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II

ELECTION, DISSENT AND RENUNCIATION

W. BRYAN BOLICH*

In the assignment of topics for discussion at this Institute in connection with the new Intestate Succession Act it fell to my lot to present a paper on election, dissent and renunciation. These words are polysemantic—their meaning varying from state to state. For example, while most of the statutes relating to dower or the spouse's forced share provide that the surviving spouse may "elect," others say "renounce," "waive," "relinquish," "refuse," or "dissent from" the provisions of the decedent spouse's will, and yet all mean the same thing.¹ As in this state, so in the others, each jurisdiction has its own definitions of these terms, but they inevitably overlap. Under our meanings for example, the widow who dissents both elects and renounces.

In this paper no exhaustive general treatment of the topics, election, dissent and renunciation, will be attempted. Of necessity some general discussion will occur, but the subject of this paper is the impact of the Intestate Succession Act on these concepts. These will be discussed in order, but with some inevitable overlapping.

A number of the act's provisions are new to this state, and while there are some guides to decision from judicial utterances construing the same or similar statutory provisions in other jurisdictions, it remains for this act to be hammered out on the anvil of decided cases. Legislation is indeed a delicate art, and what the courts will do in fact by way of interpretation of a statute often makes prediction a hazardous undertaking.

ELECTION

Election has been succinctly defined as "the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both."² It thus presupposes a plurality of rights or gifts; with an intention, express or implied, of the person who has the right to control one or both, that one shall be a

* Professor of Law, Duke University. Professor Bolich wishes to acknowledge the benefit which he received in the preparation of this paper from an unpublished manuscript by Thomas L. Young, Assistant Attorney General of North Carolina, entitled "Advancements, Renunciation and Dissent under the Intestate Succession Act."

¹ 3 VERNIER, AMERICAN FAMILY LAW § 205 (1935).

² 3 STORY, EQUITY JURISPRUDENCE § 1451 (1918); see *Commercial Nat'l Bank v. Misenheimer*, 211 N.C. 519, 191 S.E. 14 (1937); *Weeks v. Weeks*, 77 N.C. 421 (1877).

substitute for the other; and is based upon the equitable principle that one upon whom inconsistent rights are conferred may take either, but cannot have both. The doctrine seems to have originated in a case where a testator (*T*) devised *A*'s property, Blackacre, to *B*, and devised his, *T*'s, own property, Whiteacre, to *A*. Thus the theory and basis of election: *T* must have intended *A* to acquiesce in the devise of Blackacre to *B* if *A* is to keep his devise of Whiteacre from *T*. Therefore, *A* must make an election: either relinquish his property to *B*, or claim his own property and give up *T*'s devise to him. It involves a problem of construction of the language used in the light of the surrounding circumstances, and for an election to be called for the will must disclose a situation which puts the beneficiary to a choice between retaining his own property or accepting the proffered devise or bequest in lieu thereof. For example, if *T* devises to *W* a life estate in land which he owned in fee simple with her as a tenancy by the entireties and devises the remainder therein to *B* she must make an election if *T* devises property of his own to her,³ unless *T* mistakenly supposed himself to have a disposable interest therein^{3a} or conferred no alternative benefit on *W*.^{3b} If put to an election *W*'s acceptance of the devise to her of other land owned by *T*, may constitute her implied election to accept this devise and give up her interest in the tenancy by the entireties.

Thus the surviving spouse may be compelled, like any other devisee, to elect between some benefit offered him by the will in lieu of a devise of his property to others. However, it would seem that the statutory requirement of dissent whereby the surviving spouse claims his non-barrable intestate or forced share in the decedent's estate in lieu of the will's provision for him is one thing, and the common law rule of election which requires a surviving spouse whose property has been devised to another either to retain this property or give up a voluntary devise to him of property owned by the testator may be another.^{3c} It seems that an election is not called for when the testator's alternative "gift" in exchange for a devise of the survivor's property to another is only that fraction of his estate of which the surviving spouse could not be legally deprived without his consent.^{3d} Common law dower and curtesy created inchoate inter vivos rights in the land of the owning spouse of which neither spouse could deprive the other by deed or will without his consent and which became consummate upon the owner's death if the other survived. In the days of dower if the husband purported to devise an unencumbered title in his land to another, he was

³ *Wachovia Bank & Trust Co. v. Burrus*, 230 N.C. 592, 55 S.E.2d 183 (1949).

^{3a} *Benton v. Alexander*, 224 N.C. 800, 32 S.E.2d 584 (1945).

^{3b} *Lamb v. Lamb*, 226 N.C. 662, 40 S.E.2d 29 (1946); *Annot.*, 60 A.L.R.2d 790 (1958).

^{3c} See *Tripp v. Nobles*, 136 N.C. 99, 106, 48 S.E. 675, 677 (1904) (Walker, J., dissenting); *Annot.*, 49 L.R.A. (N.S.) 1073, 1103 (1914).

^{3d} *Bell v. Nye*, 225 Ill. 283, 99 N.E. 610 (1912); *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670 (1955).

in theory devising away a property interest of his wife. If his will made a separate provision for his widow, she was compelled to elect between her dower and the other interest if it was found to be his intent that the provision was in lieu of dower.⁴ But under most dissent statutes the common law presumption favoring dower has been reversed, and a husband's devise of his land presumptively excludes dower unless the widow dissents from his will in the manner and within the time specified by the statute.⁵

With the new act's abolition of common law dower and curtesy as to persons dying on or after July 1, 1960, and the substitution of absolute title in a forced share in the estate of the decedent in favor of the surviving spouse, in theory no inter vivos interest is thereby created in the survivor in the decedent's property. Therefore, when the decedent wills his property to others than his surviving spouse it is no longer theoretically possible to say, as was true in case of dower, that an interest in property belonging to the widow has been given to another so as to put her to an election. The forced share concept created by the new act merely secures to the survivor a designated interest in the decedent's estate. If the decedent has failed to make a minimum provision for the survivor, he is given a statutory right of dissent from the decedent's will. Thus as to the forced share the traditional basis of election is not precisely presented: the choice of surrendering some property right of his in lieu of receiving another. It is rather a choice between alternative, inconsistent courses of action: acquiescing in the will or taking against it by filing a written statement of dissent with the clerk of the superior court within six months of the will's probate in the manner prescribed by the statute, failure to file as required by the statute being judicially deemed an election to take under the will.⁶ The new act radically changes the substantive statutory law of dissent, but as to the mechanics thereof which affect election it makes no substantial change.⁷ It also creates a new right of election in favor of the surviving spouse of an intestate and the surviving spouse of a testator who dissents from the will to take a life estate analogous to dower in lieu of the intestate or forced share by filing a notice thereof in the form of a petition within six months after the death of the decedent and in the same manner prescribed for filing a dissent from the will, with failure so to file being conclusively deemed by the statute a waiver of this right of election.⁸ The act broadens the prior statute governing renunciation and requires it to be formally exe-

⁴ *Lee v. Giles*, 161 N.C. 541, 77 S.E. 852 (1913); Annot., 171 A.L.R. 651 (1947).

⁵ *Bell v. Thurston*, 214 N.C. 231, 199 S.E. 93 (1938); *Craven v. Craven*, 17 N.C. 339, 344 (1833); ATKINSON, *WILLS* § 33 (2d ed. 1953); 4 PAGE, *WILLS* § 1352 (Lifetime ed. 1941).

⁶ See generally ATKINSON, *WILLS* §§ 33, 138 (2d ed. 1953).

⁷ N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1959).

⁸ N.C. GEN. STAT. § 29-30 (Supp. 1959).

cuted and filed with the clerk of the superior court within one year of the intestate's death, and in case it affects real estate to be recorded in the local register of deeds office.^{8a} In the interest of convenience the remaining discussion of election will occur in connection with dissent and renunciation, the major topics of this paper.

