



1954

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John E. Howe  
*St. Louis University*

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### Recommended Citation

Howe, John E. (1954) "Renunciation by the Heir, Devisee or Legatee," *Kentucky Law Journal*: Vol. 42 : Iss. 4 , Article 5.  
Available at: <https://uknowledge.uky.edu/klj/vol42/iss4/5>

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## Renunciation by the Heir, Devisee or Legatee

By JOHN E. HOWE\*

In discussing the problem of renunciation by the heir, devisee or legatee one is not confronted with the problem of framing a factual situation to illustrate the unjustness of the present rule. In *Hardenbergh v. Commissioner of Internal Revenue*<sup>1</sup> we have an actual case which serves that purpose. In that case the decedent left to survive him as his only heirs at law a wife, daughter and son. Prior to the time of his death he had made statements which indicated his intent to make a will by which he would give all of his property to the son. The will was never executed, but after his death the wife and daughter renounced the interest that they had in the estate so that the supposed intent of the deceased would be effected. The Collector of Internal Revenue became involved at this point, because it was his contention that the renunciation was actually a transfer from the decedent's wife and daughter to the son, and that the transfer was taxable under the federal gift tax law. The courts agreed with this contention.

The decision in the case is based on the theory that an heir can not renounce the share he receives under the Statute of Descent and Distribution. Therefore, when one has an attempted renunciation and the property passes to another, the title that is taken is deemed to come from the renouncer, and the renunciation has the effect of an outright transfer.

The decision in the *Hardenbergh* case has been criticized for two reasons. First: Regardless of prior decisions, the assessment of a gift tax in such circumstances is unconstitutional. Second: The authority upon which the court relied, when traced to its original source, does not support the rule that an heir can not renounce his inheritance.<sup>2</sup>

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\* A.B., Western Kentucky State Teachers College; LL.B., University of Kentucky; LL.M., University of Michigan. Member of Kentucky and Missouri Bars. Associate Professor, St. Louis University School of Law, St. Louis 8, Mo.

<sup>1</sup> 198 F. 2d 63 (8th Cir. 1952), cert. denied, 344 U.S. 836 (1952).

<sup>2</sup> Roehner and Roehner, *Renunciation As Taxable Gift—An Unconstitutional Tax Decision*, 8 TAX L. R. 289 (1953).

It may seem incredible that an heir, or devisee, or legatee would refuse to take a valuable asset that is given to him without any consideration on his part. In the ordinary case he will not refuse this legacy or inheritance, but under some circumstances he finds it necessary to renounce the gift in order to accomplish an objective that he has in mind. In the *Hardenbergh Case* the heirs renounced to bring about the decedent's expressed intention. In some instances the heir has attempted to renounce to prevent his creditor from reaching the property,<sup>3</sup> or to fulfill an obligation that was taken when the heir became a member of a religious order requiring him to forego tangible wealth.<sup>4</sup> The devisee or legatee has also renounced to defeat his creditors;<sup>5</sup> to prevent liability for a statutory assessment against bank stock, which stock was the subject matter of the legacy;<sup>6</sup> to escape the burden of a charge on devised realty;<sup>7</sup> to defeat the wife's claim to the property in a divorce suit;<sup>8</sup> to defeat the will, and thus permit the assets to pass as intestate property;<sup>9</sup> to accelerate a remainder;<sup>10</sup> to remove any objection that he is not a competent witness because of his interest;<sup>11</sup> and to enable him to recover a fee as attorney that is greater than the sum prescribed by the testator.<sup>12</sup>

The *Hardenbergh* case, in holding that the heir could not renounce, followed a rule that is supported by a majority of the cases involving the problem.<sup>13</sup> On the other hand, the courts have

<sup>3</sup> *Coomes v. Finegan*, 233 Iowa 448, 7 N.W. 2d 729 (1943); *Bostian v. Milens*, 239 Mo. App. 555, 193 S.W. 2d 797 (1946); *McQuiddy Printing Co. v. Hirsig*, 23 Tenn. App. 434, 134 S.W. 2d 197 (1939).

<sup>4</sup> *In Re Johnston's Estate*, 186 Wis. 599, 203 N.W. 376 (1925).

