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ANTENUPTIAL AGREEMENTS IN PENNSYLVANIA

The problem of the validity of antenuptial agreements has been dealt with on numerous occasions by the Pennsylvania courts and, on the whole, the law pertaining to such contracts is well-settled. This paper attempts to bring before the reader the guiding principles which may be gleaned from the cases and may, perhaps, aid the practitioner who finds himself confronted with the problem of drawing up such an agreement for an elderly client bent upon marriage.

Antenuptial contracts, when viewed in the light of their purpose, which is to bar dower, trace their origin to the early similarly designed device of jointure. It will be remembered that once the concept of uses had been conceived and developed by the equity courts, practically all lands in England were held by one person to the use of another. Since the right of dower existed only in lands of which the husband died seised, the wife was deprived of dower because there was no seisin of land conveyed to uses. Consequently, in order to protect the wife, it became customary for the bride's parents to require the groom to take an estate from his feoffees and to limit it to himself and his intended wife for life or in tail in joint tenancy or jointure, the wife thus being provided with an estate for life in the event her husband predeceased her. It should be noted that prior to the Statute of Uses, a jointure itself was no bar to dower "for, it is established law, that a right, or title, of dower, cannot be barred by a collateral satisfaction."¹

As the effect of the Statute of Uses was to transfer the legal title to the owner of the use, a married woman would have become entitled to dower in lands which previously had been conveyed to the use of her husband although she had already been provided for by jointure. Foreseeing this prospect, Parliament inserted a provision in the statute which prohibited the widow from having both dower and jointure.² The law courts set up a number of requirements,³ all of which had to be met, in order for the jointure, called a "legal jointure," to bar dower. However, where the settlement did not comply with all the essentials of a legal jointure, it was recognized in equity as sufficient to bar dower provided it was assented to by the wife before marriage. Such a jointure was known as an "equitable jointure"; it was founded upon an agreement by the wife.

¹ Kennedy v. Nedrow, 1 Dallas 415 (Pa. 1789).
² Statute of 27 Henry VIII c. 10 § 6. That a widow may be barred of dower by a jointure made in pursuance of this statute in Pennsylvania, see Kennedy v. Nedrow, supra.
³ According to Blackstone "these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not pur autre vie, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be in satisfaction of her whole dower, and not of any particular part of it." Blackstone's Commentaries, Lewis' Edition (1902) Book 2 p. 600, § 138.
to relinquish dower, whereas a legal jointure barred dower irrespective of the wife's consent.4

Antenuptial agreements, therefore, owe their origin to so-called equitable jointures and such an agreement has been defined as "a contract which is entered into before, but in contemplation and generally in consideration of, marriage, and involves property or property rights and interests of the prospective husband or wife or both."5 In determining the validity of a prenuptial contract and in enforcing its provision, the general principles of equity will be applied.

The typical fact situation which gives rise to the problem of the validity of an antenuptial agreement is as follows: H, an elderly widower, possessed of considerable wealth and having children by a former marriage, desires the comfort and companionship of a second wife in his declining years. Generally, she is quite a few years his junior and the distinct probability is that she will outlive him. Being unwilling to pay the high price the intestate laws give the widow for a few years of marital joy, and at the same time desirous of preserving the bulk of his estate for the natural objects of his bounty, he resolves to have his prospective bride enter into an antenuptial agreement. The lawyer's problem is to advise him concerning the formation of such a contract bearing in mind the holdings of the Pennsylvania cases.

"Dower is a legal, an equitable, and a moral right. It is favored in a high degree by law, and, next to life and liberty, held sacred."6 Since the avowed purpose of an antenuptial contract is to bar dower, the contract is bound to be looked at with a searching eye by the courts. On the other hand, "the law regards with favor an antenuptial contract especially where it is entered into by parties each of whom are advanced in years with separate children and separate estates. Such family arrangements, in many instances, reconcile differences and avoid unpleasant disputes."7 They "are not inherently fraudulent nor is there any such presumption."8 However, if the agreement contains provisions contrary to public policy, it will be stricken down.