DISSENT

Introduction and General American Law

In effect, our system of laws permits, within limits, the perpetuation of one's ownership of property beyond the grave. And with the exception of some forms of inter vivos conveyance which are in reality testamentary, the persons to whom a decedent's property passes upon his death are determined either by the laws of intestacy or the provisions of his will. When during the feudal era society was organized upon the basis of land holding in return for personal services, quite naturally the tenant was not free to alienate or devise his land to whomsoever he saw fit. Freedom of inter vivos conveyance was achieved through the Statute of Quia Emptores (1290) and freedom of testation by the Statute of Wills (1540), but neither form of transfer was complete until the Statute of Tenures (1660) abolished military tenure. Since personal property was not the subject of feudal tenure, the owner thereof was allowed to transfer it both inter vivos and by testament. However, its post mortem disposition having fallen under the jurisdiction of the ecclesiastical courts instead of the common law courts in the church-state struggle for jurisdiction, for centuries the laws of succession differed as to real and personal property. Zealous that a man be permitted to devote part of his property to pious uses and perform his Christian duty of supporting his family, it became law that a man had freedom of testation as to only one-third of his personal property. He was required to bequeath at least one-third to his children and one-third to his widow, with the free third being customarily willed to the Church for absolution of his soul. However, as to real property, freedom of testation was the rule. And when the above doctrine of "reasonable parts" as to personal property died out in England in the seventeenth century, the common law countries lost this civil law principle of compulsory provision for dependents, and a testator could with impunity disinherit his heirs and distributees. Only the marital estates of dower and curtesy afforded one's family any legal protection against disinheritance. This became the American system through our adoption of English law. It might be rationalized as personal liberty of the individual, as the right to accumulate and dispose of property within reasonable limits, as an inci-

^{8a} N.C. GEN. STAT. § 29-10 (Supp. 1959).

dent of ownership, or as a popular answer to the English common law canons of descent of land which made a will for a man which no sane man would ever make for himself.⁹

In England and the Dominions modern legislation has now made this type of thinking obsolete by statutes known as Family Provision Acts. They illustrate the philosophy that as a parent is required to support his family during his life so must he after death to the extent of his available property. These statutes provide that the surviving spouse or a dependent child may obtain maintenance out of the decedent's estate if the court is of the opinion that the applicant's testate or intestate share thereof is insufficient. This system avoids the rigid forced share concept of the civil law, and by leaving the matter to judicial discretion permits tailor-made decrees as to disposition of one's estate among dependents according to need.¹⁰ In the United States, however, we still cling to the dower-curtsey principle of protecting by law only the surviving spouse and let the rest of the family go.

Institutions of an age when land was the foundation of the economy, primogeniture the rule of descent, and neither husband nor wife heir of the other, dower and curtesy, by restricting freedom of both inter vivos and testamentary transfer by the owner as against the other spouse, afforded the survivor and children some measure of economic and social security so long as the life-tenant parent lived and received the benefits. But in our industrial economy of today both estates have become something of anachronisms because they fetter commerce in land and no longer serve sufficiently the original protective purpose when principal assets of the average estate are more often personal property than real estate.¹¹ Therefore, there has developed in most states statutory concepts which make husband and wife equal and preferred heirs of each other and substitute for dower and curtesy a non-barrable right in the surviving spouse to an absolute interest in a specified fraction of all the property, both real and personal, owned by the deceased spouse at his death. This forced share of the surviving spouse is protected against testamentary disposal by giving the survivor a right to "dissent from," "elect against" or "renounce" the will of the decedent within a specified time and take a certain share of his estate in lieu of the provision for such survivor made by the will of the decedent. It is most often the intestate share and therefore varies in amount according to circumstances, *e.g.*, one-third if there are surviving descendants and one-half

⁹ Atkinson, *op. cit. supra* note 6, §§ 3, 4; McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, 14 ILL. L. REV. 96 (1919); Nussbaum, *Liberty of Testation*, 23 A.B.A.J. 183 (1937).

¹⁰ Crane, *Family Provision in England*, 35 N.Y.U.L. REV. 984 (1950); Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107 (1938).

¹¹ 2 POWELL, REAL PROPERTY ¶¶ 212-19 (1950).

if there are none, or all of the estate up to a designated amount plus a fraction of the balance, or the equivalent of dower in a few states with some share of the personal property. This right of election may be lost by failure properly to exercise it as provided by the statute, by express waiver, or by acceptance of benefits under the will.¹²

Since this forced share is a fraction of the decedent's probate estate it gives one spouse no inter vivos interest in the other's property. Therefore this property is generally subject to the claims of the owner's creditors and is vulnerable to his sole inter vivos transfers. Thus it differs radically from common law dower and curtesy which could not be barred without the other spouse's consent. Of course, the forced share could be safe-guarded by requiring one spouse's release or joinder in all transfers of the other's property in order to bar it.^{12a} While such joinder in conveyances of land with their usual requirements of writing and recording greatly impairs marketability of real estate, its requirement as to all transfers of personal property in order to assure a good title as against the surviving spouse would constitute an intolerable burden on commerce. Thus a spiteful spouse may by unilateral act cut off the survivor by simply giving away his property during his lifetime, but in most cases self-interest against impoverishment is usually a sufficient deterrent. It is general law that voluntary conveyances of property made by one spouse with intent to defeat the other spouse's marital rights such as dower or curtesy may be set aside as fraudulent to the extent of such interest.¹³ And by analogy to the judicial remedies afforded these marital property rights courts do protect the surviving spouse's statutory share. Secret pre-nuptial gifts made with intent to defeat the forced share are voidable,¹⁴ and post-nuptial transfers may generally be set aside except sales and exchanges for fair value and bona fide gifts.¹⁵ Some courts set aside a gift as fraudulent if made with the intent of depriving the survivor of such interest in the estate of the

¹² ATKINSON, *op. cit. supra* note 6, § 33; MODEL PROBATE CODE § 32 (Simms 1946); 6 POWELL, *op. cit. supra* note 11, §§ 971, 995; 3 VERNIER, *op. cit. supra* note 1, §§ 189, 199, 205, 216; Phelps, *The Widow's Right of Election in the Estate of Her Husband*, 37 MICH. L. REV. 236, 401 (1938-1939); Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 330 (1929). In Phipps, *Marital Property Rights*, 27 ROCKY MT. L. REV. 180, 191 (1955), will be found a resumé of the American statutes governing marital forced succession.

^{12a} D.C. CODE ANN. § 18-201a (1951).

¹³ Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940); Szambothy v. Mertz, 347 Mo. 776, 148 S.W.2d 1028 (1941); White v. White, 212 S.C. 440, 48 S.E.2d 189 (1948). *Contra*, Mark v. Mark, 145 Ohio St. 341, 61 N.E.2d 595 (1945).

¹⁴ Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509, 54 HARV. L. REV. 336 (1940); Granger v. Granger, 296 Mich. 357, 296 N.W. 288, 40 MICH. L. REV. 300 (1941).

¹⁵ Bensing, *Inter Vivos Trusts and the Election Rights of a Surviving Spouse*, 42 Ky. L.J. 616 (1954); Annot., 64 A.L.R., 466 (1929); Annot., 79 A.L.R. 377 (1932); Annot., 112 A.L.R. 649 (1938); Annot., 49 A.L.R. 2d 521 (1956).

other or as illusory because a mere mask for retention of ownership.¹⁶ Other gifts fall within a twilight zone of uncertainty. Obviously, these forced share statutes create more than a mere expectancy and declare a sound public policy against disherison of the surviving spouse, but they restrict only testamentary disposal and their usual silence as to inter vivos transfer leaves it to the courts to decide which of such transactions shall be nullified to protect the surviving spouse.

The uncertainty and unsuitability of these tests in resolving the conflict of policies between an owner's power of unencumbered transfer of his property and the protection of his surviving spouse against disherison has motivated a number of suggestions for statutory solutions.¹⁷ The Model Probate Code permits the surviving spouse who dissents to treat the decedent's inter vivos gifts as if they were testamentary dispositions and to recover them from the donees if made "in fraud of the marital rights" of the survivor in the decedent's estate; and it also creates a prima facie presumption that gifts made within two years of death are fraudulent.¹⁸ One writer in effect suggests a statute analogizing the estate of the decedent to which the survivor's right of dissent attaches to the gross estate concept of the Internal Revenue Code, and he proposes that "except for rights of bona fide purchasers for value, transfers made (a) subject to the enjoyment or control of the decedent or (b) with intent to diminish or defeat the rights of his dependents should be judicially voidable."¹⁹ The inclusiveness and relative certainty of the federal estate tax gross estate concept and its terms make it a good device whereby to define the estate of the decedent subject to the rights of the surviving spouse. While not perfect for the purpose, its use would simplify matters because the tax report would serve both purposes and also it would solve most of the questions stemming from the decedent's use of such typical devices as survivorship interests, inter vivos trusts, life insurance, gifts in contemplation of death and powers of appointment to reduce the size of his estate as to both his surviving spouse and the fisc.²⁰ And if the primary purpose of such a law is to provide for the survivor's support, it should apply equally whether the decedent dies testate or intestate because he can as easily pauperize the survivor by giving away all his property and dying intestate as by

¹⁶ *Martin v. Martin*, 282 Ky. 411, 138 S.W.2d 509, 54 HARV. L. REV. 336 (1940); *Granger v. Granger*, 296 Mich. 357, 296 N.W. 288, 40 MICH. L. REV. 300 (1941); *Annots.*, 64 A.L.R. 466 (1929); 79 A.L.R. 377 (1932); 112 A.L.R. 649 (1938). See generally ATKINSON, *op. cit. supra* note 6, § 32. And see RESTATEMENT, PROPERTY § 316 (1940), for a comparison of this forced share with an ordinary expectancy.

