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

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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 statutes³¹ 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 down-trodden 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. § 41-6² 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. Holsouser*, 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 GEN. STAT. 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

quently, the limitation over should be construed to mean "to the children" of the testator. Since the testator died without children surviving, the plaintiffs argued that the limitation over was void, and they were therefore entitled to the land.³ The North Carolina Supreme Court held that G.S. § 41-6 was not applicable and the heirs of the testator would take.

While it seems that G.S. § 41-6 was intended to modify the common-law rule that no one is the heir of a living person,⁴ the precise limits of the statute have been a source of litigation and speculation for a number of years. It was held in the early case of *Starnes v. Hill*⁵ that the Rule in Shelley's Case was unaffected by the statute because the rule "has nothing whatsoever to do with limitations to the heirs of a person unless there is a precedent limitation of a freehold estate to that person . . ."⁶ Therefore, the statute can never apply where there is a precedent freehold estate in the ancestor of the heirs designated in the instrument.

It remains undecided whether the statute is applicable where the limitation is made to the heirs of an ancestor holding a precedent estate of less than freehold, for example, where *T* devises land to *A* for ten years, remainder to the heirs of *A*. It would seem that the statute should be applicable in such a case because of the court's pronouncement in *Starnes* that the statute would not apply where there is a *precedent freehold estate* granted to the ancestor of the heirs mentioned in the instrument. An intervening contingent interest between the freehold estate and the limitation to the heirs would not alter this holding.⁷ Likewise the statute does not change the formulas for the creation of fee simple⁸ and fee tail estates.⁹

other writing, to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by deed or will."

³ *Quaere* whether this contention has merit. See 1 SIMES, FUTURE INTERESTS § 179 (1936).

⁴ *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011 (1893). For an application of the common-law rule, see *Timberlake v. Harris*, 42 N.C. 188 (1851).

⁵ 112 N.C. 1, 16 S.E. 1011 (1893). In this case *G* deeded land to *A* for life, and in the event *B* outlive *A*, then to *B* for life, then to the heirs of *B*. The court held that *B* took a contingent remainder for life, and that until the contingency occurred the Rule in Shelley's Case could not operate to vest a fee simple in *B*. As to the applicability of the statute to the Rule in Shelley's Case see: *Jones v. Ragsdale*, 141 N.C. 200, 53 S.E. 842 (1906); *Marsh v. Griffin*, 136 N.C. 333, 48 S.E. 735 (1904).

⁶ 112 N.C. at 20, 16 S.E. at 1013. In addition the court found that it was impossible to believe that the drafters of the statute would have omitted any reference to the Rule in Shelley's Case had they intended to abolish the rule.

⁷ See *Hartman v. Flynn*, 189 N.C. 452, 127 S.E. 517 (1925), where there

The statute has been applied where the limitation in a deed was to the heirs of the grantor after a preceding estate in another,¹⁰ where the conveyance was directly to the heirs of a third person,¹¹ and where the limitation was to the heirs of a third person after an intervening estate.¹² However, where the gift or devise is defeated by the failure of heirs of the first taker, the statute does not apply. Thus, where *T* devised land to *A* and his heirs, and if no heirs at his death, the land was to return to the nearest relations of *A*, the court held that G.S. § 41-6 would not apply to the words of defeasance because the proper construction of the defeasance clause should be "if *A* die without issue."¹³

In addition to the limitation placed on the statute by *Starnes*, the statute itself contains the limitation that "unless a contrary intention appear by deed or will,"¹⁴ heirs will be construed to mean children.¹⁵ Just when a contrary intention appears is difficult to determine.¹⁶

was a deed to *A* for life, then to *A*'s bodily heirs, but if *A* dies before his wife, the wife shall hold so long as she remains single. The court held that the contingent estate in the wife did not prevent the operation of the Rule in Shelley's Case; and therefore, the statute could not apply.

⁸ *Starnes v. Hill*, 112 N.C. 1, 22, 16 S.E. 1011, 1017 (1893) (dictum).

