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Wills--Implied Gifts of Remainders

W. Richard McCune Jr.
West Virginia University College of Law

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WILLS—IMPLIED GIFTS OF REMAINDERS

The desire of courts to effectuate the intent of the testator is the main objective in the construction of wills. However, certain ambiguous phrases frequently recur which do not clearly indicate this intent. As a result, courts have developed rules of construction to aid in interpreting such phrases. These rules must not, however, be used to supplant the testator's intent. That intent is always controlling unless contrary to a positive rule of law.¹ There is a conflict implicit between the desire to give words settled meanings through the use of rules of construction and the desire to give words the effect intended by each individual testator. The meaning of a given word or phrase may be apparent when standing alone, but in the context of a particular will it may assume a meaning quite distinct from its usual legal definition.²

"To A for life and if A dies without issue to B" is such a phrase. On its face it is an inadequate devise of the testator's property. No provision is made for the possibility that A will die with issue surviving him. The words, however, do not stand alone. They are placed in a will written for one very obvious purpose—to devise the testator's property. The court must, therefore, decide whether the phrase raises a sufficient implication of an intent on the part of the testator to devise a remainder to the surviving children of the life tenant. If the remainder is implied, a division among the life tenant's surviving children is easily accomplished. The beneficiaries are determined at the point of distribution of the property—the death of the life tenant. If no remainder is implied, the division of the property may be more difficult. This construction would leave the devise without effect at the death of the life tenant with surviving children. The property would, therefore, pass either to a residuary legatee or to the testator's next of kin by intestacy. The testator's death may have preceded the death of the life tenant by a considerable period. Under these circumstances, it may be difficult to determine the testator's heirs, their location, and the amount of their individual interests. This situation may

¹Wheeling Dollar Savs. & Trust Co. v. Stewart, 128 W. Va. 703, 709, 37 S.E.2d 563, 567 (1946).

²In Stephenson v. Kuntz, 131 W. Va. 599, 617, 49 S.E.2d 235, 244 (1948), the court, in discussing the testator's use of the word "heirs," noted:

It may be said that our holding runs counter to the general rule and presumption that the word "heirs" is ordinarily used in the technical sense. We agree that this is the rule, but the presumption may be repelled by a plain implication of intention to use it in a different sense.

cause delay in division of the property and the final settlement of the estate.

Any decision that children who might survive the life tenant have a contingent remainder interest in the property must be based on acceptance of the doctrine of gift by implication. This doctrine is not new. It has long been a part of the English common law.³ The applicability of the doctrine in England, however, is subject to a strict standard of proof first enunciated by Lord Chancellor Eldon in 1812: "[I]n construing a Will conjecture must not be taken for Implication: but necessary Implication means, not natural Necessity, but so strong a Probability of Intention, that an Intention contrary to that which is imputed to the Testator, cannot be supposed."⁴ Courts in the United States have often cited this rule, but in so doing, some have criticized it as too restrictive. In this country, a substantial number of courts now use the doctrine more liberally than a narrow interpretation of Lord Eldon's rule would allow.⁵

³W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 381 (Lewis ed. 1902), indicates approval of the use of implication to effectuate the testator's intent:

[A] devise [should] be most favorably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises that are absolutely requisite in all other instruments. Thus, a fee may be conveyed without words of inheritance; and an estate-tail without words of procreation. By a will also an estate may pass by mere implication, without any express words to direct its course.

⁴Wilkinson v. Adam, 35 Eng. Rep. 163, 180 (Ch. 1812).

⁵In *In re Klein's Estate*, 36 N.J. Super. 407, 419-20, 116 A.2d 53, 60-61 (1955) (concurring opinion), Judge Clapp commented on the continuing viability of Lord Eldon's rule:

The critical question in this case, as above stated, is what should be the standard of proof here. I think Lord Eldon's rule and the rule calling for clarity are too strongly stated. In my view the criterion should be simply probability; a provision should be implied if we are of the opinion that in all probability the testator actually intended that very provision. Such a standard produces a far more just result, than if we were to refuse to make any implication at all. We extend our efforts, as we thought, toward effectuating the testator's intentions. But—and this is the heart of the matter—the result reached does not, I think, do any violence to the overriding policies of the Statute of Wills which require the testator's intentions to be integrated into the paper propounded. For we derive a probability as to his designs from the very words of the paper.

