REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME VI.

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BERNARD *v.* HIPKINS.

1806. *April.*

If the wife renounces the will of her husband, who has no child alive, she is entitled to dower in his slaves, and a moiety of his other personal estate in absolute property, although he left grand children.

Hipkins died testate after the year 1792, leaving a wife and grand children; but no child alive. The wife renounced his will; and the principal question in the cause was, What proportion of her husband's estate the wife was entitled to? The chancellor decreed dower in the lands and slaves; and a moiety of the goods and chattels in absolute property. *Bernard*, the executor, and the grand children, appealed to the court of appeals.

Warden, for the appellant. The act of 1705, gave a third of the personal estate to the wife, *Old Virg. Laws*, 29; and the fair inference is, that no more was intended by the existing law; which, in cases where the wife renounces the will, gives a third of the slaves only, although in the event of a general intestacy without a child, a moiety of the slaves, upon the other construction, is allowed; a difference not easily to be accounted for upon any other principle, than some omission in the act, which the court may supply.

Wickham and *Randolph*, *contra*. The words of the act, of 1792, *sect.* 27, are express that, if there be no *child*, the wife shall be entitled to a moiety of the personal estate, *Pleas. Edi. Laws*, 164; and the dropping of the word *issue* in this member of the section, and inserting it in the last sentence, is a proof that the omission of grand children and other descendants, except children, was intended. The word *child* cannot be construed into *grand child*, *Owen* v. *Morris*, 2 Call, 520; and the court has no inducement to violate the text, as the grand father is not bound to provide for the grand children.

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Call, in reply. The construction contended for, on the other side, is contrary to the general spirit of the laws relative to the distribution of intestates' property; which give a third, in all other cases: and therefore the language must be very imperative to induce the court to depart from the general system. The word *child* was intended to include *descendants:* So that, whenever there was living issue, the wife should be confined to a third: And therefore the last member of the 27th clause speaks of the *issue* coming into distribution, *with the other persons entitled:* Which shews, that *child* was considered as synonymous with *issue:* And, if so, the case of *Browne* v. *Turberville*, 2 Call, 390, proves that any words may be supplied, which are necessary to effectuate the legislative intention. The 25th section clearly manifests that a third was the general contemplation: and that it was inadvertently omitted in the 27th. For it is difficult to conceive any reason why the widow, in case she renounces the will, should have no more than a third of the slaves; but a moiety where the intestacy is complete. Indeed a moiety, in the first case, would have been a more obvious provision, than in the latter; because men are more apt to make wills when they have no children, than when they have, as a just parent will usually be content with the provision made by the law: And, if we suppose the legislature to have had any regard to the feelings of mankind, the motives, for establishing the same rule throughout, are apparent; because the grand father, who has no child living, feels himself regenerated in his grand children, and has the same paternal fondness for them, that he had for their parents. That the legislature did proceed upon a notion of that kind, is proved by the circumstance, that, if there had been a child alive, the grand children would have taken a share equal to that of the child, and the wife would have been confined to a third: Which could only be founded upon the presumption of equal kindness in the decedent, for children and grand children; or a vacillation of sentiment in the legislature not to be accounted for. The appellants'

construction gives consistency to all the legislation upon the subject; for it establishes a fixed sentiment in the law makers, that whenever there are any living *descendants*, a larger proportion of the estate is intended for the *issue*, who represent the deceased, than for the wife, who will carry her portion into other families; and therefore is preferred only when she comes into distribution with collaterals, over whom she may reasonably be supposed to have some advantage in her husband's affections; but not so, with regard to the issue of his blood. To effect this great object of the legislature, therefore, the court should consider all the laws upon the subject together, and evolve a construction suited to the general bent of the legislative mind: Which will be completely attained, by regarding the act of 1705 as still in force, and reading it in conjunction with the 27th section of the present law.

Cur. adv. vult.

TUCKER, Judge. The only question discussed at the bar was, Whether the word children in the act should be interpreted to extend to grand children of the decedent, living at his death, since their mother, his daughter and only child were dead? If the words *child*, or *children*, meant issue, and not merely children of his body, the counsel for the appellants contended that the widow was only entitled to one third instead of a moiety.

That the word *children*, in a will, has been construed to extend to grand children, is apparent from several cases, 2 *Vern.* 108, where it is said to have been admitted by all, that if there had been no child (as there was in that case), the grand children of the testator might have taken by the devise to his children. This doctrine is recognized in *Wyth* v. *Blackburn*, 1 Ves. 200, 201, 202. Ambl. 555. *Boyle* v. *Hamilton*, 4 Ves. 439. *Reeves* v. *Brymon*, 4 Ves. 698, where the master of the rolls said, *children* may mean *grand children* where there can be no other construction; but not otherwise. A contrary construction has obtained in *Alex-*

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ander v. *Alexander*, 2 Ves. 640, and *Adams* v. *Adams*, Cowp. 651, as also in *Morris* v. *Owen*, in this court, 2 *Call*, 520. Which shews that the courts have not proceeded so much upon the construction of the word children, as upon the testator's intention, to be collected from the general scope of his will.

The act of 1705, *ch.* 7, for distribution of intestates' estates, declares that, in case there be no children, nor any legal representatives of them, the wife of a person, dying intestate, shall be entitled to a moiety. In a subsequent clause, *sect.* 4, it declares that, if a testator shall leave more than two children, he shall not leave his wife less than a child's part; but, if he leaves no child, then the wife shall have a moiety. Had the question arisen under this act, I should have been of opinion that the provision intended for the wife was to be the same, whether the husband died intestate, or made a will, and the wife renounced all benefit under it. Consequently that the word *child* in the latter clause might have been construed *grand children*, as the representatives of children deceased. But, in the act of 1785, there is no such guide. The word *children*, whereever it occurs in the law of descents, to which this clause refers, is used strictly, and not in the same sense with issue. Whenever the legislature changes the phraseology of the law, we are bound to consider it as changing its policy also, unless there be some good reason to control that construction. Here there is no such reason that I perceive. The law of distribution is very materially changed in another, and perhaps in more instances. The former law declared, that no representatives should be admitted among collaterals, after brothers' and sisters' children: The latter, that the descendants of collaterals shall be admitted into partition in every case where their ancestors would have been. I mention this only as an instance to shew that the law has been materially changed. In the present instance, I conceive it to have been the intention of the legislature to change it. A man is bound to provide for his wife; who

very frequently brings her full portion of the personal estate of which her husband dies possessed, into his family: His children he is likewise bound to provide for. The obligation, either in a moral or legal light, is certainly less towards his grand children, who may be presumed to derive a provision from their own father. I do not, therefore, see any reason for extending the interpretation of the words *child*, or *children;* and am for affirming the decree.

ROANE, Judge. I am of the same opinion. For there are no circumstances to induce us to believe that the legislature did not mean what they have said.

FLEMING, Judge. It is a very clear case. The words of the act are express, that if there be no *child*, the wife shall have a moiety; and I do not feel myself at liberty to depart from them. I therefore concur that the decree should be affirmed.

CARRINGTON, Judge, and LYONS, President. Affirm the decree.