The third subsection of section four of the English Statute of Frauds, which relates to agreements made upon consideration of marriage, has no counterpart in the Pennsylvania statute and therefore the agreement may be oral,9 but "an oral antenuptial agreement should not be found, save upon clear and convincing proof."10 However, where the contract is one which is to affect the title to real estate, it falls within the purview of the Statute of Frauds relating to land11

5 41 C. J. S. 553.
8 Robinson's Estate, 222 Pa. 113, 70 A. 966 (1908).
9 Lant's Appeal, 95 Pa. 279 (1880).
10 Hunt's Appeal, 100 Pa. 590 (1882).
11 Act of March 21, 1772, 1 Sm. L. 389, 33 P. S. 1.
and must satisfy the familiar requirements of that statute in order to be enforceable. And in this connection, it has been held that a consummation of the marriage is not such part performance as will take the case out of the statute.\textsuperscript{12}

A problem which, surprisingly, has been litigated only rarely in Pennsylvania and other jurisdictions, and not at all in recent years, and yet an issue which could be decisive in any given case, is: What is the effect of the infancy of the wife upon the agreement? Some states have provided a solution of the problem in the form of statutes which usually provide that a female infant may bind herself by an antenuptial agreement where her parent or guardian has given his consent.\textsuperscript{1} But in the absence of statute the problem is one of the interpretation of the provisions of the antenuptial agreement itself, and the Pennsylvania rule, is that although the contract is valid, and binding upon the husband,\textsuperscript{14} it may be avoided or ratified by the wife within a reasonable time after she attains her majority even though entered into with the advice and consent of her parent and guardian.\textsuperscript{16}

In this respect, a distinction has been made between a jointure and an antenuptial agreement. In the case of \textit{Shaw v. Boyd},\textsuperscript{16} the infant female, in contemplation of marriage, executed a bond by which she agreed to relinquish her dower right in consideration of the sum of $500 to be paid to her by her husband's executors upon the husband's death. At the time of his death, the wife was still an infant; she gave a deed relinquishing her dower right and the executors paid her the $500. Upon re-marrying, she and her second husband brought an action of dower in which the court granted recovery despite the fact that she did not refund or tender the $500. Justice Gibson, later Chief Justice, who wrote the opinion of the court, said, \textit{inter alia}, that where a jointure is involved

"The fact of the \textit{feme} having been an infant at the time of the marriage, is altogether inoperative; for a jointure derives its efficacy as a bar, not from any supposed contract or assent of the \textit{feme}, but by the provisions of the statute 27 H. 8 c. 10 s. 6 which makes no distinction as to age. A jointure will, therefore, be available in the case of an infant, wherever it would be so in the case of an adult . . . the assent of the wife . . . [is not] an operative circumstance . . . [the] jointure being a bar \textit{a provisione viri}, and not \textit{ex contractu}."

But in this case there was no settlement by the husband upon the wife. There was nothing but the bond of the wife

"and it is settled, a jointure is not a contract by the wife for a provision, but an actual provision by the husband. What is there, then, in the case, but a naked contract by an infant in expectation of marriage, with the advice and consent of her parent and guardian . . . which she may, at the death of her husband, if she has then come of age, confirm or avoid at her election."

\textsuperscript{12} Flory v. Houck, 186 Pa. 263, 269, 40 A. 482 (1898); Kearney's Estate, 60 D. & C. 217 (1947).
\textsuperscript{14} See 81 Neb. 33, 115 N. W. 550 (1908); 142 Wis. 504, 125 N. W. 937 (1910).
\textsuperscript{16} Whichcote v. Lyle's Executors, 28 Pa. 73 (1857).
\textsuperscript{14} 5 S. & R. 309 (1819).
It is fundamental contract law that any agreement entered into with mutual assent and supported by a legal consideration is binding upon the parties thereto. Antenuptial agreements stand on a different footing however since their very purpose is to bar the sacred right of dower, and because the parties to the agreement stand in a confidential relationship. Thus the Pennsylvania cases repeat over and over the standard formula: "For their validity antenuptial contracts depend upon the presence of one of two factors: A reasonable provision for the wife, or, in the absence of such a provision, a full and fair disclosure to the wife of the husband's worth." The reader will observe that the rule is in the alternative; if it can be shown that the husband made a full disclosure, the court will not concern itself with the question of adequacy. Conversely, if the court deems the provision reasonable, whether or not the husband made a full disclosure is immaterial.