¹⁷ See ATKINSON, *op. cit. supra* note 6, § 33; Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936); Note, 27 N.Y.U.L. REV. 306 (1952).

¹⁸ MODEL PROBATE CODE § 33 (Simes 1946).

¹⁹ Cahn, *supra* note 17, at 153.

²⁰ Note, 27 N.Y.U.L. REV. 306, 312 (1952).

retaining it and leaving it by will to others. And since certain gifts from the decedent to third persons remain part of the decedent's estate for purposes of determining the survivor's non-barrable share, it seems arguable that where the survivor has benefitted by similar gifts from the decedent such property should be counted toward this share, *i.e.*, brought into hotchpot by analogy to the rule as to advancements.

The law of other states protecting the survivor's forced share has been discussed with some fullness because our act, like most of the other forced share statutes, contains no provisions protecting the survivor's share against inter vivos conveyances by the owning spouse. However the elective life estate available to the survivor in lieu of his forced share protects him against inter vivos conveyances of the decedent's real property, but not personal property, so the law of other states as above discussed could be useful when such problems arise under our new act.

Law of North Carolina

A. Prior to July 1, 1960

Since the revolutionary property emancipation of the wife by the basic constitutional and statutory enactments of 1868, and prior to the new Intestate Succession Act, the principal inter-spousal property rights relevant to this paper are substantially as follows: both husband and wife are the individual owners of all property separately acquired by each before and during the marriage; the wife has common law dower in all estates of inheritance owned by her husband at any time during the coverture, which cannot be taken by his creditors, or barred without her consent by the husband's conveyance, inter vivos or testamentary; the husband no longer has common law curtesy initiate in his wife's lands and has curtesy consummate only if she dies intestate thereto; the wife's common law disability to make a will has been removed but her conveyance of her land is void without her sane husband's written assent; on intestacy each may be heir and distributee of the other, with the widow being entitled to her year's allowance; and by legislation beginning in 1784 the widow may dissent from her husband's will and thereby take in lieu of its provisions for her the same rights in his real and personal estate as if he had died intestate, *i.e.*, dower, distributive share and a year's allowance.²¹ The 1784 statute affected dower in two far-reaching ways: it was from 1784 until 1868 confined to lands owned by the husband at his death and it in effect reversed the common law presumption that the husband's testamentary provision for his widow was a bounty in addition to dower unless the will clearly expressed a contrary intent

²¹ See DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA §§ 21, 39, 169-175.1 (curtesy), 18, 39, 48, 158 (dissent), 20, 157-168 (dower), 27, 28, 232 (descent), 26, 28, 234, 235 (distribution), 19, 145-156 (year's allowance) (1948); MORDECAI, LAW LECTURES 291-96, 360-62, 370-90, 1350-51 (2d ed. 1915).

or the provision itself was not consistent with dower. As to dissent the statute provided that a widow whose husband makes a provision for her out of his personal estate is not entitled to dower unless she dissents from his will within six months.^{21a} This clause requiring dissent if the husband provided for his widow from his personal estate was subsequently removed.

As the law of dissent stood in 1959 by express terms of the statutes a husband could not by will bar his widow from taking dower and other intestate rights in his estate to which she was otherwise entitled if within six months from its probate she filed with the clerk of the superior court a dissent to his will. Her dissent could be filed in person or by attorney, and if she has an infant or insane, by her guardian. If she dissented and took dower it was not subject to the claims of her husband's creditors. And the same was true for her life to the amount of her dower right in lands he devised to her even if she did not dissent.²²

Judicial decisions interpreting these statutes have filled in certain important details in establishing the legislative intent. The statute is one of limitation allowing a maximum of six months from probate to ascertain the condition of the estate and file a dissent, which election is binding when so made if it is not induced by misrepresentation or caused by mistake.²³ Failure to dissent within the time allowed constitutes an implied election to take under the will and generally precludes dissent; but this period may be extended where a caveat is filed, or an insanity involved, and dower even allowed without a dissent when the estate proves to be insolvent.²⁴ The effect of a dissent is to cause the testator to die intestate as to his widow, but in other respects the will stands.²⁵ In determining the amount of her intestate share advancements made by him are brought in.²⁶

B. Subsequent to July 1, 1960.

With regard to the privilege of dissent, the Intestate Succession Act makes some material changes in the law relating to the rights of a surviving spouse in the property and estate of the decedent which it seems desirable to summarize before considering details. Prior to this act a

^{21a} *Craven v. Craven*, 17 N.C. 339 (1833).

²² N.C. GEN. STAT. §§ 30-1 to -3 (1950) [N.C. Pub. Laws 1868-69, ch. 93, §§ 37, 38, 34, as amended]. See generally MORDECAI, *op. cit. supra* note 21, 383-84.

²³ *Whitted v. Wade*, 247 N.C. 81, 100 S.E.2d 263 (1957); *Union Nat'l Bank v. Easterby*, 236 N.C. 599, 73 S.E.2d 541 (1952); *Richardson v. Justice*, 125 N.C. 409, 34 S.E. 441 (1899); *Horton v. Lee*, 99 N.C. 227, 5 S.E. 404 (1888); Notes, 23 N.C.L. REV. 380 (1945), 35 N.C.L. REV. 520 (1957).

²⁴ *Whitted v. Wade*, *supra* note 23; *Atlantic Trust & Banking Co. v. Stone*, 176 N.C. 270, 97 S.E. 8 (1918); *Perkins v. Brinkley*, 133 N.C. 86, 45 S.E. 465 (1903); *Yorkly v. Stinson*, 97 N.C. 236, 1 S.E. 452 (1887).

²⁵ *Murphy v. Murphy*, 125 Fla. 855, 170 So. 856 (1936); *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879, 31 N.C.L. REV. 491 (1953).

²⁶ *Arrington v. Dortch*, 77 N.C. 367 (1877).

husband was not permitted to dissent from his wife's will, but a widow could under the statute at her whim or caprice dissent from his will and take her intestate rights in his estate. Now both husband and wife have reciprocal rights of dissent, but this right and its reward are no longer statutorily unqualified. It exists only when the survivor receives less than half of the testator's estate as defined by the act, and in certain cases the dissenter does not receive the whole intestate share. In lieu of the will's provision the dissenter gets his intestate share up to a maximum of one-half of the estate or at his election a life estate analogous to dower. However, these amounts are cut in half if 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.²⁷

In its treatment of dower and curtesy the act follows the Model Probate Code and the general pattern of marital property legislation in a majority of American jurisdictions by abolishing these ancient relics of yesterday's agrarian society, giving husband and wife equal forced shares in each other's estate and protecting this share by according to the survivor the right to dissent from the decedent's will and take absolute title to a specified portion of the decedent's estate. Relatively unique features of this act are two: the right of election which permits the survivor in lieu of this share to take a life estate analogous to dower in one-third of the real estate, including the dwelling and its household furnishings even though this inclusion produces an excess above the one-third limitation; and the proviso which halves the dissenter's rights in some cases of the second or successive spouse of the decedent.²⁸

1. Constitutionality

Two of the most important changes effected by this act, which applies "only to estates of persons dying on or after July 1, 1960," are its abolition of dower and curtesy and its abridgement of a wife's power to make a will disinheriting her husband by giving him a right to dissent from her will. And since their constitutionality may be raised, it is proposed to discuss this at the outset. By the great weight of authority inchoate dower, not being a vested property right, may at any time prior to the husband's death be abridged or abolished.²⁹ As to curtesy initiate, if it still exists in this state after the adoption of the Constitution of 1868,

²⁷ N.C. GEN. STAT. §§ 29-4, -14, -30, 30-1 to -3 (Supp. 1959).

²⁸ ATKINSON, *op. cit. supra* note 6, § 33; MODEL PROBATE CODE, *op. cit. supra* note 12, §§ 22, 31, 32; 2 POWELL, *op. cit. supra* note 11, ¶¶ 212-19; 6 POWELL, *op. cit. supra* note 11, ¶¶ 971, 995; 3 VERNIER, *op. cit. supra* note 1, §§ 188, 189, 199, 205, 216; Phelps, *supra* note 12; Sayre, *supra* note 12.