<sup>5</sup> *In Re Kalt's Estate*, 16 Cal. 2d 807, 108 P. 2d 401 (1940); *Bogenrief v. Law*, 222 Iowa 1303, 271 N.W. 229 (1937); *Lehr v. Switzer*, 213 Iowa 658, 239 N.W. 564 (1931); *Funk v. Grulke*, 204 Iowa 979, 213 N.W. 608 (1927); *Schoonover v. Osborne*, 193 Iowa 474, 187 N.W. 20 (1922); *In Re Wilson's Estate*, 298 N.Y. 398, 83 N.E. 2d 852 (1949); *Bradford v. Calhoun*, 120 Tenn. 53, 109 S.W. 502, 19 L.R.A. (N.S.) 595 (1908).

<sup>6</sup> *Hardesty v. Corrothers et al.*, 31 F. Supp. 365 (N.D. W.Va. 1940); *Bacon v. Barber*, 110 Vt. 280, 6 A. 2d 9, 123 A.L.R. 253 (1939).

<sup>7</sup> *Foulkes v. Foulkes*, 173 Ark. 183, 293 S.W. 1 (1927); *Windquist v. Doering*, 135 Kan. 92, 9 P. 2d 632 (1932); *Chilcoat v. Reid*, 154 Md. 378, 140 Atl. 100 (1928).

<sup>8</sup> *Blake v. Blake*, 147 Ore. 43, 31 P. 2d 768 (1934).

<sup>9</sup> *In Re Murphy's Estate*, 217 Iowa 1291, 252 N.W. 532 (1934); *Davenport v. Sandeman*, 204 Iowa 927, 216 N.W. 55 (1927).

<sup>10</sup> *Albright et al. v. Albright et al.*, 192 Tenn. 326, 241 S.W. 2d 415 (1951).

<sup>11</sup> *Burritt v. Silliman*, 13 N.Y. 93 (1855).

<sup>12</sup> *Kingdom of Yugo-Slavia v. Jovanovich*, 100 Colo. 406, 69 P. 2d 311 (1937).

<sup>13</sup> *Coomes v. Finegan*, 233 Iowa 448, 7 N.W. 2d 729 (1943); *Bostian v. Milens*, 239 Mo. App. 555, 193 S.W. 2d 797 (1946); see *Watson v. Watson*, 13

permitted the devisee or legatee to renounce the benefit that accrues to him under the will of the decedent.<sup>14</sup> Why should the heir be denied the right to refuse his inheritance while a devisee or legatee is allowed to reject the provision that has been made for him? Permitting renunciation in the one case and refusing it in the other does not seem logical, but the courts justify this inconsistency on the theory that the title is cast on the heir by operation of law,<sup>15</sup> that this passage of title is regulated entirely by statute,<sup>16</sup> and that one should not have the power to prevent or defeat a result that has been brought about by statute.<sup>17</sup> The net effect of this reasoning compels one to accept as correct the premise that the law can do no wrong, and that one who is given property through operation of the Statute of Descent and Distribution has no right to refuse it. We must further accept as a conclusive fact the presumption that the legislature has acted for the best interests of the person, and that for this reason such person should not be allowed to make any decision or election which would defeat the result that the legislature has said should occur. However, where property passes under a last will and testament it is given to the beneficiary by the act of an individual and to require him to accept it may not be for his best interests. For that reason he should be given an option to refuse the gift. While one can not dispute the right to refuse a devise that has been burdened with an onerous condition, it would seem equally true that each person is entitled to decide for himself

Conn. 83, 85 (1838); *McQuiddy Printing Co. v. Hirsig*, 23 Tenn. App. 434, 134 S.W. 2d 197, 202 (1939); *In Re Johnston's Estate*, 186 Wis. 599, 203 N.W. 376, 378 (1925).

