Volume 33
Issue 3 *Dickinson Law Review - Volume 33, Issue 3*

3-1-1929

Wills-Construction-Next of Kin

A. J.W. Hutton

The first theory is based on the assumption that in certain cases a person may sacrifice another for himself and *a fortiori* that a people may. Its application requires a comparison of values. When it is applied in a prosecution for homicide, it might well be asked, "By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?"[49] A distinction might well be taken between: (1) cases where the criminal act inflicts injury on a private person; and (2) cases where it does not. It might well be for the public interest in the first class of cases in order to prevent the increase of crime, to hold that a man should be held to a choice of evils, injury to himself or criminal punishment, and should not be allowed to shift his injury to another. On the other hand, where the criminal act directly injures no individual, the result of excusing the act is not to allow the shifting of the burden to another person, but to benefit one at the cost of allowing an act that ordinarily public policy forbids, and it would seem that extreme emergencies might afford a justification.[50]

The adoption of the second theory involves an abandonment of the retributive and an adoption of the deterrent theory of punishment. Punishment for deterrence should be inflicted only where it is possible to deter. Where deterrence is impossible such punishment should be renounced. A man may have motives adverse to the law of such great strength as to overcome any fear that can be inspired by the terror of any legal punishment. He may be urged to the commission of a crime by motives more proximate and imperious than any sanction the law can hold out. In such cases, as the threats of the law are necessarily ineffective, they should not be made, and their fulfillment is gratuitous cruelty—the infliction of needless and uncompensated evil.

W. H. HITCHLER

WILLS — CONSTRUCTION — NEXT OF KIN. IN RE: *Stoler's Estate, 293 Pa. 433,* decided by the Supreme Court, Pennsylvania, June 30, 1928.

Testator in his will gave to his wife a life estate in all of his property and then provided as follows:

[49]Reg. v. Dudley, supra.

[50]The stealing bread cases would come in the first class. The embargo, and liquor cases, in the second. May, Criminal Law, 3rd ed., sec. 68.

"At her death I give, devise and bequeath the same to my next of kin to be divided among them in accordance with the provisions of the Intestate Laws of Pennsylvania."

After the death of the widow the administrator of her estate made claim before the auditor distributing the estate of the testator for a share in the latter estate claiming the wife of testator was embraced in the expression "to my next of kin" and also contending that the quoted clause of the testator's will meant "to next of kin in accordance with the Intestate Laws of the State of Pennsylvania."

In affirming the decree of the lower court which sustained exceptions to the auditor's report, our Supreme Court, per Frazer, J., held that pursuant to *Buzby's Appeal,*[1] the general rule of construction is well settled that a devise or bequest to heirs, heirs at law or next of kin will be construed as referring to those who are such at the time of testator's decease, unless a different intent is plainly manifested by the testator. The Court found no ambiguity or uncertainty in the language of the testator. The gift was to such remainder-men as were the next of kin of testator at the time of his decease and that distribution was to be made as the will plainly specified "in accordance with the provisions of the Intestate Laws of Pennsylvania."

The court further held the words "next of kin" were used by the testator in their primary sense and according to such sense a husband is not next of kin to his wife and a wife is not next of kin to the husband.[2] That the technical meaning of the words "kin" and "kinship" as generally used is to denote only persons related by blood and testator making use of this meaning the words excluded the wife whose estate might have taken a share had the testator's language been construed as so intending under the rule of construction as urged by counsel for the appellant that if a tenant for life be of the next of kin, either solely or jointly with other persons, he will not, on that account, be excluded from participation in the remainder to next of kin.[3]

The will in this case became operative before the Act of June 29, 1923, P. L. 914, a fact not appearing in the record of this case as reported from the Supreme Court

---

[1]61 Pa. 111, 116.

[2]Garrett's Estate, 249 Pa. 249.

[3]Buzby's Appeal, supra; Stewart's Estate, 147 Pa. 385.

but explanatory of the reason why this statute was not the subject of discussion either by the court below or the Supreme Court.

Under its provisions the construction to be given to gifts by remainder over to the testator's heirs or next of kin or the persons thereunto entitled under the intestate laws or other similar or equivalent phrase shall be construed as meaning the person or persons thereunto entitled at the time of the termination of the estate for years, for life or upon condition under the intestate laws of the commonwealth as they shall exist at the time of such termination, specifically stating furthermore, that such phrases shall not be construed as meaning such person or persons as were the heirs or next of kin at the time of the death of said testator, saving always, nevertheless, the right of testator to expressly state the construction to the contrary or where such construction may arise by necessary implication. Had this statute been applied in the instant case the result would have been the same for the estate of the widow would have had no semblance of claim to the fund to be distributed.

A. J. W. HUTTON.

PRACTICE—JURISDICTION OF JUSTICES OF THE PEACE—ACTIONS FOR DAMAGES BROUGHT UNDER MOTOR VEHICLE ACTS—The Act of June 30, 1919, P. L. 678, Section 36 provides:

> All civil actions for damages arising from the use and operation of any motor vehicle may, at the discretion of the plaintiff, be brought in the county wherein the alleged damages were sustained, and service of process may be made by the sheriff of the county wherein the defendant or his registered agent resides or where service may be had upon him under the existing laws of this Commonwealth, in like manner as process may now be served in the proper county.

This provision of the Act of 1919 is amended by Section 30 of the Act of June 14, 1923, P. L. 718, as follows:

> All civil actions for damages arising from the use and operation of any motor vehicle may, at the discretion of the plaintiff, be brought before any alderman, magistrate, or justice of the peace, in the county where the alleged damages were sustained, if the plaintiff has had said damages repaired, and shall produce