²⁹ Randall v. Krieger, 90 U.S. (23 Wall.) 137 (1874); Griswold v. Magee, 102 Minn. 114, 112 N.W. 1020 (1907); Annot., 20 A.L.R. 1330 (1922). *Contra*, Walker v. Bennett, 107 N.J. Eq. 151, 152 Atl. 9 (1930); O'Kelley v. Williams, 84 N.C. 241 (1881). See generally SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 285 (1953).

the same is true.³⁰ Article X, § 6 of this Constitution erased the ancient dogma of the common law that as to property husband and wife are one and he is that one, and established for a married woman the ownership and control of her separate property; and as to the *jus disponendi* thereof provides that it "may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." This language poses the question whether this statute which extends to the husband the right to dissent from his wife's will, a right that she was given in 1784 as to his will, is an unconstitutional legislative abridgement of the above grant of freedom of testation by virtue of which it has heretofore been held that a married woman may by will deprive her surviving husband of all interest in her estate, including curtesy.³¹

The specific purpose of the above-quoted constitutional provision was to remove the common law testamentary disability of a married woman and to confer upon her the same right as a man or unmarried woman to dispose of her property by will; and with her husband's written assent to transfer it inter vivos. In a leading case construing the above constitutional provision, it was contended that a statute, which declared that when a parent's will makes no provision as to an after-born child the testatrix dies intestate as to such child, was an unconstitutional abridgement of a married woman's right of testation. In holding this statute valid the court pointed out that it did not void the whole will and that it was valid except as to such after-born child. The opinion said 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 . . . 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.³²

The matter of a dissent falls squarely within the reasoning of the above case because a dissent to a will does not render it void but merely

³⁰ *Hallyburton v. Slagle*, 132 N.C. 947, 44 S.E. 655 (1903); *Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1891); *Alexander v. Alexander*, 85 Va. 353, 7 S.E. 335 (1888); *MORDECAI, op. cit. supra* note 21, §§ 387-89; see *SCURLOCK, op. cit. supra* note 29, at 279.

³¹ *Watts v. Griffin*, 137 N.C. 572, 50 S.E. 218 (1905); *Hallyburton v. Slagle, supra* note 30; N.C. GEN. STAT. § 52-16 (1950) [N.C. Pub. Laws 1871-72, ch. 193 § 30].

³² *Flanner v. Flanner*, 160 N.C. 126, 129, 75 S.E. 936, 937 (1912); see *Annot.*, 29 A.L.R. 1338 (1924).

upsets it as to the dissenter;³³ and the new act specifically so provides in declaring as follows: "the residue of the testator's net estate . . . shall be distributed to the other devisees and legatees as provided in the testator's last will . . ."³⁴ And as stated, it is felt that this act's change of the law so as to give husband and wife equal forced shares in each other's estates and reciprocal rights of dissent, as now exist in many other states despite Married Women's Property Acts empowering the wife to will her property as if sole, constitutes merely a reasonable regulation of a married woman's constitutionally conferred power of testation and is therefore valid, although there are earlier North Carolina decisions which point to the contrary.³⁵

That the provisions of Article X, § 6 are not immune to legislative alteration is further proved by the fact that its requirement that the wife's inter vivos conveyance of her property have her husband's written assent has been similarly regulated by statutes making the wife a free trader and dispensing with the necessity of such joinder of the husband in cases of certain leases of her realty, legal separation, abandonment by the husband, and his insanity, all of which have been upheld as valid legislative limitations on Article X, § 6,³⁶ which has also been restated and otherwise implemented by statute.³⁷

By the Intestate Succession Act's abolition of dower all legal restraint by the wife over her husband's freedom of inter vivos conveyance of his land disappeared, while such conveyances of hers were, subject to the above-mentioned exceptions, void unless signed by him. Under these circumstances the General Statutes Commission realized the desirability of finding an acceptable substitute for dower compatible with this state's traditional policies of freedom of alienation of land and protection of the home. In practically all states there are homestead laws, the primary purpose of which is to protect the family home against creditors and sole conveyances of the owning spouse; and most of these are so phrased in terms of acreage or monetary value as to accomplish this purpose.³⁸ But unfortunately the North Carolina provisions are hopelessly inadequate because of their maximum of one thousand dollars as to real property and five hundred as to personal property, and their lack of confinement

³³ *Murphy v. Murphy*, 125 Fla. 885, 170 So. 856 (1936); *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879, 31 N.C.L. Rev. 491 (1953); Annot., 27 L.R.A. (N.S.) 602 (1910).

³⁴ N.C. GEN. STAT. § 30-3(c) (Supp. 1959).

³⁵ *Tiddy v. Graves*, 126 N.C. 620, 75 S.E. 936 (1900); 6 POWELL, *op. cit. supra* note 11, ¶ 970 n. 30; 3 VERNIER, *op. cit. supra* note 1, § 216; Annot., 29 A.L.R. 1338 (1924); see MORDECAI, *op. cit. supra* note 21, at 377.

³⁶ *Keys v. Tuten*, 199 N.C. 368, 154 S.E. 631 (1930); *Lancaster v. Lancaster*, 178 N.C. 22, 100 S.E. 120 (1919); *Vann v. Edwards*, 135 N.C. 661, 47 S.E. 784 (1904); N.C. GEN. STAT. §§ 52-4 to -6 (1950).

³⁷ N.C. GEN. STAT. §§ 52-1 to -3, -7, -8 (1950).

³⁸ 6 POWELL, *op. cit. supra* note 11, ¶¶ 263, 970; 3 VERNIER, *op. cit. supra* note 1, § 228.

to land used as the home.³⁹ It was recognized that the widely prevalent custom of home ownership in this state through the use of tenancy by the entireties with its protective features as to creditors and sole conveyances of the spouses tempers the loss of dower and inadequacy of our homestead laws. In this situation the Commission felt that commerce in land would be facilitated and the wife adequately protected if the family home could not be conveyed without her joinder. Attention was therefore focused upon our homesite statute⁴⁰ which was enacted in 1919 in order to protect the inchoate right of dower and prohibit the sale of the home by the husband without the written consent of the wife. A study of this act, which was repealed in 1959, disclosed that it was largely a dead letter and would not serve the purpose because of both the insufficiency of its provisions and the uncertainty of some of them, including the basic definition of "homesite."⁴¹ A new homesite statute was accordingly drafted and submitted to the legislature in 1959 as a companion statute to the Intestate Succession Act under the title of "An Act To Provide for the Creation of and To Limit the Conveyance of Family Homesites."

Essentially, it protected only the homesite from unilateral conveyance by the owner, and, subject to the constitutional requirement of a husband's written assent to validate the wife's conveyances, made both spouses free traders as to the remainder of their land. It established a special proceeding to determine whether particular land was homesite, and also permitted husband and wife to designate their principal homesite by contract with provision for registration of such contracts and decrees.⁴² This proposed statute met with determined opposition largely because of its possible adverse effect on real estate law and practice, including title search, and was not adopted. Extended study and deliberation resulted in the enactment of a substitute proposal as an amendment to the Intestate Succession Act. This allows the surviving spouse to elect a life estate analogous to dower in lieu of the intestate share, and in case of testacy and dissent, to elect this life estate in lieu of the allowable intestate or other specified share of the decedent's estate.⁴³

2. Right of Dissent

This act effects a significant change of law as to the right of dissent by extending the privilege to the husband and by so qualifying it that

³⁹ N.C. CONST. art. X, §§ 1, 2, 3, 5, 8; N.C. GEN. STAT. §§ 1-369 to -392 (1950).

⁴⁰ See N.C. GEN. STAT. § 30-8 (1950) [N.C. Sess. Laws 1945, ch. 73, § 2].

⁴¹ See *Boyd v. Brooks*, 197 N.C. 644, 150 S.E. 178 (1929); N.C. GEN. STAT. § 30-8 (Supp. 1959); McCall & Langston, *A New Intestate Succession Statute for North Carolina*, 11 N.C.L. REV. 266, 270-76 (1933); *Proposals for Legislation in North Carolina*, 11 N.C.L. REV. 50, 64-68 (1932).

⁴² See S. 103, Session 1959.