The English cases seem to be opposed to these views. But it will be found upon an examination of the facts presented by cases in this country that a substantial number of authorities accept the more liberal position advanced here.

The English courts still follow Lord Eldon's rule closely. Despite one early case to the contrary,⁶ this has resulted in the settled rule in England that the phrase "to A for life and if A dies without issue to B" does not imply a contingent remainder in A's surviving children.⁷ The courts recognize that the testator probably intended to make such a gift.⁸ The words themselves, however, do not foreclose the "bare possibility" that the testator had a contrary intent.⁹ At least one early English authority discussed the possibility of applying the doctrine of gift by implication in this situation. Jarman, in *A Treatise on Wills*, concluded that the application would be "convenient" and that it would avoid a "palpable absurdity." The author noted, however, that there was no authority for such a construction.¹⁰ The English courts thus chose to follow *stare decisis* despite the greater convenience in using the doctrine of gift by implication and the probability that the gift over to the life tenant's surviving children was, in fact, intended by the testator.

A substantial minority of United States' jurisdictions cling to the English view.¹¹ *Bond v. Moore*, an Illinois decision based

⁶One early English decision implied a gift to the children of a life tenant. *Ex parte Rogers*, 56 Eng. Rep. 400 (V.C. 1816). This case was later expressly overruled. *Neighbour v. Thurlow*, 54 Eng. Rep. 278 (Rolls 1860).

⁷*Scale v. Rawlins*, [1892] A.C. 342, *affirming In re Rawlins' Trusts*, 45 Ch. D. 299 (1890); *Re Hayton's Trusts*, 10 L.T.R. (n.s.) 336 (1864); *Neighbour v. Thurlow*, 54 Eng. Rep. 278 (Rolls 1860); *Sparks v. Restal*, 53 Eng. Rep. 341 (Rolls 1857); *Ranelagh v. Ranelagh*, 50 Eng. Rep. 1036 (Rolls 1849); *Greene v. Ward*, 38 Eng. Rep. 102 (Rolls 1826).

⁸*Ranelagh v. Ranelagh*, 50 Eng. Rep. 1036 (Rolls 1849), is one example of the hesitancy of English courts to find gifts by implication. The testator bequeathed personal property to a number of people for their respective lives, and "[i]n case of the demise of any of the above parties without legitimate issue, their, his, or her proportions to be divided equally amongst the survivors." The court refused to find a gift by implication to surviving issue:

I think it extremely probable that the testator did mean a benefit to the children, but *si voluit non dixit*. [Roughly translated: "He may have intended so, but he did not say so."] I think that there is not sufficient [evidence of that intention] to raise the implication, and that the legacy falls into the residue.

Id. at 1038.

⁹"[T]he bare possibility that the testator may have purposely excluded the omitted issue would alone be sufficient to prevent me from inserting in the will estates which the testator has in fact omitted." *Monypenny v. Dering*, 68 Eng. Rep. 236, 243-44 (V.C. 1850).

¹⁰T. JARMAN, *A TREATISE ON WILLS* 674 (6th ed. 1910).

¹¹*Bond v. Moore*, 236 Ill. 576, 86 N.E. 386 (1908); *Harvey v. Clayton*, 206 Iowa 187, 220 N.W. 25 (1928); *Bell v. Dukes*, 158 Miss. 563, 130 So. 734 (1934) (*But see* *Ball v. Phelan*, 94 Miss. 293, 49 So. 956 (1909)); *Hunter v. Miller*, 109 Neb. 219,

largely on the precedent set by the English cases, is an example of a carefully considered opinion adopting the English rule.¹² The case is also an example of the kind of bizarre result that can occur when a court is so determined to preserve technical and historical consistency that it disregards the probable intent of the testator.