<sup>14</sup> *Brown v. Routzhan*, 63 F. 2d 914 (6th Cir. 1933); *Hardesty v. Corrothers et al.*, 31 F. Supp. 365 (N.D. W.Va. 1940); *Kingdom of Yugo-Slavia v. Jovanovich*, 100 Colo. 406, 69 P. 2d 311 (1937); *People v. Flanagan*, 331 Ill. 203, 162 N.E. 848 (1928); *Lehr v. Switzer*, 213 Iowa 658, 239 N.W. 564 (1931); *Funk v. Grulke*, 204 Iowa 979, 213 N.W. 608 (1927); *Schoonover v. Osborne*, 193 Iowa 474, 187 N.W. 20 (1922); *In Re Wells' Estate*, 142 Iowa 255, 120 N.W. 713 (1909); *In Re Stone's Estate*, 132 Iowa 136, 109 N.W. 455, 10 Ann. Cas. 1033 (1906); *Chilcoat v. Reid*, 154 Md. 378, 140 Atl. 100 (1928); *In Re Meyer's Estate*, 137 Misc. 730, 244 N.Y.S. 328 (1930); *In Re Wolfe's Estate*, 89 App. Div. 439, 85 N.Y.S. 949 (1903); *Burritt v. Silliman*, 13 N.Y. 93 (1855); *Bradford v. Calhoun*, 120 Tenn. 53, 109 S.W. 502, 19 L.R.A. (N.S.) 595 (1908); *Bacon v. Barber*, 110 Vt. 280, 6 A. 2d 9, 123 A.L.R. 253 (1939); *see* *Kearley v. Crawford*, 112 Fla. 43, 151 So. 293, 297 (1933); *In Re Howe's Estate*, 112 N. J. Eq. 17, 163 Atl. 234, 236 (1932); *Blake v. Blake*, 147 Ore. 43, 31 P. 2d 768, 771 (1934); *Tarr v. Robinson*, 158 Pa. 60, 27 Atl. 859, 860 (1893).

<sup>15</sup> *Coomes v. Finegan*, 233 Iowa 448, 7 N.W. 2d 729 (1943).

<sup>16</sup> *People v. Flanagan*, 331 Ill. 203, 162 N.E. 848 (1928).

<sup>17</sup> *Bostian v. Milens*, 239 Mo. App. 555, 193 S.W. 2d 797 (1946).

whether or not his succession (either testate or intestate) is burdensome, and if he determines that it is such then he should be allowed to reject the same regardless of his position as an heir, a devisee or a legatee.<sup>18</sup> In other words, and without regard to the character of the rule that is adopted, there should be no differentiation made between testate and intestate succession.

The devisee or legatee has even been given the right to renounce in a case where his refusal to accept was motivated by the fear that the property would be taken by his creditors to satisfy their claims.<sup>19</sup> In fact, the courts do not consider the motive which prompts the beneficiary to renounce, because the right that he has to renounce is considered to be superior to any claim that his creditors may have.<sup>20</sup> Possibly this rule can be justified on the theory that the right to elect is personal, and that any election must therefore depend on the intent of the individual himself. If we refuse to give him the right to renounce a devise or legacy we are saying in effect that he accepts such. From this forced acceptance it follows that he intended to accept, and the ultimate result is that the court forms the intent that should remain with the person himself. We must admit that the court has refused to compel a surviving husband to take against the will even though creditors were prejudiced thereby,<sup>21</sup> but does it necessarily follow that we should also refuse to do anything that would interfere with a beneficiary's choice as to whether he will accept or refuse that which is given to him by a last will and testament?

The wisdom of allowing the devisee to refuse the devise to the prejudice of his creditors was raised in one of the early cases.<sup>22</sup> The court, in that case, suggested the possibility of presuming an acceptance, and once an acceptance—even though presumed—was found, it would be a fraud on the creditors to allow the beneficiary to change his mind and reject the provision of the will. However, with one possible exception, the right of the de-

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<sup>18</sup> It is probably true that burdens are more likely to be found in testate succession as the testator may attach a condition to the devise or bequest, but an inheritance—even though free from conditions—can also in the eyes of the heir be the proverbial "white elephant."

<sup>19</sup> *Funk v. Grulke*, 204 Iowa 979, 213 N.W. 608 (1927); *Bradford v. Calhoun*, 120 Tenn. 53, 109 S.W. 502, 19 L.R.A. (N.S.) 595 (1908).

<sup>20</sup> *Schoonover v. Osborne*, 193 Iowa 474, 187 N.W. 20 (1922).

<sup>21</sup> *Pike County v. Sowards*, 147 Ky. 37, 143 S.W. 745 (1912).