⁴³ N.C. GEN. STAT. § 29-30 (Supp. 1959).

the decedent can bar a dissent and thereby prevent his will from being upset. The survivor may not dissent "if he or she receives one half or more in value of all the property passing upon the death of the testator, including both that property passing under the will and that property passing in any manner outside the will as a result of the death of the testator."^{43a} And there is expressly included in this computation: one-half of the value of any property passing by survivorship to the survivor, and the value of life insurance on the decedent's life received by the survivor to the extent that neither the survivor nor anyone in his behalf paid the premiums thereon. Under the statutes of most states the surviving spouse has *carte blanche* to dissent, but a few others in addition to North Carolina qualify the right.⁴⁴ This statute declares a policy: so long as the testator makes a certain minimum provision for his surviving spouse the law recognizes his privilege to give the remainder of his property to others by his will. It is designed as a protection of the survivor against harsh property dispositions but also seeks to prevent him from getting the lion's share by technical jockeying which might unduly restrict freedom of testation by preventing the testator from benefitting such objects of his bounty as his other kin and favorite charities. In other words, if the survivor receives at least one-half of the decedent's estate by deed, will or contract this is irrebutably deemed to be in lieu of the statutory right unless the will states that the survivor is to have both; but if less than one-half is so received it is deemed to be in lieu of the statutory right unless he rebuts this presumption by a dissent from the will filed within apt time. As a matter of inter-spousal estate planning and disposition much use is made of life insurance, inter vivos transfers both in trust and outright, and co-ownership of property by husband and wife with survivorship such as joint bank accounts, stocks and bonds, and tenancy by the entireties as to the home. Thus it would be quite improper for dissent purposes to exclude such property which passes by gift to the survivor from the decedent in computing the value of the latter's estate and thereby permit the survivor to dissent and also get his forced share of the probate estate. However, the statute could operate with equal unfairness when the survivor happens to be the one who paid for the property. Therefore, such survivorship property should be treated as part of the decedent's estate only to the extent that the survivor did not contribute to its acquisition.⁴⁵

^{43a} N.C. GEN. STAT. § 30-1(b) (Supp. 1959).

⁴⁴ COLO. REV. STAT. ANN. § 152-5-5 (1955); KAN. GEN. STAT. ANN. §§ 59-602(2), -603 (Supp. 1955); LA. CIV. CODE ANN. art. 2382 (Dart 1945); MISS. CODE ANN. §§ 667-670 (1954); N.Y. DECED. EST. LAW § 18; N.C. GEN. STAT. § 30-1 (Supp. 1959).

⁴⁵ See INT. REV. CODE of 1954, § 811(e).

3. Time and Manner of Dissent

The mechanics of dissent under the act follow the prior law by requiring it to be filed with the clerk of the court of probate of the will within six months thereafter and permitting it to be made in person, by attorney or by guardian. The act adds the provision that the attested written authority of the attorney be acknowledged, permits a dissent by the general guardian or guardian of the person or property and by a next friend if the survivor has no guardian. In so far as the prior statutes remain unchanged by this act the body of judicial decision construing the statutes as previously outlined would appear to remain trustworthy.⁴⁶

In most all states the surviving spouse is given statutory right of election between the provisions made in the will and some law-given interest in the decedent's property and estate. The statutory procedure is generally exclusive, and failure to take the prescribed affirmative action generally waives the right and constitutes an election to take under the will.⁴⁷ This result could be very disadvantageous when the estate debts are large or the will's provision small. This right of election is usually classified as a choice between alternative benefits, but where the will makes no provision for the survivor, it is rather a choice between two courses of action: departing from or abiding by the testator's disposition of his property.⁴⁸ In addition to waiver by failure to dissent, the right may be barred by certain misconduct of the survivor;⁴⁹ and by ante-nuptial and post-nuptial agreement of the spouses, provided the contract is fairly made and the consideration adequate, the statutory rights protected by a dissent may be barred.⁵⁰ And the same is true of acts in pais by way of estoppel.⁵¹ Our statutory period of six months for a dissent seems short for making an intelligent choice, and a better period might be not later than one month after expiration of the allowable time for creditors of the estate to file claims.⁵²

While our statute states in detail the requirements for and effects of

⁴⁶ N.C. GEN. STAT. § 30-2 (Supp. 1959); materials cited *supra* notes 22-26.

⁴⁷ *Davey v. Weber*, 133 Colo. 365, 295 P.2d 688 (1956); *Kreamer v. Hitchcock*, 207 Md. 454, 115 A.2d 255 (1955); 4 PAGE, *op. cit. supra* note 5, §§ 1352-54; 3 VERNIER, *op. cit. supra* note 1, §§ 205-07; see *Perkins v. Brinkley*, 133 N.C. 86, 45 S.E. 465 (1903).

⁴⁸ *Kittel v. Smith*, 136 Kan. 522, 16 P.2d 538 (1932); *In re Lottman's Estate*, 145 Misc. 839, 261 N.Y.S. 400 (Surr. Ct. 1932).

⁴⁹ N.C. GEN. STAT. §§ 28-10 to -12, -19, -20 (1950) [28-10 to -12: N.C. Pub. Laws 1871-72, ch. 193, §§ 42-45, as amended; -19: N.C. Pub. Laws 1941, ch. 243; -20: N.C. Pub. Laws 1868-69, ch. 113 § 61; 3 VERNIER, *op. cit. supra* note 1, § 202.

⁵⁰ N.C. GEN. STAT. §§ 52-12, -13 (Supp. 1959); ATKINSON, *op. cit. supra* note 6, § 31; Powell, § 216 Amots., 2 L.R.A. 372 (1899), 9 L.R.A. (N.S.) 953 (1907), 49 A.L.R. 116 (1927); see MODEL PROBATE CODE, *op. cit. supra* note 12, § 39.

⁵¹ See *Yorkly v. Stinson*, 97 N.C. 236, 1 S.E. 452 (1887); Annots., 82 A.L.R. 1509 (1933), 166 A.L.R. 316 (1947).

⁵² ATKINSON, *op. cit. supra* note 6, § 33; see ARK. STAT. ANN. § 60-503 (1955); MODEL PROBATE CODE, *op. cit. supra* note 12, § 35.

a dissent, it is silent as to what constitutes and is the effect of an election to take under the will, leaving this in the main to judicial legislation.⁵³ By majority rule the effect of an election to take under the will, either by express action or by failure to take the affirmative action required by the dissent statute, is to bar all intestate rights of the survivor in the decedent's property passing under the will to other beneficiaries and outside of it, as by partial intestacy. This result is sometimes supported on the reasoning that one may not both accept and reject a will, and having accepted the testamentary benefit the taker is barred from participating in the intestate property.⁵⁴ But by the better reasoning this involves no violation of the election doctrine that one may not claim under an instrument without giving full effect to it in every respect because the intestate property passes under the intestate statutes and not by the will. Therefore such a taking is no denial of the instrument.⁵⁵ Also, he who dissents and thereby takes against the will is generally entitled to his full share of the intestate property, including that as to which the testator died partially intestate.⁵⁶

4. Effect of Dissent

Under the statute in effect and operative as to persons dying prior to July 1, 1960, the effect of a dissent was to give the widow the same rights and estates in the real and personal property of her husband as if he had died intestate, *i.e.*, dower, year's allowance, and intestate share.⁵⁷ Under the new act the surviving spouse who dissents is entitled to his intestate share except that when the decedent is not survived by issue or a parent and the surviving spouse would otherwise take the entire net estate, he is limited to one-half of the estate calculated before payment of federal estate tax and free of such tax, and if the survivor is a widow she may also get her year's allowance.⁵⁸ Both the act's provisions qualifying the right of dissent in all cases by confining it to situations where the survivor does not receive by deed, contract or will at least one-half

⁵³ N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1959); see MODEL PROBATE CODE, *op. cit. supra* note 12, § 40; Phelps, *supra* note 12, at 255, 427.

⁵⁴ Bunker v. Bunker, 130 Me. 103, 154 Atl. 73 (1933); Ford v. Whedbee, 21 N.C. 16 (1834); 1 AMERICAN LAW OF PROPERTY § 5.41 (Casner ed. 1952); Annot., 93 A.L.R. 1384 (1934).

⁵⁵ Tilton v. Tilton, 382 Ill. 426, 47 N.E.2d 453 (1943); Redmond v. Coffin, 17 N.C. 437, 447 (1833); and see Phelps, *supra* note 12, at 269-72.

⁵⁶ Cain v. Barnwell, 125 Miss. 123, 87 So. 481 (1921); Phelps, *supra* note 12, at 255.