In *Bond*, the testatrix devised a life estate in certain land to her son. The life tenant was given the power to sell the real estate and the right to use the proceeds necessary to meet his reasonable expenses. At the son's death the property was to pass as follows: "[B]ut should he die without children, then the estate, or so much of it as may remain . . . shall go to my nearest relatives . . ."¹³ The court determined that the will devised a contingent remainder to the nearest relatives of the testatrix alive at the life tenant's death. The principal problem, however, was whether the will devised a vested remainder to the children of the life tenant subject to divestment if they predeceased him, or whether it devised a reversion to the heirs of the testatrix if the life tenant died with issue surviving. The testatrix' son sought to convey a fee simple interest in the property by application of the doctrine of merger. He contended that as the life tenant and the owner of a reversionary interest, which he claimed pursuant to his status as the sole heir at law of the testatrix at her death, he could convey both interests to a third party, thereby destroying the contingent remainder and vesting full fee simple title in the grantee. One of the life tenant's daughters disagreed, arguing that the life tenant was attempting to convey an interest vested in his children subject to divestment only if they predeceased him.

The court, with three judges dissenting, found that the life tenant could use the doctrine of merger to convey a fee simple title. Relying heavily on the English authorities, the court refused to imply a remainder interest in favor of the life tenant's children. To

190 N.W. 583 (1922); *Monk v. Geddes*, 159 S.C. 86, 156 S.E. 175 (1930); *Wood v. Wood*, 132 S.C. 120, 128 S.E. 837 (1925); *Addison v. Addison*, 9 Rich. Eq. 58 (S.C. 1856); *Carr v. Porter*, 1 McCord, Eq. 60 (S.C. 1825).

¹²236 Ill. 576, 86 N.E. 386 (1908). The opinion states the following minority rule: A devise for life with a gift over on the death of the life tenant without issue, is not, of itself sufficient to create a gift by implication to the children of the life tenant. Such implication can only arise when supported by some other matter appearing in the will raising an inference in favor of the children.

Id. at 588, 86 N.E. at 390. The decision in this case was reviewed with approval in *Comment*, 3 ILL. L. REV. 590 (1908).

¹³236 Ill. at 577, 86 N.E. at 387.

imply such a remainder, the majority reasoned, would be to presume a will for the testatrix based on mere speculation as to her intention.¹⁴ The testatrix had made no provision for the descent of the real estate if the life tenant died with issue surviving, and the court would not insert such a provision for her.¹⁵ The court held that an estate cannot be raised by implication when the will is absolutely silent with regard to it, but must be based only on an expression in the will giving some evidence of the testator's intention.¹⁶ In addition, the court indicated that, in the construction of wills, a presumption against disinheritance of heirs existed and this presumption could be rebutted only by clear words to the contrary.¹⁷ Since no words in the will clearly indicated that the testatrix did not want her son to inherit the reversionary interest in the property, it was presumed that she intended him to inherit it.

By refusing to imply a gift over to those children of the life tenant who survived him, the court perverted the testatrix' most obvious intention. The language in the will clearly indicated that the life tenant was not to have absolute title to the property. The court itself found an intent for the property to go to other relatives if the life tenant died without children. The reliance placed on English precedents and the desire to conform to those precedents made the will ineffective as a devise of the real estate in question. The testatrix obviously intended that the property pass according to the will's provisions. Instead, it effectively passed in fee to her sole heir at law. The will managed only to cause an expensive legal controversy.

The English cases refusing to imply a remainder can no longer be considered to represent a settled rule of construction. By a great weight of authority in the United States, a gift over to the surviving children of the life tenant will now be implied.¹⁸ The *Restatement*

¹⁴*Id.* at 590, 86 N.E. at 391.

¹⁵*Id.* at 589, 86 N.E. at 391.

¹⁶*Id.* at 581, 86 N.E. at 388.

¹⁷*Id.* at 589-90, 86 N.E. at 391.

¹⁸*Estate of Heard v. Bank of America*, 25 Cal. 2d 322, 153 P.2d 553 (1944); *Estate of Easterday v. American Trust Co.*, 45 Cal. App. 2d 598, 114 P.2d 669 (1941); *In re Estate of Blake*, 157 Cal. 448, 108 P. 287 (1910); *Du Pont v. Equitable Sec. Trust Co.*, 115 A.2d 482 (Del. Ch. 1955); *Shepherd v. Peratino*, 86 App. D.C. 395, 182 F.2d 384 (D.C. Cir. 1950); *Wetter v. United Hydraulic Cotton Press Co.*, 75 Ga. 540 (1885); *Robinson v. Barrett*, 142 Kan. 68, 45 P.2d 587 (1935); *Vittitow v. Keene*, 265 Ky. 66, 95 S.W.2d 1083 (1936); *Bourne v. Johns*, 233 Ky. 448, 26 S.W.2d 13 (1930); *Wilkins v. Miltimore*, 95 N.H. 17, 56 A.2d 535 (1948); *Kendall*

of *Property* contains a concise statement of the prevailing view on construction of the phrase in question:

When property is limited by an otherwise effective conveyance "to B for life, and if B dies without issue, then to C," or by other words of similar import, then, unless a contrary intent of the conveyer is found from additional language or circumstances, an inference is required that the conveyer has limited an interest in favor of the issue of B, in the event that B dies survived by issue.¹⁹

The argument in favor of the majority position is based upon common sense rather than technical construction.²⁰ Simes and Smith, in their treatise on future interests, approve the *Restatement* rule as "the only rational explanation" for the phrase used.²¹ The *Restatement* and Simes and Smith both indicate that a reasonable implication leading to a rational result is preferable to the assumption that the testator failed to devise a portion of his estate.²² The

v. Kendall, 36 N.J. Eq. 91 (1882) (*But note* the "advisory opinion" given by the court without citing *Kendall* in *Daly v. Rogers*, 132 N.J. Eq. 200, 27 A.2d 885 (1942)); *Bishop v. Bishop*, 257 N.Y. 40, 177 N.E. 302 (1931); *In re Moore's Estate*, 152 N.Y. 602, 46 N.E. 960 (1897); *In re Brooks' Estate*, 114 N.Y.S.2d 342 (Sur. Ct. 1952); *McRorie v. Creswell*, 273 N.C. 615, 160 S.E.2d 681 (1968); *West v. Murphy*, 197 N.C. 488, 149 S.E. 731 (1929); *Hauser v. Craft*, 134 N.C. 319, 46 S.E. 756 (1904); *Keister v. Keister*, 144 N.E.2d 336 (Ohio C.P. 1957) (*But see* *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644 (1914) and *Woodlief v. Duckwall*, 19 Ohio C.C.R. 564, 10 Ohio C. Dec. 686 (1900)); *Rouse Estate*, 369 Pa. 568, 87 A.2d 281 (1952); *Africa Estate*, 359 Pa. 567, 59 A.2d 925 (1948); *Cope Estate*, 353 Pa. 306, 45 A.2d 52 (1946); *List's Estate*, 283 Pa. 255, 129 A. 64 (1925); *Beilstein v. Beilstein*, 194 Pa. 152, 45 A. 73 (1899); *In re Estate of Roth*, 101 Pa. Super. 443 (1930); *Rhode Island Hosp. Trust Co. v. Huntoon*, 181 A.2d 614 (R.I. 1962); *Garber v. Saufley*, 131 Va. 514, 109 S.E. 306 (1921); *Conrad v. Quinn*, 111 Va. 607, 69 S.E. 952 (1911); *Wine v. Markwood*, 31 Gratt. 337 (Va. 1878).

¹⁹3 RESTATEMENT OF PROPERTY § 272 (1940).

²⁰*In Shepherd v. Peratino*, 86 App. D.C. 395, 397, 182 F.2d 384, 386 (D.C. Cir. 1950), the court, in adopting the *Restatement* rule, commented that the principle of construction formulated by the *Restatement* was "soundly based on common sense."

²¹ In the majority of cases, it would seem that the only rational explanation for the gift over on death of the life tenant without children is that the testator intended the children to take if the life tenant died with children. Special contexts may, of course, lead a court to refuse to imply a remainder, but in the ordinary case testamentary intent would be effectuated by the implication.

2 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 842, at 327-28 (2d ed. 1956).