<sup>22</sup> *Ex Parte Fuller*, 2 Story 327 (U.S. 1842).

visee or legatee to renounce has not been questioned. In a California case<sup>23</sup> the beneficiary under a will was indebted on certain notes. The holders of the notes brought suit and recovered judgments. When writs of attachment were levied on the debtor's interest in the estate, the debtor tried to renounce. In its opinion the court said:

A legatee is free to renounce even a beneficial bequest, so long as the rights of third parties are not involved. If, however, the claims of his creditors would thereby be defeated he can not exercise the same freedom.<sup>24</sup>

The California case stands alone insofar as creditors are concerned. One difficulty that is encountered in giving relief to creditors who are prejudiced by the renunciation lies in the failure of the court to find some firm basis to permit the devisee or legatee to renounce, and at the same time permit the creditors to reach the property. It has been suggested that a renunciation to defeat creditors is in the same category as a conveyance in fraud of the creditors. Where one does convey to defraud creditors it is quite common to have a statutory provision providing that such conveyance is void insofar as the creditors are concerned.<sup>25</sup> For that reason the court should either set aside the renunciation on the theory that the situation is covered by the statute, or it should enjoin the devisee from renouncing.<sup>26</sup> However, in the case where this was suggested the court refused to enjoin because the will specifically gave the beneficiaries the right to renounce.

Even without such a right being spelled out in the will it is doubtful that a different result would be reached. This would follow from the effect that the courts give a renunciation. While the cases are not in complete agreement as to the effect of the renunciation, they all seem to agree that the title does not pass from the devisee or legatee in the event the testamentary gift is

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<sup>23</sup> *In Re Kalt's Estate*, 16 Cal. 2d 807, 108 P. 2d 401 (1940).

<sup>24</sup> *Id.* at 810, 108 P. 2d at 404.

<sup>25</sup> For example, KY. REV. STAT. 378.010 provides: "Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers or other persons, and every bond or other evidence of debt given, action commenced or judgment suffered, with like intent, shall be void as against such creditors, purchasers and other persons. . . ."

<sup>26</sup> *Ohio National Bank of Columbus v. Miller et al.*, Court of Appeals of Ohio, Franklin County, 57 N.E. 2d 717 (1943).

refused. One line of cases adopts the theory that the title passes to the legatee or devisee, but that a renunciation relates back to the time when, under the law, the will became effective.<sup>27</sup> The net effect is that the beneficiary never had the title, and you can not therefore treat his refusal to accept as a transfer from him to the person that takes because of such renunciation. A second theory is based upon the thought that the title does not pass to the devisee or legatee until he has by some means indicated his acceptance of the provision that has been made for him. Thus, a refusal to accept could not be treated as a conveyance, because the beneficiary under the will has nothing to convey until he does accept.<sup>28</sup> This latter view may be capable of division into two branches; one line holding that there must actually be an acceptance, the other making use of a presumption of acceptance, which presumption is erased when the devisee or legatee actually renounces.<sup>29</sup> The net result of any view is about the same; a renunciation by the devisee or legatee is not to be considered as a transfer by him, because he has nothing that can be the subject matter of a conveyance or transfer. Thus, under neither theory would the renunciation be said to amount to a conveyance or transfer.

Where the court can find an acceptance or a defective renunciation the creditor will be protected, and he can subject the beneficiary's interest to the payment of the debt.<sup>30</sup> This is especially important as the courts say that they will presume that a person will accept items of value, and that a legacy or devise which is beneficial to the person receiving it will not be renounced.<sup>31</sup> For this reason it is essential that the beneficiary, in order to defeat his creditor, take some step to indicate his unwillingness to accept the provision made for him. If he has no desire to take the testamentary gift he must—by some positive act—indicate his renunciation or refusal of the provision.<sup>32</sup> The in-

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<sup>27</sup> *People v. Flanagan*, 331 Ill. 203, 162 N.E. 848 (1928); *Schoonover v. Osborne*, 193 Iowa 474, 187 N.W. 20 (1922); *In Re Wilson's Estate*, 298 N.Y. 398, 83 N.E. 2d 852 (1949); *In Re Meyer's Estate*, 137 Misc. 730, 244 N.Y.S. 328 (1930).

<sup>28</sup> *Bouse v. Hull*, 168 Md. 1, 176 Atl. 645 (1935); *Greely v. Houston*, 149 Miss. 799, 114 So. 740 (1927); *Olsen v. Wright*, 119 N.J. Eq. 103, 181 Atl. 182 (1935).