⁵⁷ N.C. GEN. STAT. §§ 28-149, 29-1(8), 30-2 to -5, -15 (1950) [28-149: N.C. Pub. Laws 1868-69, ch. 113, § 53, as amended; 29-1(8): N.C. Pub. Laws 1925, ch. 7; 30-2: N.C. Pub. Laws 1868-69, ch. 93, § 38; -3: N.C. Laws 1791, ch. 351, § 4, as amended; -4: N.C. Pub. Laws 1871-72, ch. 193, § 44; -5: N.C. Laws 1827, ch. 46, as amended; -15: N.C. Pub. Laws 1868-69, ch. 93, as amended]; Cheshire v. Drewry, 213 N.C. 450, 197 S.E. 1 (1938); Drewry v. Raleigh Sav. Bank & Trust Co., 173 N.C. 664, 92 S.E. 593 (1917); DOUGLAS, *op. cit. supra* note 21, §§ 18, 48(c).

⁵⁸ N.C. GEN. STAT. §§ 29-14(4), 30-3(a), -15 (Supp. 1959).

of the decedent's property passing at his death, and that limiting the dissenter to a maximum of one-half of the "gross estate" where the decedent leaves no issue or parent constitute a double restriction on dissent and are designed to prevent unfair or capricious dissents and to foster freedom of testation as previously suggested. The same or similar provisions qualifying the right of dissent and setting a top percentage of the intestate share receivable, exist in the statutory law of dissent of some of the other states, with the Model Probate Code having only the latter.⁵⁹

In the absence of this provision confining the dissenter in this situation to a maximum of one-half of the intestate share the surviving spouse who had received any fraction less than the disqualifying one-half of the decedent's property passing at his death could dissent and take the whole estate regardless of the adequacy of inter vivos or testamentary provision for him, or the needs or deserts of the other relatives of the testator who were beneficiaries under his will. However, the dissenter's share being computed before and being free of the federal estate tax assures the maximum marital deduction, unless a nonqualifying life estate is elected, and may in some situations put a premium on dissenting by increasing the value of the dissenter's bounty to the detriment of the other beneficiaries under the will.⁶⁰

In case the dissenting spouse is a second or successive spouse of a decedent who is survived by issue, none of whom are also issue of the dissenter, he or she takes only one-half of the amount provided by this act.⁶¹ This limitation on the amount of a dissenter may receive could have either or both of two objectives: fostering freedom of testation or discouraging multiple marriages by making it financially less desirable to marry a widow or widower with issue by a prior marriage. Similar limitations exist in a few other states.⁶² The application of this limitation to G.S. § 29-30 where the dissenting spouse elects instead of the intestate share a life estate in one-third of the decedent's real estate, including without regard to value the dwelling house and household furnishings, might be awkward. Would it be a life estate in one-sixth, including the dwelling and furnishings regardless of value?

As to the effects of a dissent on the will it is provided that it does

⁵⁹ COLO. REV. STAT. ANN. § 152-5-5 (1955); ILL. STAT. ANN. § 110.264 (Jones 1955); IND. ANN. STAT. § 6-301 (1955); KY. REV. STAT. § 392.080 (Supp. 1957); MASS. ANN. LAWS ch. 191, § 15 (1955); MICH. COMP. LAWS § 702.69 (Supp. 1954); MO. ANN. STAT. § 474.160 (1956); N.Y. DECED. EST. LAW § 18.1; TENN. CODE ANN. §§ 31-606, -608 (1956); W. VA. CODE ANN. § 4091 (1955); see MODEL PROBATE CODE, *op. cit. supra* note 12, § 32; Annot., 36 A.L.R.2d 147 (1954). For qualification of right of dissent, see statutes cited note 44 *supra*.

⁶⁰ See Note, 31 N.C.L. Rev. 491 (1953), commenting on Wachovia Bank & Trust Co. v. Green, 236 N.C. 654, 73 S.E.2d 879 (1953); Westfall, *Estate Planning and the Widow's Election*, 71 HARV. L. REV. 1269, 1287 (1958).

⁶¹ N.C. GEN. STAT. § 30-3(b) (Supp. 1959).

⁶² IND. STAT. ANN. § 6-301 (Burns 1955); WYO. COMP. STAT. ANN. § 6-301 (1955).

not void the will and that the residue of the property not taken by the dissenter shall be distributed to the other beneficiaries of the will diminished pro rata unless the will provides otherwise.⁶³ The usual result of a dissent is to upset the will; and if the testator has not made an alternative disposition in such case, the court really has to re-write the will as near as may be in accordance with the testator's presumed intent.⁶⁴ By majority rule the loss resulting from a dissent is made up by abating other devises and bequests in accordance with the order of abatement to pay debts, which rule generally saddles the residuary beneficiaries with this burden.⁶⁵ This statute which is similar to the New York statute adopts the fairer minority rule which abates pro rata all devises and bequests regardless of their nature.^{65a} Where the renounced interest is a life estate acceleration of future interests dependent upon it or its sequestration may occur to compensate the losers.⁶⁶

When the survivor dissents and thereby elects to take his intestate share as provided by the act, several situations causing difficulty have arisen. Usually the renounced interest of the dissenter is sequestered to compensate disappointed beneficiaries,⁶⁷ but when this interest is intestate the dissenter is usually not allowed to share in it because the specified forced share is all that the law gives him.⁶⁸ And when the testator dies partially intestate some courts similarly refuse to allow the dissenter to participate, while others permit it because it is genuine intestate property.⁶⁹ When the testator is donee of a power of appointment which he exercises by his will in favor of the dissenter, strict application of the principle that taking against the will bars all interest thereunder would prevent him from taking.⁷⁰ But application of the dogma that the appointee takes from the donor and not from the donee, who does not own the property but has only a power over it, should permit the dissenter to take.⁷¹

5. Election of a Life Estate in Lieu of the Intestate Share

The history and general effect of this legislation have heretofore been discussed, and it remains to point out some of the details as set forth in

⁶³ N.C. GEN. STAT. § 30-3(c) (Supp. 1959).

⁶⁴ See generally ATKINSON, *WILLS*, § 33 (2d ed. 1953).

⁶⁵ Annot., *Who Must Bear the Loss Occasioned by Election Against a Will*, 36 A.L.R.2d 291 (1954).

^{65a} *In re Byrnes' Estate*, 149 Misc. 449, 267 N.Y.S. 627 (Surr. Ct. 1933), 47 HARV. L. REV. 889 (1934).

⁶⁶ *Baptist Female College v. Borden*, 132 N.C. 476, 44 S.E. 47 (1903); RESTATEMENT, PROPERTY §§ 231-33 (1940).

⁶⁷ ATKINSON, *op. cit. supra* note 64, § 33.

⁶⁸ *Shoup v. Shoup*, 319 Ill. 179, 149 N.E. 746 (1925).

⁶⁹ *Blatt v. Blatt*, 79 Colo. 57, 243 Pac. 1099 (1926).

⁷⁰ *In re Kates' Estate*, 282 Pa. 417, 128 Atl. 97 (1925).

⁷¹ See *Hoddy's Estate*, 236 Pa. 276, 84 Atl. 909 (1909).

the statute.⁷² It is so similar to dower, both substantively and procedurally, that one might say the act buries dower with one hand and resurrects it with the other. Having abolished both dower and curtesy and substituted for them as to the surviving spouse a forced absolute share in the decedent's estate protected by the right of dissent, the act then creates a life estate analogous to dower as an elective alternative to the forced share, whether the decedent spouse dies testate or intestate. In several states there is similar legislation under which the forced share in fee simple and the life estates of dower and curtesy exist side by side, and upon dissent the surviving spouse is permitted to elect the life estate of dower or curtesy in lieu of the forced absolute share;⁷³ but some limit this election to the widow.⁷⁴

Under such a system the survivor who is otherwise qualified to dissent has three choices: (1) take the interest, if any, given by the will; (2) dissent and take the forced share of the decedent's estate, or (3) dissent and elect a life estate instead of the forced share. This triple election is created by our act in favor of the surviving spouse who dissents from the decedent's will. The first election is exercised by allowing six months to elapse from the date of probate of the will without filing a dissent with the clerk of the court; the second by so filing a dissent and the third by both so dissenting and also filing with the clerk of the court within six months of the decedent's death a notice of and petition for the elective life estate in the decedent's real property in lieu of the forced share of the estate. Where the decedent dies intestate only a double election exists, which reduces his choices to (1) the intestate share or (2) the elective life estate in lieu of the intestate share.

Some features of this elective life estate include: (a) the interest exists as an inchoate right in all fee simple estates owned by either spouse during the coverture and may be barred only by joinder in the other's conveyance; (b) regardless of any excess value above a one-third interest in the decedent's real estate the survivor's life estate "shall include" the decedent's usual dwelling "and the lands upon which situated and reasonably necessary to the use and enjoyment thereof," and the fee simple ownership of the household furnishings; (c) it must be formally elected within six months after the decedent's death by notice and petition to the clerk of the superior court, with failure so to elect constituting an absolute waiver of the right of election; (d) it is allotted by a jury of

⁷² N.C. GEN. STAT. § 29-30 (Supp. 1959); authorities cited notes 28 and 43 *supra*.