⁹ *The Bank of Pilot Mountain v. Snow*, 221 N.C. 14, 18 S.E.2d 711 (1942). *Accord*, *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941); *Paul v. Paul*, 199 N.C. 522, 154 S.E. 825 (1930); *Jones v. Ragsdale*, 141 N.C. 200, 53 S.E. 842 (1906). A fee tail estate is converted into a fee simple by N.C. GEN. STAT. § 41-1 (1950).

¹⁰ *Ellis v. Barnes*, 231 N.C. 543, 57 S.E.2d 722 (1950), where *G* reserved a life estate in himself, then to *A* for life, and at his death to issue surviving; and if *A* die without issue, then to the heirs of *G*. See also *Thompson v. Batts*, 168 N.C. 333, 84 S.E. 347 (1915).

¹¹ *Graves v. Barrett*, 126 N.C. 267, 35 S.E. 539 (1900), where *G* made a deed to the heirs of *A*.

¹² *Smith v. Brisson*, 90 N.C. 284 (1884), where *G* deeded land to *A* and the heirs of his body, but if *A* die without such heirs, then to the heirs of *B*. See *Lide v. Wells*, 190 N.C. 37, 128 S.E. 477 (1925), where there was an intervening twenty year trust.

¹³ *Massengill v. Abell*, 192 N.C. 240, 134 S.E. 641 (1926). Compare *Williamson v. Cox*, 218 N.C. 177, 10 S.E.2d 662 (1940).

¹⁴ N.C. GEN. STAT. § 41-6 (1950).

¹⁵ For a discussion of the problems involved in this construction, see *Bolich, Some Common Problems Incident to Drafting Dispositive Provisions of Donative Instruments*, 35 N.C.L. REV. 17 (1956).

¹⁶ *Therrell v. Clanton*, 210 N.C. 391, 186 S.E. 483 (1936), where *G* conveyed to her daughter and her husband for their joint lives and for life to the survivor of them, remainder to the daughter's children of such marriage, and if no children, then in fee simple to the "right heirs" of the grantor. The court, looking at the entire instrument and to the fact that the daughter was the only child of the grantor, found that the words "right heirs" in this context showed a contrary intention and that "heirs" was not to mean "children." This case is discussed in 15 N.C.L. REV. 59 (1936). In *Ellis v. Barnes*, 231 N.C. 543, 57 S.E.2d 722 (1950), *G* reserved a life estate in

In general the court has consistently said that technical construction of a deed or will must not be allowed to defeat the intention of the grantor or testator;¹⁷ however, there have been occasional departures.¹⁸

In the principal case¹⁹ the court relying both on the rationale of the *Starnes* case and the limitation contained within the statute, held that the limitation to the heirs of the testator after a prior defeasible fee was not affected by G.S. § 41-6. The reasons were: (1) if the purpose of the statute is to avoid the common law construction that there are no heirs of a living person, then there is no necessity for application of the statute since the heirs are determined upon the death of the testator, the testator necessarily being dead when the will becomes operative; (2) the testator had no children when the will was executed, and to place a limited construction on the word "heirs" would deliberately do violence to the intention of the testator.

The effect of G.S. § 41-6 on the doctrine of worthier title²⁰ has been the subject of much discussion.²¹ This doctrine which has its roots in the feudal land law²² is applicable to both inter vivos conveyances and testamentary dispositions.²³ The question of applica-

herself, then to *A* for life and at *A*'s death to issue surviving, and if no issue survive *A*, then to the heirs of *G*. The court held that the statute applied making "heirs" of *G* read "children" of *G*.

¹⁷ In *Williamson v. Cox*, 218 N.C. 177, 10 S.E.2d 662 (1940), the court stated: "The cardinal principle in the interpretation of wills is that the intention of the testator as expressed in the language of the instrument shall prevail, and that the application of technical rules will not be permitted to defeat an intention which substantially appears from the entire instrument." *Id.* at 179, 10 S.E.2d at 663.