²²Simes and Smith point out that "[t]he argument that the testator may have intended the life tenant to take a reversion by intestacy is not very convincing. Testators do not, as a rule, express their intentions in any such manner." *Id.* § 842, at 328. The *Restatement* takes a similar position, using slightly different language:

presumption against intestacy and the presumption against disinheritance should be given equal weight, with reason tipping the scale to one side or the other. The majority of the states in this country consider it more reasonable in this situation to find that the testator meant to devise a remainder to the life tenant's surviving children.²³

Professor Richard Powell, in his treatise on real property,²⁴ proposes a slightly different approach from the *Restatement* position. He contends that the phrase "to A for life and if A dies without issue to B" is not sufficient evidence from which the court may imply a remainder interest to those children of A who survive him.²⁵ In most of the cases in which the implication has been made, it has helped to mitigate inequality between the various groups of the testator's descendants. Powell believes that those parties asking the court to imply the remainder should be required to show that the implication will tend to distribute the property more evenly among the descendants.²⁶

The difference between Powell's position and that of the *Restatement* is one of emphasis. Powell sees the tendency to promote equality of distribution as a necessity. The *Restatement* considers it a corroborative factor.²⁷ The *Restatement* concedes that testators normally seek to make an equal distribution²⁸ but contends that the rule can be validly applied when this additional factor is not present. The *Restatement* rule seems preferable, since the implication is made under this rule without a court determina-

[I]n this situation . . . the intent commonly prevalent among conveyors similarly situated . . . requires the inferring of an interest in favor of the issue of B. The failure to make such an inference would impute to the conveyor caprice in the disposition of his property and no such imputation is to be made when reasonably avoidable.

3 RESTATEMENT OF PROPERTY § 272, at 1398 (1940).

²³Discussions analyzing and quoting from many of the cases in the United States which reach the issue of whether the phrase "to A for life and if A dies without issue to B" implies a gift over to the surviving children of A may be found in Annot., 22 A.L.R.2d 177 (1952), and in 28 AM. JUR. 2d *Estates* § 202 (1966).

²⁴R. POWELL, *THE LAW OF REAL PROPERTY* (rev. ed. 1971).

²⁵2 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 323, at 740 (rev. ed. 1971).

²⁶*Id.*

²⁷"When the making of the inference of a remainder in favor of the 'issue of B,' prevents or minimizes inequality of distribution as between two or more stirpes related to the conveyor in the same manner, then this fact is a corroborative circumstance, strengthening the rule stated in this section." 3 RESTATEMENT OF PROPERTY § 272, comment e, at 1400 (1940).

²⁸*Id.* § 243, comment f, at 1214.

tion that it would tend to distribute the property more evenly among the descendants. Thus, a court proceeding can be avoided. The trend in case law in the United States is toward the *Restatement* position.²⁹

*Fisher v. West Virginia Gas Corp.*³⁰ is the only decision by the West Virginia Supreme Court of Appeals that has passed upon the question discussed herein. In *Fisher*, a dispute over rights to royalties from a gas lease led to litigation over a will admitted to probate more than fifty years before the actual controversy arose. The will contained a clause granting certain realty to the testator's nephew for life and, if he died without issue, to the heirs of the testator. After the testator died, his heirs granted a quitclaim deed to the life tenant who then quitclaimed his interest to another. The claimants under this chain of title were the defendants in *Fisher*. The plaintiffs were the heirs of the life tenant's surviving son.³¹

²⁹Of seven decisions made since 1950 dealing with the issue of whether the remainder should be implied, three adopted the *Restatement* rule. *Shepherd v. Peratino*, 86 App. D.C. 395, 397-98, 182 F.2d 384, 386-87 (D.C. Cir. 1950); *McRorie v. Creswell*, 273 N.C. 615, 618-19, 160 S.E.2d 681, 683 (1968); *Rhode Island Hosp. Trust Co. v. Huntoon*, 181 A.2d 614, 618 (R.I. 1962). Two cases cite the *Restatement* rule with apparent approval but without specifically adopting it. *DuPont v. Equitable Sec. Trust Co.*, 115 A.2d 482, 489 (Del. Ch. 1955); *Kiester v. Kiester*, 144 N.E.2d 336, 349 (Ohio C.P. 1957). Two cases cite neither the *Restatement* rule nor the relevant portions of Powell's treatise. *In re Brooks' Estate*, 114 N.Y.S.2d 342 (Sur. Ct. 1952); *Rouse's Estate*, 369 Pa. 568, 87 A.2d 281 (1952). Both decisions imply a remainder, but *In re Brooks' Estate* seems to adopt Powell's reasoning. In this case, the court indicates that the implication is made because "[i]t is by this construction alone that a coherent and symmetrical plan of distribution can be effected." *In re Brooks' Estate*, *supra* at 347. *Rouse's Estate*, however, states the *Restatement* rule without citing to the *Restatement* and announces that it is a "well established canon of will construction." *Rouse's Estate*, *supra* at 571, 87 A.2d at 283.