What is a reasonable provision for the wife? Mr. Justice Bell, in McClellan's Estate, reiterated the principle confirmed by all the cases: "It is . . . well established that in considering the adequacy of the provision for a wife . . . all of the relevant facts and circumstances surrounding the case must be considered; and the true test of adequacy is whether the provision . . . is sufficient to enable her to live comfortably after her husband's death in substantially the same way as, considering all the circumstances, she had previously lived." What are the relevant facts and circumstances, which the court will consider in determining the question of adequacy? An examination of the decisions indicates that the following facts are material: the husband's worth at the time of the agreement, not as of the time of his death, the wife's financial situation, the age and state of health of each of the parties, the number of times each party has been married previously, the number of children each party has by a former marriage, the intelligence of the parties, whether she is, or is likely to be the mother of any of his children, whether she aided him in accumulating his wealth, whether there are any other natural objects of the husband's bounty, and of course, the size of the provision compared to the amount retained. In this connection, the

20 Flannery's Estate, 315 Pa. 576, 173 A. 303 (1934); Smith's Appeal, 115 Pa. 319, 8 A. 582 (1887).
21 Kline v. Kline, 57 Pa. 120 (1868); McCready's Estate, 316 Pa. 246, 175 A. 554 (1934); Emery's Estate, 362 Pa. 142, 66 A.2d 262 (1949). See also note 20.
22 Ludwig's Appeal, 101 Pa. 535 (1882); Smith's Appeal, 115 Pa. 319, 8 A. 582 (1887); Neely's Appeal, 124 Pa. 406 (1889); Whitmer's Estate, 224 Pa. 413, 75 A. 551 (1909); Clark's Estate, 303 Pa. 538, 154 A. 919 (1931); McCready's Estate, 316 Pa. 246, 175 A. 554 (1934); Groff's Estate, 341 Pa. 105, 19 A.2d 107 (1941); McClellan's Estate, 365 Pa. 401, 75 A.2d 595 (1950).
opinion of Chief Justice Paxon in *Neely's Appeal*,\(^26\) merits quotation at length:

> "There is a marked distinction between this case and that of a young couple just entering upon the verge of life. In the latter instance they grow up together; the wife is the mother of his children; she shares his burdens in his early struggles, and often by her thrift and economy materially aids him in the accumulation of his fortune. To cut off such a wife with a mere support during life would be as unjust as it would be ungenerous. But when a man in the decline of life, who has been twice a widower, and who has two sets of children, for the third time leads a woman to the altar, and an elderly woman at that, it is very different. In such a case the wife reaps where she has not sown, and if she is provided with a comfortable support after her husband's death she has no just cause of complaint . . ."

Inasmuch as the express purpose of an antenuptial contract is to alter the provision which the law makes for the intended spouse, percentages are of little value in determining the adequacy of the provision the agreement makes for the wife.\(^26\) In some respects, each case is unique and must be decided on its own particular facts. Some examples of what the court considered fair and reasonable, and what as deemed unjust are the following:

1. In *Kline v. Kline*\(^27\) H disclosed but one tenth of his wealth; the provision for the wife was an annuity of forty dollars or about eleven cents a day. *Held*: "Such a pittance leaves her to be an object of private charity or public relief."

2. In *Bierer's Appeals*\(^28\) H was worth $60,000, W had nothing. He agreed that she should have five dollars thirty days after his death. *Held*: "This paltry sum . . . (is) manifestly . . . unreasonable and disproportionate . . ."

3. In *Ludwig's Appeal*\(^29\) H was worth $14,000; he agreed to furnish W a comfortable support during her life and a decent and Christian burial at her death, plus one dollar. *Held*: adequate. Said the court: "From a sentimental standpoint, the provision . . . would not seem to be generous. But a widower of 57 with 11 children, seldom contracts a second marriage from mere sentiment."

4. In *Clarke's Estate*\(^30\) H was worth $450,000; the agreement gave W an undivided one-eighth interest in H's estate at his death. *Held*: adequate.

5. In *Emery's Estate*\(^31\) H was worth $1,430,000; the agreement gave W $50,000 in bonds and securities outright. *Held*: adequate.