<sup>29</sup> *Succession of Tertron*, 217 La. 901, 47 S. 2d 681 (1950).

<sup>30</sup> *In Re Howe's Estate*, 112 N.J. Eq. 17, 163 Atl. 234 (1932).

<sup>31</sup> See note 43, *infra*.

<sup>32</sup> *Ex Parte Fuller*, 2 Story 327 (U.S. 1842); *Peter v. Peter*, 343 Ill. 493, 175

dication of his rejection need not be made by a deed, the renunciation being determined in many cases by the acts of the party.<sup>33</sup> It may seem that a refusal by a devisee should be by deed as the subject matter is real property, but when one remembers that a renunciation is not a transfer it follows that there would be no sound reason to require the refusal to be by deed. However, the rejection should not be in the form of an assignment, as this indicates an acceptance coupled with a transfer or conveyance.<sup>34</sup>

Furthermore, the renunciation by the devisee or legatee is required to be made within a reasonable time.<sup>35</sup> Whether or not he has done so is a question to be determined from the facts of the case, and this will in most instances be a matter to be decided by the jury.<sup>36</sup> However, in any event the renunciation must be made before there has been an acceptance.<sup>37</sup> The case of *In Re Howe's Estate*<sup>38</sup> involved an attempted renunciation some four months after the will was admitted to probate. The court did not permit the renunciation because it was felt that an unreasonable period of time had elapsed even though a statute gave the surviving widow six months to decide whether she would take the testamentary provision made for her, or her statutory share. However, the renunciation in that case was made by the personal representative of the devisee and the court may have been influenced by the argument that the personal representative of the devisee should not have had a right to renounce. A period of six years has been held to be an unreasonable time in which to renounce, the court finding that the presumption of acceptance became conclusive during that time.<sup>39</sup> The same result has been

N.E. 846 (1931); *In Re Wilson's Estate*, 298 N.Y. 398, 83 N.E. 2d 852 (1949); *Bacon v. Barber*, 110 Vt. 280, 6 A. 2d 9, 123 A.L.R. 253 (1939).

<sup>33</sup> *Brown v. Routzhan*, 63 F. 2d 914 (6th Cir. 1933); *King v. Gridley*, 46 Conn. 555 (1879); *Albany Hospital v. Hanson*, 214 N.Y. 435, 108 N.E. 812 (1915); *American Church Missionary Society v. Griswold College*, 27 Misc. 42, 58 N.Y.S. 3 (1899); *Bradford v. Calhoun*, 120 Tenn. 53, 109 S.W. 502, 19 L.R.A. (N.S.) 595 (1908).

<sup>34</sup> *McQuiddy Printing Co. v. Hirsig*, 23 Tenn. App. 434, 134 S.W. 2d 197 (1939).

<sup>35</sup> *Brown v. Routzhan*, 63 F. 2d 914 (6th Cir. 1933); *In Re Howe's Estate*, 112 N.J. Eq. 17, 163 Atl. 234 (1932); *In Re Wilson's Estate*, 298 N.Y. 398, 83 N.E. 2d 852 (1949); *Bacon v. Barber*, 110 Vt. 280, 6 A. 2d 9, 123 A.L.R. 253 (1939).

<sup>36</sup> *Bacon v. Barber*, *supra* note 35.

<sup>37</sup> *Bogenrief v. Law*, 222 Iowa 1303, 271 N.W. 229 (1937); *Blake v. Blake*, 147 Ore. 43, 31 P. 2d 768 (1934); *McQuiddy Printing Co. v. Hirsig*, 23 Tenn. App. 434, 134 S.W. 2d 197 (1939).

<sup>38</sup> 112 N.J. Eq. 17, 163 Atl. 234 (1932).

<sup>39</sup> *Storm v. Wood*, 100 Kan. 556, 164 Pac. 1100 (1917).

reached where the devisee waited 13 years before renouncing.<sup>40</sup> However, in an Iowa case the devisee was allowed to renounce four years after the will became effective, because it was found that no one would suffer by the delay.<sup>41</sup> Of course the courts will presume an acceptance in the event that the testamentary provision is beneficial to the devisee or legatee,<sup>42</sup> but this presumption of acceptance is not conclusive and the beneficiary may overcome it by evidence showing that he did renounce.<sup>43</sup> The effect of the presumption is expressed in the case of *Bacon vs. Barber* where the court stated:<sup>44</sup>

... the presumption [of acceptance] has the effect of casting upon the party claiming nonacceptance the duty of going forward with the evidence in support of his contention. [Citations omitted]. In this meaning of the phrase, the burden of proof is upon him. [Citations omitted].