⁷³ ILL. ANN. STAT. ch. 3, § 168 (Smith-Hurd 1941); MD. ANN. CODE art. 45, §§ 6, 7, art. 93, § 314 (1957); see MASS. GEN. LAWS ch. 189, § 1, ch. 191, § 15 (1955). See generally 1 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 54, §§ 5.42, .74; 3 VERNIER, AMERICAN FAMILY LAW §§ 189 (dower), 216 (curtesy) (1935).

⁷⁴ FLA. STAT. ANN. §§ 131.34, .35 (1955); GA. CODE ANN. §§ 31-101, -103 (1952); MO. REV. STAT. §§ 469.010, .020, .070, .090, .120, .130, .150 (1949).

three, and a certified copy of the report must be recorded in the register of deeds office in each county where in the land lies; and (e) it is not subject to debts of the decedent's estate other than a purchase money mortgage or deed of trust.

The similarities of this interest to dower are striking, and the body of prior statutory law and interpretative decisions thereon should prove useful with regard to this legislation.⁷⁵ Like the homestead laws of most states, its basic purpose is to insure the homeplace against the testamentary caprices, sole conveyances and debts of the owning spouse. This immunity of the dwelling house and its land and furnishings from estate debts during the survivor's lifetime often will by its inclusion of all the decedent's property save a household from break-up and financial ruin upon the death of the provider. However, this continuation of the dower system will necessarily result in some clog on the marketability of real estate.

Whether the surviving spouse's choice involves the double election or the triple election it may not always be easy, and the deciding factors will necessarily vary from case to case. But they will generally include such matters as the kind and amount of the estate's assets; whether they are realty or personalty; the amount and nature of the estate debts; whether prior conveyances and mortgages of the owner's real estate were made with the survivor's joinder except that a purchase money mortgage binds the property without such joinder; the separate property and other income of the survivor; estate and inheritance taxes; nature and condition of the dwelling house and land used in connection with it; the status and personal desires of the surviving family; and the provisions of the will in cases of testacy.

The orthodox common law election concept involves a choice by a legatee or devisee between the will's provision for him and some inconsistent or alternative claim, when he cannot have both, such as a devise of his property to another,⁷⁶ or the bequest to another of an insurance policy of which he is the beneficiary,⁷⁷ or a bequest to a creditor

⁷⁵ See especially N.C. GEN. STAT. §§ 30-3 to -7, -12, -13 (1950) [30-3: N.C. Laws 1791, ch. 35, § 4, as amended; -4: N.C. Pub. Laws 1871-72, ch. 193, § 44; -5: N.C. Laws 1827, ch. 46, as amended; -6: N.C. Pub. Laws 1868-69, ch. 93, § 35; -7: N.C. Sess. Laws 1945, ch. 73, § 1; -12: N.C. Pub. Laws 1868-69, ch. 93, §§ 40, 41, as amended, N.C. Pub. Laws 1891, ch. 133, as amended, N.C. Sess. Laws 1945, ch. 116; -13: N.C. Pub. Laws 1868-69, ch. 93, § 42, as amended, N.C. Pub. Laws 1893, ch. 314, as amended, N.C. Pub. Laws 1931, ch. 393, as amended, N.C. Pub. Laws 1939, ch. 339], for similarities to dower. As to protection of household articles, see ARIZ. REV. STAT. ANN. § 14-513 (1956); MICH. COMP. LAWS § 702.93 (1948); MO. ANN. STAT. § 474.250 (1956); N.C. GEN. STAT. § 45-3 (1950) [N.C. Sess. Laws 1945, ch. 73, § 8]. As to what a homesite may include, see N.C. GEN. STAT. § 30-8 (1950) [N.C. Sess. Laws 1945, ch. 73, § 2]; *Boyd v. Brooks*, 197 N.C. 644, 150 S.E. 78 (1929).

⁷⁶ Materials cite *supra* notes 2-3b.

⁷⁷ *Royal v. Moore*, 187 N.C. 379, 121 S.E. 666 (1924); cf. *Commercial Nat'l Bank v. Meisenheimer*, 211 N.C. 519, 191 S.E. 14 (1937).

in satisfaction of a debt.^{77a} This statute broadens the concept by giving the surviving spouse a right of election of a life estate analogous to dower which includes the family dwelling as between both his share on an intestacy and his forced share in case of a dissent. And whereas the common law required no particular form of election and only required it to be made within a reasonable time, this statute compels the election to be made in the form of a legal proceeding and within six months of the decedent's death.^{77b} Generally the surviving spouse who is required to make an election must take notice of the necessity for election without any citation, and failure properly to elect as required is conclusively deemed to waive the right except in cases of judicial extension of time or of fraud.⁷⁸

RENUNCIATION

General American and North Carolina law prior to July 1, 1960

It is a principle of Anglo-American law that no one can have property thrust upon him against his will. This has been picturesquely put as follows: "A man cannot have an estate put into him in spite of his teeth."⁷⁹ To this rule there is the one well recognized common law exception that an heir cannot by disclaimer or renunciation prevent property from descending to him on an intestacy because it occurs by force of law and not by any act of the ancestor or heir.⁸⁰ By a somewhat ambiguously worded statute enacted in 1953 this common law rule was so changed in this state as to permit a distributee of intestate personal property to renounce.⁸¹

Neither by deed nor will can one force a gift of property upon another against his will. As to a deed this result is rationalized by the requirement of an acceptance by the grantee, but as to wills different theories are utilized to explain the recognized right of a devisee or legatee to renounce and thereby refuse a gift. Sometimes it is said that acceptance is necessary to a transfer by will and a renunciation constitutes a refusal to accept, or that title passes subject to defeasance by disclaimer. Under the first theory renunciation is seen as preventing the vesting of an interest, while in the second it is regarded as the

^{77a} See generally ATKINSON, *op. cit. supra* note 64, § 133.

^{77b} N.C. GEN. STAT. § 29-30 (Supp. 1959).

⁷⁸ *In re Stitzer's Estate*, 103 Colo. 529, 87 P.2d 875 (1932); *Dauh's Estate*, 205 Pa. 446, 157 Atl. 908 (1932); see *McGehee v. McGehee*, 189 N.C. 558, 127 S.E. 684 (1925); *In re Will of Shuford*, 164 N.C. 133, 80 S.E. 420 (1913); *Bell v. Wilson*, 41 N.C. 1 (1849); *Craven v. Craven*, 17 N.C. 339 (1833).

⁷⁹ *Thompson v. Leach*, 2 Vent. 198, 86 Eng. Rep. 391, 396 (K.B. 1869) (Ventriss, J., dissenting).

⁸⁰ *Hardenberg v. Commissioner*, 198 F.2d 63 (8th Cir.), *cert. denied*, 344 U.S. 836 (1952); *Coomes v. Finnegan*, 233 Iowa 448, 7 N.W.2d 729 (1943); *Bostian v. Milens*, 239 Mo. App. 555, 193 S.W.2d 797, 170 A.L.R. 424 (1946); see *Perkins v. Isley*, 224 N.C. 793, 32 S.E.2d 588, 23 N.C.L. Rev. 380 (1945).

⁸¹ N.C. GEN. STAT. § 28-149(13) (Supp. 1959); see *A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. Rev. 375, 376 (1953).

divestment of a previously acquired interest.⁸² But whatever its theory, renunciation is regarded as a process which prevents a succession from occurring in favor of the renouncer, rather than his conveyance of an interest to the person who takes the renounced property as a result of the renunciation.⁸³

Renunciations generally result from attempts to accomplish such objectives as the following: (1) to keep creditors of the heir or devisee from taking the property; (2) to reduce estate or inheritance taxes; (3) to avoid burdens attached to the devise by the will; (4) to dissent from the will and take another interest.⁸⁴ Since a renunciation results in the failure ab initio of the devise or legacy by majority rule it generally prevents the creditors of the renouncer from reaching the property or the imposition of a succession tax by the state or federal government.⁸⁵ But it has been held that since this immunity from debt depends upon the fiction of relation back it should not in justice be allowed to defeat the lien of a judgment creditor and the Model Probate Code provides that a "renunciation shall be subject to the rights of creditors of the heir or devisee and of the taxing authorities."⁸⁶ It is settled that one may not accept part and renounce part of an entire gift though couched in the form of two devises; but as to severable gifts most courts permit it.⁸⁷ However, a few courts say they do not recognize partial renunciation even if the gifts are separate and distinct.⁸⁸

At common law a renunciation need not be made in any particular form because it was not a conveyance,⁸⁹ nor within any fixed time since a reasonable time was allowed.⁹⁰ As to the effect of a renunciation it has heretofore been pointed out in connection with the topic of dissent that when a surviving spouse renounces by filing a dissent, the taking of her statutory share generally increases her portion of the estate and upsets the will by diminishing and distorting estate assets available for

⁸² Did not vest—*Hart v. Mumford*, 27 F. Supp. (N.D. Pa. 1939); *Bradford v. Calhoun*, 120 Tenn. 53, 109 S.W. 502 (1907). Divested—*Hardesty v. Carrothers*, 31 F. Supp. 365 (N.D. W. Va. 1940); *In re Estate of Kalt*, 16 Cal.2d. 807, 108 P.2d 401, 133 A.L.R. 1424 (1941).