6. In *McClellan's Estate*\(^32\) H was worth $579,327; the agreement gave her $5,000, household furniture, and the right to live in an apartment rent-free during her widowhood. *Held*: unreasonable and unjust.

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\(^{25}\) 124 Pa. 406 (1889).
\(^{27}\) 57 Pa. 120 (1868).
\(^{28}\) 92 Pa. 265 (1880).
\(^{29}\) 101 Pa. 535 (1882).
\(^{30}\) 305 Pa. 338, 154 A. 919 (1931).
\(^{32}\) 365 Pa. 401, 75 A.2d 595 (1950).
Where the court concludes that the provision for the wife is manifestly unreasonable and grossly disproportionate, the effect is to raise a presumption of designed concealment amounting to a fraud on the wife, and throws the burden of proof of full and fair disclosure upon those who aver the validity of the agreement. This burden quite frequently cannot be carried and since the presumption is not overcome the transaction is stricken down as fraudulent. This leads one to a consideration of the problem of full disclosure.

The doctrine that the parties to an antenuptial contract stand in a confidential relationship has been followed without modification since it was announced by Mr. Justice Sharswood in the *Kline* case, *supra*. The learned Justice wrote:

"There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arm’s length... is a mistake. Surely when a man and woman are on the eve of marriage, and it is proposed between them... to enter into an antenuptial contract... it is the duty of each to be frank and unreserved in the disclosure of all circumstances materially bearing on the contemplated agreement."

Because of the close relationship, requiring the exercise of *ube rrima fides*, it is incumbent upon the prospective husband to impart to his intended bride sufficient information concerning the value of his estate to enable her to make an intelligent decision. There is no duty on her to investigate; the court will not impute to her selfish and interested motives at such a time. She has a right to assume that he will deal honestly with her. The intended wife should have an opportunity to read the contract or it should be read to her, and its effects on her legal rights fully explained and made clear. Frequently the cases suggest that she should have the benefit of independent counsel or the advice of friends. Knowledge of the extent and value of his estate will not be implied merely from the fact that she lived in the same neighborhood.

On the other hand, it is not necessary that the husband disclose to his bride the *exact* value of his estate; it is sufficient if she knows approximately what

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84 57 Pa. 120 (1868). See also Neely's Appeal, 124 Pa. 406 (1889); Groff's Estate, 341 Pa. 103, 19 A.2d 107 (1941); McClellan's Estate, 365 Pa. 401, 75 A.2d 595 (1950); Warner's Estate, 207 Pa. 580, 57 A. 35 (1904); 210 Pa. 431; Whitmer's Estate, 224 Pa. 413, 75 A. 351 (1909).


he is worth.\textsuperscript{38} Furthermore, in considering the question of whether she had sufficient knowledge to act wisely, the court will take into consideration the fact that she was a woman with considerable business experience and acumen. She may not blindly overlook facts apparent to all.\textsuperscript{39}

Frequently the agreement in question before the court contains a recital to the effect that the parties thereto have entered into the contract with full knowledge of the extent and value of the estate of the other, and the court is called upon to determine the effect of such an admission. The cases are not entirely harmonious, but the latest pronouncement\textsuperscript{40} on the subject asserts that such a recital is only \textit{prima facie} evidence that a full and fair disclosure was made and may be overcome by proof of facts to the contrary.

In view of the strict requirement of full and fair disclosure, one may be led to doubt whether a sound antenuptial agreement can ever be made. The answer to this, of course, lies in the many agreements which have been upheld by the courts as valid. When entered into knowingly and understandably, they will be enforced with full rigor despite the fact that they may be harsh and ungenerous. The wife has only herself to blame if she willingly bargains away her rights as a widow for the proverbial mess of porridge. For example, in Neely's Appeal\textsuperscript{41} the wife balked at signing the agreement, called the contract "mean" and shed some tears until the husband told her there would be no wedding unless she signed. The court remarked, somewhat admiringly, that "Mr. Neely was a keen, shrewd, firm, business man."

