E. 6 (1896).

[27] 257 N.C. at 581, 126 S.E.2d at 597.

the dissent statute, had it been so inclined, by adherence to the literal wording of article X, § 6.[28]

The policy of the new act was, in keeping with the modern tendency, to provide for the survivor's support by giving either spouse a non-barrable right to an equal forced share in the other's estate, which is protected against testamentary disposal by reciprocal rights of dissent.[29] The effectiveness of this policy is largely dependent upon the according of equal treatment to both husband and wife. The decision in the principal case will permit a wife, at her whim or caprice, to cut her husband out of all interest and estate in her property.[30] The rationale of the court will not only seriously jeopardize other unrelated statutes[31] but will destroy the symmetry of the new Intestate Succession Act.[32]

If the court adheres to its present position, we are faced with the paradoxical situation of having to restore the rights of downtrodden husbands, either by corrective legislation or by a revision of article X, § 6 of our state constitution which would equalize the rights of a husband with those of his wife.

J. HAROLD THARRINGTON

Wills—G.S. § 41-6—Doctrine of Worthier Title

In *Scott v. Jackson*[1] the testator devised land to his niece in fee simple, and in the event she dies without issue, then to the heirs of the testator. Plaintiffs, heirs of the testator's niece who had died without issue, contended that G.S. § 41-6[2] was controlling, and conse-

[28] The general rule is that every presumption will be made in favor of the constitutionality of a legislative act unless its repugnance to the constitution is clear and beyond a reasonable doubt, and that the courts may resort to implication to sustain an act, but not to destroy it. *E.g.*, Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115 (1941); State v. Brockwell, 209 N.C. 209, 183 S.E. 378 (1936).

[29] See, *e.g.*, PA. STAT. ANN. tit. 20, §§ 1.2, 180.8 (Supp. 1961); PA. STAT. ANN. tit. 20, §§ 1.1, 1.5 (1950). See generally 3 VERNIER, AMERICAN FAMILY LAW § 216 (1935); Bolich, *supra* note 4, at 21-24.

[30] ALA. CODE ANN. tit. 61, § 18 (1960) gives only widows the right to dissent from the will of their deceased spouse. This has been criticized as investing married women with a "super-right" capable of creating havoc in the settlement of the husband's estate. 3 ALA. L.J. 30 (1927).

[31] *E.g.*, N.C. GEN. STAT. § 105-20 (1958) (right to impose inheritance tax lien on testator's estate); N.C. GEN. STAT. § 31-5.5 (Supp. 1961) (right of after-born child to take his intestate share).

[32] N.C. GEN. STAT. §§ 29-1 to -30 (Supp. 1961).

[1] 257 N.C. 658, 127 S.E.2d 234 (1962).

[2] N.C. GEN. STAT. § 41-6 (1950) provides: "A limitation by deed, will or