⁸³ *Perkins v. Isley*, 224 N.C. 793, 32 S.E.2d 588, 23 N.C.L. REV. 380 (1945); *ATKINSON, op. cit. supra* note 64, § 139, 4 PAGE, WILLS §§ 1401-05 (3d ed. 1941).

⁸⁴ 3 AMERICAN LAW OF PROPERTY § 14.15 (Casner ed. 1952).

⁸⁵ Debt—*Schoonover v. Osborne*, 193 Iowa 474, 187 N.W. 20, 27 A.L.R. 465 (1922), noted in 36 HARV. L. REV. 347 (1923). Taxes—*People v. Flanagan*, 331 Ill. 203, 162 N.E. 848, 60 A.L.R. 305 (1928), noted in 38 YALE L.J. 549 (1929).

⁸⁶ MODEL PROBATE CODE, at 86 (Simes 1946); see *In re Estate of Kalt*, 16 Cal.2d 807, 108 P.2d 401, 133 A.L.R. 1424 (1949), noted in 29 CALIF. L. REV. 531 (1944).

⁸⁷ Severable—*State Banking Co. v. Hinton*, 178 Ga. 68, 172 S.E. 42, 91 A.L.R. 596 (1933). Entire—*Waggoner v. Waggoner*, 111 Va. 325, 68 S.E. 990 (1910).

⁸⁸ *Bailey v. McLain*, 215 N.C. 150, 1 S.E.2d 372, 120 A.L.R. 1487 (1939).

⁸⁹ *Defreese v. Lake*, 109 Mich. 415, 67 N.W. 505 (1806); *Perkins v. Isley*, 224 N.C. 793, 32 S.E.2d 588, 23 N.C.L. REV. 380 (1945).

⁹⁰ *Matter of Wilson*, 298 N.Y. 398, 83 N.E.2d 852, 47 MICH. L. REV. 806 (1949).

the other legatees and devisees.⁹¹ However, renunciation by other beneficiaries than the surviving spouse of the testator generally produces only a distortion of the will, and the renounced gift arguments pro tanto the shares or interests of other legatees or devisees, or passes by intestacy.⁹²

As the law of this state stood after the enactment of the above-mentioned 1953 statute, and prior to its repeal on July 1, 1960, testate real and personal property could be renounced, but only intestate personal property was the subject of renunciation. Though the broadness of the language of the statute permitting renunciation by "the heirs at law or any of them or any person entitled to receive any benefits from said estate" could indicate a legislative intent to permit both the heir and distributee "to renounce or disclaim," it occurs only in the law relating to distribution of personal property. To date it does not seem to have been judicially construed. It applied only to intestate succession and prescribed no formalities for a renunciation but provided that it shall occur "before said estate has been settled and before they have received any part thereof."⁹³ This clause may simply re-state the common law rule that renunciation must occur before acceptance⁹⁴ with the addition that the maximum period for a renunciation cannot extend beyond settlement of the estate. Since acceptance is presumed if a gift is beneficial, mere inaction often forecloses renunciation by lapse of time.⁹⁵

North Carolina law subsequent to July 1, 1960

Renunciation takes three different forms: (1) renunciation by the surviving spouse who dissents from the decedent spouse's will; (2) renunciation by any other legatee or devisee of a will; and (3) renunciation by an heir of intestate property. The Intestate Succession Act applies only to (1) and (3), and therefore should not directly affect the law of this State relating to (2). The principal changes of the law of dissent effected by this act having been previously set forth, it remains to discuss its changes in the law relating to renunciation of intestate property.

The principal purpose of this legislation is to permit intestate real and personal property to be renounced by the heir, and thereby erase

⁹¹ See *Blackwood v. Blackwood*, 237 N.C. 726, 76 S.E.2d 122 (1953); *Neill v. Bach*, 231 N.C. 391, 57 S.E.2d 385 (1950); 4 PAGE, *op. cit. supra* note 83, §§ 1389-91.

⁹² *Perkins v. Isley*, 224 N.C. 793, 32 S.E.2d 588, 23 N.C.L. REV. 380 (1945); *Privott v. Graham*, 214 N.C. 199, 198 S.E. 635 (1938); 3 AMERICAN LAW OF PROPERTY §§ 21.43 to .46 (Casner ed. 1952).

⁹³ N.C. GEN. STAT. § 28-149(13)(a) (Supp. 1959); see *A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. REV. 375, 376 (1953).

⁹⁴ *Perkins v. Isley*, 224 N.C. 793, 32 S.E.2d 588, 23 N.C.L. REV. 380 (1945).

⁹⁵ See *Bacon v. Barber*, 110 Vt. 280, 6 A.2d 9, 123 A.L.R. 253 (1939).

the anomalies resulting from the old common law rules allowing legatees and devisees to renounce while refusing to accord the same privilege to heirs and next of kin. Whatever the original basis of this distinction, there seems no good reason for its perpetuation at the present time. As previously indicated, this purely technical and unrealistic distinction has subjected an heir's inheritance to the claims of his creditors; and compelled him to pay a succession or gift tax on intestate property which he has refused, while a legatee or devisee could renounce and avoid both burdens. Also, state variations in renunciation law may produce differences in the application of federal tax laws.⁹⁶

This act specifies in detail both the mechanics and effects of a renunciation as follows: (1) permits an heir to renounce his intestate share, in whole or in part; (2) requires the renunciation to be (a) signed and acknowledged by the heir, (b) within one year of the death of the intestate, (c) delivered to the clerk of the superior court of the county in which the administrator or collector qualifies, and (d) recorded in the office of the register of deeds of each county wherein any land lies which is affected by the renunciation; (3) provides that (a) the renunciation is retroactive to the date of the intestate's death, and (b) the renounced property passes under this act as if the renouncer had died immediately prior to the intestate.⁹⁷

Under the terms of this act when a surviving spouse refuses to take under the will and an heir refuses an inheritance, both in effect renounce, but some material details vary. For example, a dissent must occur within six months of the will's probate, whereas the maximum period for renouncing intestate property is one year from the intestate's death; a dissent may be by authorized attorney, or by guardian or next friend of one *non sui juris*, but no similar representation provisions occur as to renunciation by an heir; and apparently a dissent must be both witnessed and acknowledged while a renunciation requires only signature and acknowledgment.⁹⁸ Since the act seems to be mandatory both the methods provided for an heir's renunciation and a surviving spouse's renunciation by dissent are exclusive and must be complied with at least substantially, but acceptance may occur by inaction.⁹⁹ However, renunciation of a legacy or devisee by any beneficiary other than a surviving spouse who dissents is governed by the common law.

Only by experience and continued analysis of the act can its good

⁹⁶ Authority cited *supra* notes 80, 85; see Rogers & Sterling, *Post Mortem Estate Planning*, 14 U. PITT. L. REV. 224 (1953). See generally ATKINSON, *op. cit. supra* note 64, § 139.

⁹⁷ N.C. GEN. STAT. § 29-10 (Supp. 1959).

⁹⁸ N.C. GEN. STAT. §§ 29-10, 30-1 to -3 (Supp. 1959).

⁹⁹ See Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588, 23 N.C.L. REV. 389 (1945); Hinton v. Hinton, 28 N.C. 274 (1846); cases cited note 78, *supra*; 4 PAGE, *op. cit. supra* note 83, §§ 1374, 1378, 1406-09.

and bad features be disclosed. As to renunciation by an heir it has already been observed that certain inequitable results may occur under the terms of the act. For example, an heir might mortgage his share of the property and later, within the one year period allowed, renounce his rights to the estate; or by renouncing an heir could place his representatives in a position to receive a larger share of the estate than the heir himself could have received. As to these, appropriate amendments of the act will be proposed by the General Statutes Commission.