It does not seem just to allow a renunciation where the creditors of the devisee or legatee would be allowed to reach the property to satisfy their claim if the beneficiary accepted. In the case of a general power of appointment the donee of the power is not compelled to exercise it in favor of his creditors, but if he does exercise the power in favor of a volunteer the courts will permit the creditors to take the subject matter of the power even though it was exercised for the benefit of third persons.<sup>45</sup> In other words, the courts will compel the donee of a power to act equitably for the benefit of his creditors, but in the case of a renunciation a different result is reached. In fact, in a renunciation the creditors are harmed because the devisee or legatee acts whereas, in a power the creditors would take nothing if the donee fails to act.

The courts have had little difficulty in disposing of the prop-

<sup>40</sup> *Crumpler v. Bartfield & Wilson Co.*, 114 Ga. 570, 40 S.E. 808 (1902).

<sup>41</sup> *Lehr v. Switzer*, 213 Iowa 658, 239 N.W. 564 (1931).

<sup>42</sup> There may be a presumption that an onerous devise or bequest is refused. See *Chilcoat v. Reid*, 154 Md. 378, 140 Atl. 100 (1928); *Bradford v. Leake*, 124 Tenn. 312, 137 S.W. 96 (1911).

<sup>43</sup> *Ex Parte Fuller*, 2 Story 327 (U.S. 1842); *Hardesty v. Corrothers et al*, 31 F. Supp. 365 (N.D. W.Va. 1940); *Storm v. Wood*, 100 Kan. 556, 164 Pac. 1100 (1917); *Bouse v. Hull*, 168 Md. 1, 176 Atl. 645 (1935); *Olsen v. Wright*, 119 N.J. Eq. 103, 181 Atl. 182 (1935); *In Re Howe's Estate*, 112 N.J. Eq. 17, 163 Atl. 234 (1932); *In Re Waring's Will*, 293 N.Y. 186, 56 N.E. 2d 543 (1944); *Bradford v. Leake*, 124 Tenn. 312, 137 S.W. 96 (1911).

<sup>44</sup> 110 Vt. 280, 6 A. 2d 9, 12 (1939).

<sup>45</sup> 1 SIMES, FUTURE INTERESTS sec. 265 (1936).

erty that the devisee or legatee refuses to accept. Where the devise or bequest is rejected, and there is a residuary clause that is broad enough to include the rejected property, the same will go into the residue of the estate and pass to the residuary legatee.<sup>46</sup> If the residuary clause is not broad enough to cover the rejected property, i.e., where a devisee rejects and the residuary clause includes only the personal property, the property passes as intestate property.<sup>47</sup> The property that is not accepted will also pass to the heirs when the residuary legatee renounces, provided that there is no alternate or joint residuary legatee who will be entitled to take.<sup>48</sup>

Some difficulty could be experienced in disposing of property that the beneficiary under the will has rejected. Assume for example that the sole residuary legatee renounces and that such legatee is also one of the heirs. From what has been said, such residuary legatee would not be allowed to renounce his intestate share as an heir. Thus, if he had creditors who wanted to take the property, he would defeat them from taking the share that he would receive as a residuary legatee, but he would immediately place at their disposal the share that he would take as an heir. Should we, in that case, make an exception and allow the heir to renounce so that the creditors would be completely defeated in their attempt to reach the property? Another case that presents a special problem involves the devisee who renounces to escape a burdensome condition that has been attached to the gift by the testator. This beneficiary, if he is also an heir, may renounce the devise and then claim that he is entitled to a share of the property as heir of the decedent. In that case it would seem doubtful that the court could attach any condition on the property that passes under the intestate succession, but at the same time it does not seem right to permit the devisee-heir to take even a part of the property free and clear of the condition that was attached by the testator. It is true that the condition might be deemed to be a charge on the land, and that the bene-

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<sup>46</sup> *In Re Arms' Estate*, 186 Cal. 554, 199 Pac. 1053 (1921); *Myers v. Smith*, 235 Iowa 385, 16 N.W. 2d 628 (1944); *In Re Meyer's Estate*, 137 Misc. 730, 244 N.Y.S. 328 (1930); *In Re Wolfe's Estate*, 89 App. Div. 439, 85 N.Y.S. 949 (1903).