¹⁸ In *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941) where *G* conveyed to *W* and her heirs by *H*, the court held this to be a fee tail special now converted into a fee simple by G.S. § 41-1. Justices Clarkson and Seawell dissented contending that the court must look to the intent of the grantor as drawn from the entire instrument rather than to technical construction. The dissent felt that the clear intention of the grantor was to have "heirs" construed as "children."

¹⁹ 257 N.C. 658, 127 S.E.2d 234 (1962).

²⁰ The doctrine of worthier title is stated by Simes as follows: "[I]f an owner of land in fee simple sought to convey a life estate or an estate tail, with a remainder to the grantor's heirs, the remainder was void and the grantor had a reversion in fee simple. A like rule obtained also as to wills, so that, if a testator devised to an heir the precise interest in land which the latter would have inherited in the absence of the provision in the will, the heir was regarded as acquiring the land by descent and not by purchase." 1 SIMES, FUTURE INTERESTS § 144 (1936).

²¹ See, e.g., Note, 14 N.C.L. REV. 90 (1935).

²² See 1 SIMES, FUTURE INTERESTS § 144 (1936).

²³ *Ibid.*

tion of the statute to the doctrine in North Carolina first arose as to an inter vivos conveyance in the case of *Thompson v. Batts*,²⁴ where the grantor deeded land to his wife for life, the tract to descend to the issue of such marriage in fee simple, and on failure of issue, the tract was to go to the heirs of the grantor. The court held G.S. § 41-6 applicable, thereby making the ultimate limitation read "to the children" of the grantor. Thus, the doctrine of worthier title was inapplicable because a class of remaindermen was created which might have differed from the heirs general.²⁵

The *Thompson* case was qualified somewhat in *Therrell v. Clanton*,²⁶ where the ultimate limitation was to the "right heirs" of the grantor after a preceding life estate in the daughter who was the only child of the grantor. The court found from viewing the whole instrument that "right heirs" in the limitation over could not be taken to mean "children" since a life estate had already been granted to the only child of the grantor. Although the court did not mention G.S. § 41-6, it is thought that the court probably considered the issue and found that the limitation in the statute "unless a contrary intention appear" took the point out of consideration because the court felt it clear that the grantor could not have intended to mean "children."²⁷ It seems, therefore, that the doctrine of worthier title as it pertains to inter vivos conveyances is destroyed by the statute except where the court can find that the grantor intended that the limitation should not be construed as "children."

The doctrine of worthier title applies to testamentary dispositions whenever a devise gives to the heir the same nature and quality of estate as he would have taken by descent.²⁸ Thus if a deviser devised lands to an heir who would have taken the same estate and in the same manner by descent had the deviser died intestate, the doctrine of worthier title would strike the words of gift from the will and the heir would take by descent. The effect of G.S. § 41-6 on the testamentary branch of the doctrine of worthier title has never been

²⁴ 168 N.C. 333, 84 S.E. 347 (1915).

²⁵ In the inter vivos branch of the doctrine of worthier title, heirs must be used in the general, technical sense. Thus, when any remainderman or class of remaindermen is indicated which might differ from the heirs general, the doctrine is not applicable and the land will not pass by descent but by purchase. 1 SIMES, FUTURE INTERESTS §147 (1936).

²⁶ 210 N.C. 391, 186 S.E. 483 (1936).

²⁷ See Note, 15 N.C.L. REV. 59, 61 (1936).

²⁸ For a discussion of the operation of this branch of the doctrine, see 46 HARV. L. REV. 993 (1933).

expressly declared by our court. It has been suggested that the statute would not apply in the case of a will where the limitation was to the heirs of the testator because when the will takes effect, the testator is dead and his children could not be classified as "the heirs of a living person."²⁹ Although the principal case was not expressly concerned with the doctrine of worthier title, the court did state that "the statute applies only when the conveyance is to the heirs of a living person. Here the contingent and ultimate beneficiaries could not be the heirs of a living person because nothing was given prior to the death of . . . the devisor."³⁰ Even if the court had applied G.S. § 41-6 to the limitation to the heirs of the testator, the statute would not necessarily prevent the operation of the doctrine of worthier title if the "children" had taken the same nature and quality of estate as they would have taken by descent.³¹