An interesting problem, not yet considered by the Pennsylvania courts, is what effect, if any, a divorce has upon an antenuptial agreement. The Pennsylvania Divorce Law\textsuperscript{42} provides that after a decree of divorce \textit{a vinculo matrimonii}, "all and every of the duties, rights, and claims accruing to either of the said parties, at any time heretofore, in pursuance of the said marriage shall cease and determine . . ." Does this provision mean that a dissolution of the marriage bond will terminate an antenuptial contract?

One approach to a solution of the problem is to draw an analogy to the settled rule where separation agreements or postnuptial settlements are involved. The weight of authority in such cases is to the effect that a divorce does not distinguish the agreement in the absence of a provision in the contract to the con-

\textsuperscript{38} McCready's Estate, 316 Pa. 246, 175 A. 554 (1934); In re Holwig's Estate, 348 Pa. 71, 33 A.2d 915; Emery's Estate, 362 Pa. 142.
\textsuperscript{39} Ibid.
\textsuperscript{40} McClellan's Estate, 365 Pa. 401, 75 A.2d 595 (1950). In this connection, see also Emery's Estate, 362 Pa. 142; Groff's Estate, 341 Pa. 105, 19 A.2d 107 (1941); McCready's Estate, 316 Pa. 246; Clark's Estate, 303 Pa. 538; Smith's Appeal, 115 Pa. 319.
\textsuperscript{41} 124 Pa. 406 (1889). See also Ludwig's Appeal, 101 Pa. 555, where the court said: "... it is very clear she was of that opinion, (that the provision was adequate) and that is an end of the case."
\textsuperscript{42} Act of May 2, 1929, P. L. 1237, as amended, § 55.23 P. S. § 1-69.
For example, in *Mur's Estate* the husband obtained an absolute divorce from his wife on the ground of adultery committed subsequent to the making of a separation agreement. The court held that the divorce did not terminate the agreement and that the wife was entitled to its benefits. The court remarked that if the husband wanted to make the chastity of his wife a condition to the continuance of the agreement he should have inserted a clause to that effect, holding that it would not alter the contract however circumstances may change or conditions vary. The court reasoned that her adultery did not diminish the benefits he obtained by reason of the contract. And one textwriter broadly asserts that divorce does not terminate antenuptial or postnuptial agreements, and that the above-quoted provision of the Pennsylvania Divorce Law has no effect upon the validity of such agreements, in the theory that the wife's right to the payments contracted for rests upon the agreement and not upon the marriage.

However, the courts of other jurisdictions which have had occasion to deal with the question have not drawn the analogy and have come to a different conclusion. The Supreme Court of Ohio, in a case of first impression involving an antenuptial agreement, refused to apply the general rule in regard to the effect of divorce on other marriage settlements. In this case the parties entered into an antenuptial contract, married, and were divorced thirteen years later by reason of the wife's aggression. The court held that in sound reason and good conscience she could not require performance of a contract which she herself had failed and refused to perform. In a somewhat similar case, the Supreme Court of Iowa thought it would be "monstrous" to allow a wife who had abandoned her husband without lawful cause to enforce the antenuptial agreement. "The consideration of the instrument is the marriage contract. If it be broken and violated, the antenuptial contract cannot be enforced." The cases noted above appear to be based upon the theory that there is a failure of consideration, and stressing the fact that the party seeking to enforce the agreement is the aggressor, apply the equitable maxim that a wrongdoer may not benefit by his own wrongful acts. The Ohio court, in the *Burkhart* case, supra, emphasized this theory when it said that "the rights the wife agreed to relinquish were those of a surviving spouse. But at the time her former husband died she was not his wife, and hence had no rights as a surviving spouse to relinquish in consideration for the sums she now claims from his estate."