<sup>47</sup> *Bugbee v. Sargent*, 23 Maine 269 (1843); *Chilcoat v. Reid*, 154 Md. 378, 140 Atl. 100 (1928).

<sup>48</sup> *Brown v. Kalene et al*, 230 Iowa 76, 296 N.W. 809 (1941); *Lehr v. Switzer*, 213 Iowa 658, 239 N.W. 564 (1931).

ficiary of the charge could enforce his lien against the property even though the devisee has renounced,<sup>49</sup> but this result could not be achieved where the condition does not amount to a charge.

Another problem arises where the beneficiary wishes to renounce one gift but accept others. In the normal case, unless the contrary appears, the devisee or legatee cannot reject the burdensome part of the gift and accept that which is beneficial.<sup>50</sup>

The phrase "unless the contrary appears" is of little assistance in making a determination as to whether or not there can be a partial renunciation. If the will specifically provides that the beneficiary shall have a right to take part and refuse part there will be little question about his right to do so. But, very few wills are that explicit. If it appears that there are two separate and distinct provisions for the beneficiary he will have the right to renounce one and accept the other.<sup>51</sup> However, no infallible test seems to exist for determining whether there are two separate gifts, or one gift with two parts. The right of partial renunciation may also be permitted where the beneficiary takes in two capacities, i.e., one part absolutely and the other part as a trustee. In that case he will be permitted to reject the absolute interest, but accept the part that is given to him as a trustee.<sup>52</sup> These are two examples where the contrary has appeared and as the cases increase in number the list should also expand.

### *Conclusions*

(1) The desirability of the present rule is doubted. If the devisee or legatee is allowed to renounce, the heir should be given a like right. The reason advanced by the court for the discrepancy does not justify it, and no sound basis presents itself for compelling the heir to accept that which is cast upon him.

(2) Assuming that there should be some rule that applies equally to the heir, devisee or legatee, one is confronted with the problem as to just what the rule should be. Possibly the better

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<sup>49</sup> Olsen v. Wright, 119 N.J. Eq. 103, 181 Atl. 182 (1935).

<sup>50</sup> Foulkes v. Foulkes, 173 Ark. 188, 293 S.W. 1 (1927); Brown v. Kalene et al, 230 Iowa 76, 296 N.W. 809 (1941); Bacon v. Barber, 110 Vt. 280, 6 A. 2d 9 (1939); see Austin v. Collins, 317 Mo. 435, 438, 297 S.W. 36, 37 (1927).

<sup>51</sup> Brown v. Routzhan, 63 F. 2d 914 (6th Cir. 1933); State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933).

<sup>52</sup> In Re Wolfe's Estate, 89 App. Div. 439, 85 N.Y.S. 949 (1903).

rule is to allow the party to reject the testamentary or statutory provision that is made for him. In the case of a gift he has this right,<sup>53</sup> and as a practical matter the devise or inheritance is very similar to a gift.<sup>54</sup>

(3) If we give the party a right to renounce, should the right be absolute? No, the right to renounce must be qualified. If the property could be taken by a third person to satisfy his claim against the beneficiary in the event that the beneficiary were to accept, then the third person should be given the right to prevent a renunciation of that part of the property which he desires to subject to the satisfaction of his claim. However, this qualification should be limited to claims that exist prior to a renunciation on the part of the beneficiary.

(4) The three suggestions above may eventually be adopted by judicial decision, but the result can be achieved much faster by appropriate legislation. For that reason the states would do well to consider the enactment of laws that would accomplish those objectives.

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<sup>53</sup> BROWN, PERSONAL PROPERTY sec. 50 (1936).

<sup>54</sup> In SIMES, CASES AND MATERIALS ON TRUSTS AND SUCCESSION (1942), there is included a chapter on the problem of gifts. This would indicate that the problems relating to gifts are at least companions to the problems in the field of succession. Further, both gifts and succession are methods of acquiring property without consideration.