Although G.S. § 41-6 does not seem to affect the doctrine of worthier title as it applies to a testamentary disposition, the status of the doctrine is nevertheless in doubt. At common law there were two areas in which the doctrine was significant: (1) the doctrine of ancestral property, and (2) the rights of creditors of the estate of the testator.³² The doctrine of ancestral property applied on failure of lineal descendants or issue of the person last seized, and the inheritance descended to the collateral relations of the first purchaser.³² Estates taken by purchase³³ descended to the nearest relatives irrespective of the blood line, since the acquisition of the land by purchase was deemed to break the line of descent.³⁴

In North Carolina both the doctrine of ancestral property and the doctrine of worthier title were incorporated into the fourth canon of descent.³⁵ The joinder of these two doctrines was necessary

²⁹ Note, 14 N.C.L. REV. 90, 94 (1935).

³⁰ 257 N.C. 658, 660, 127 S.E.2d 234, 236 (1962).

³¹ See Note, 14 N.C.L. REV. 90, 94 (1935).

³² ATKINSON, WILLS § 6, at 39 (2d ed. 1953).

³³ "Purchase" as used here means acquiring the property other than by inheritance. Property is taken by purchase through the acts of the parties rather than through inheritance which is by operation of law.

³⁴ ATKINSON, WILLS § 21, at 77 (2d ed. 1953).

³⁵ N.C. GEN. STAT. § 29-1(4) (1950) provides: "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules." Notice that worthier title is embodied and extended in the

because it was considered important that the estates be deemed to pass by descent rather than purchase so that the ancestral lines were preserved. Thus where the testatrix devised property "to her heirs at law" which property had come to the testatrix by descent, and in this particular case the "heirs at law" would have taken the same nature and quality of estate under the will which they would have taken by descent if the testatrix had died intestate, the devise was void, and the heirs took by descent. Since the testatrix had no lineal heirs, the fourth canon of descents applied; therefore, the collateral heirs of the blood line of the testatrix's father took.³⁶ The new Intestate Succession Act,³⁷ which became effective on July 1, 1960, abolished the canons of descent, including the fourth canon of descent. Ancestral property also was abolished,³⁸ and since, as pointed out above, the doctrine of worthier title was incorporated into this canon, it might be argued that the doctrine is no longer applicable in North Carolina. On the other hand, it could be argued that the doctrine is a part of the common law of this state and would be unaffected by the abolition of this canon.

The second significant area of the doctrine of worthier title pertains to the rights of the creditors of the estate of the testator.³⁹ At common law land which passed by descent was subject to pay the debts of the estate before land specifically devised; consequently, land devised to an "heir" of the devisor would be deemed to have passed by descent under the doctrine of worthier title, and the "heir's" land would be subject to pay debts before land devised to persons who were not heirs.⁴⁰ It is thought that this application of the doctrine, as it pertains to creditors of the estate, has been abolished by statute in North Carolina. G.S. § 28-95⁴¹ provides that children and issue

statute "where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced . . . would have been the heir or one of the heirs . . ."

³⁶ *Yelverton v. Yelverton*, 192 N.C. 614, 135 S.E. 632 (1926).

³⁷ N.C. GEN. STAT. §§ 29-1 to -30 (Supp. 1961).

³⁸ N.C. GEN. STAT. § 29-3 (Supp. 1961).

³⁹ See Note, 14 N.C.L. REV. 90, 95 (1935).

⁴⁰ I SIMES, *FUTURE INTERESTS* § 144, at 260 (1936).

⁴¹ N.C. GEN. STAT. § 28-95 (1950) provides: "If upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decrees a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribution."

shall be regarded as specific devisees and contribution may be enforced against other devisees.

It is submitted that for all practical purposes the testamentary branch of the doctrine of worthier title has been abrogated in North Carolina since both areas of the law where the doctrine was significant have apparently vanished.

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