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43 *A. L. R. 473.*
44 *Pa. Super. 393 (1915).*
45 2 *Freedman, Law of Marriage and Divorce in Pennsylvania 1405 (1944).* It is noteworthy that none of the cases cited by the author as authority for the proposition involved an antenuptial agreement; the facts of the cases are confined to separation agreements and postnuptial agreements.
46 *Southern Ohio Savings Bank and Trust Co. v. Burkhart, 148 Ohio St. 149, 74 N. E. 2d 67 (1947).*
47 *York v. Ferner, 59 Iowa 487, 13 N. W. 630 (1882).*
The Supreme Court of Illinois in the case of *Seuss v. Schukat* advances yet another theory, which makes no distinction as to which party was the aggressor, and which has as its core the hypothesis that the wife’s rights depend not upon the *agreement*, but upon the *marriage*. It is interesting to note that the court affirms the general rule where marriage settlements and separation agreements are involved, holding that the rights under such agreements are contractual rights which exist independently of the marriage and therefore survive a divorce. On the other hand, the well-settled rule is that an absolute divorce ordinarily terminates all rights and interests of the divorced parties in the property of each other which are dependent upon the marriage such as dower, courtesy, and rights of inheritance under the intestate law. Antenuptial agreements are designed to bar such rights; in effect, the agreement is but a substitute for those rights, and once the marriage contemplated by the agreement has been dissolved the object of the agreement has been accomplished. Accordingly, the court holds that "An existing antenuptial agreement, made in contemplation of the particular marriage is, after its dissolution, without any purpose or effect and necessarily is terminated."

In a rare case which involved the effect of an annulment on a prenuptial contract, the husband-thief’s sureties sued his former wife, who had obtained an annulment on the ground of fraud, for the return of property he had given her under the terms of the contract on the theory that as an annulment renders the marriage void *ab initio*, there was a complete failure of consideration. Chief Justice Cardozo refused relief, noting that the misconduct was the husband’s, and were he the one bringing the action, he would be met by the general rule that recovery for failure of consideration is governed by equitable principles. Although the decree “destroyed the marriage from the beginning as a source of rights and duties . . . it could not obliterate the past and make events unreal.” The husband had obtained the benefits of the marriage while it lasted and the rights of the sureties rose no higher than his.

The preceding discussion will serve to point out to the reader the present unsettled state of the law in regard to this particular aspect of the validity of antenuptial agreements. There appears to be one rule for marriage settlements, meaning thereby postnuptial settlements and separation agreements, and another rule for antenuptial contracts. As there is a complete absence of authority in Pennsylvania in this respect, and recognizing the possibility that our courts may make no distinction between marriage settlements and antenuptial agreements, the prudent attorney, in drawing up such an agreement, will want to insert a *dum casta* clause giving some protection to his client in the event of a divorce.

48 358 Ill. 27, 192 N. E. 668, 95 A. L. R. 1461. See also 47 A. L. R. 473.
49 *Amer. Surety Co. v. Conner*, 251 N. Y. 1, 166 N. E. 783, 65 A. L. R. 244 (1929).
50 See further 47 A. L. R. 473.
On occasions, the courts have been called upon to determine the status of the wife where the antenuptial agreement contains a provision that the husband's heirs or executors shall pay a stipulated sum to the wife in lieu of any rights she would otherwise have as his widow. The cases uniformly hold that an antenuptial agreement in the absence of an indication in the agreement to the contrary ordinarily constitutes the wife a "creditor" of her husband's estate rather than an "heir," and the amount agreed to be paid is a debt which the wife may compel payment of by suit if necessary. This rule has important consequences. The wife is put on a par with all other creditors and must present her claim in like manner; she has no preferential privileges and her claim will not be paid before the other debts of her husband to which the law gives priority such as expenses of administration.

In Fridenburg's Estate the question arose whether the Commonwealth could insist on payment of the transfer inheritance tax assessed on the amount agreed to be paid to the wife. The court held that "As she takes neither under the will, nor against the will, nor under the intestate law, we know of no act of assembly under which such tax may be properly and legally assessed." However, the husband may make a provision for his wife in his will and put her to an election as to whether or not she will accept the provision and abandon her rights under the antenuptial contract. But she will not be required to make such an election unless it reasonably appears that this was his intention since the husband is not prevented from making, nor the widow from accepting, a gift provided by the will merely because there is an existing antenuptial agreement. However, if it is determined that his intention was to make her choose between the will and the agreement, and she selects to consider herself a legatee rather than a creditor, her status is thereby changed and the transfer inheritance tax must be paid.

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61 Cherry's Estate, 29 D. & C. 380 (1937).
64 In re Goeckel's Estate, 198 A. 504 (Pa. 1938). See also In re Brown's Estate, 340 Pa. 350, 17 A.2d 331 (1941).
65 B.D. & C. 705 (1927).
67 Cherry's Estate, 29 D. & C. 380 (1937).