³⁰127 W. Va. 645, 34 S.E.2d 123 (1945).

³¹*Id.* In greater detail, the facts in *Fisher* are as follows: The testator, John M. Fisher, by will dated May 14, 1877, and admitted to probate July 1, 1877, devised a tract of land to his nephew, Charles L. Fisher, for life "and if the said C. L. Fisher dies without bodily heirs the said land shall revert back to the heirs of John L. Fisher." In 1878, the life tenant was granted "a deed to the property by eleven persons claiming to be the heirs at law of the testator. In 1880, the life tenant and his wife conveyed all of their right, title, and interest in the property to Christopher C. Cunningham. C. Cunningham then conveyed his interest to William T. Cunningham by a deed whose date is not disclosed in the record. The court refused to rule on the effect of the deed, dated in 1878 from the purported heirs of the testator, since the deed had not been made a part of the record. The last grantee in this chain, William T. Cunningham, died intestate in 1938. His widow and heirs at law were named defendants in this action. Charles L. Fisher, the life tenant named in the testator's will, also died intestate in 1938. He left one son, Ben Fisher, surviving. Ben Fisher died intestate in 1939. His widow and heirs at law were named plaintiffs

The court, in *Fisher*, decided against the implication of a remainder in favor of the life tenant's surviving child. The court recited Lord Eldon's rule on the doctrine of gift by implication.³² It also cited *Bond v. Moore*³³ and apparently followed the reasoning used by the *Bond* court.³⁴ The dicta in the case, coupled with the failure to imply a remainder, indicate that West Virginia stands among the minority of states following the English authorities.

In reaching its decision in *Fisher*, the West Virginia court considered one early Virginia case, *Wine v. Markwood*, in which the Virginia court implied a remainder in favor of surviving issue of the life tenant.³⁵ The West Virginia court did not disapprove the holding in *Wine*; nor did it comment on the logic used in the Virginia case. It simply indicated that while the Virginia court had stated that, in the will before it, sufficient evidence existed from which a remainder could be implied, no such sufficiency of evidence could be found in the will litigated in *Fisher*.³⁶ The West Virginia court has, thus, never expressly disapproved the implication of a remainder where sufficient evidence existed to support it.

The decision in *Fisher* is not necessarily inconsistent with either the *Restatement* rule or Powell's approach. Powell cites *Fisher*

in this action. Plaintiffs executed a lease authorizing West Virginia Gas Corporation to begin drilling for gas on the property in dispute. Defendants issued a similar lease. Suit was then brought to determine who had the right to royalties derived from the profits of the above-mentioned drilling operation.

³²*Id.* at 651, 34 S.E.2d at 127.

³³236 Ill. 576, 86 N.E. 386 (1908).

³⁴See 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 323, at 739 n.3 (rev. ed. 1971).

³⁵31 Gratt. 337 (1878). *Wine* is an early example of the Virginia court's willingness to imply a gift to the surviving children of the life tenant. In this case, the court found that the gift over to others on the death of the life tenant without issue was a sufficient expression of an intention to vest a remainder in the surviving issue of the life tenant:

Why did the testator give the portion of his son Sampson [the life tenant] to his surviving brothers only in the event of his dying without issue? Why but because in the only other possible event, to-wit: the death, of said son leaving issue living at such death; he intended that such issue should have the said portion?

Id. at 339.

³⁶We have examined the opinion in *Wine v. Markwood*. . . . The Court there held that the testator's intention was sufficiently expressed or "at least implied." In this case we do not think the intention of the testator to devise a remainder to the heirs of the body of Charles L. Fisher [the life tenant] is expressed or implied.

127 W. Va. at 652, 34 S.E.2d at 127.

as an example of a case in which a remainder should not be implied, noting that such an implication would have benefited a grandnephew at the expense of descendants more closely related to the testator.³⁷ The argument can thus be made that the court did not imply a remainder because it presumed that the testator wished to distribute the property as equally as possible among his descendants. However, this is not the explanation given by the court as the basis for its decision.

It is more reasonable to argue that *Fisher* is an example of a case in which the will itself indicates that the implication should not be made. The *Restatement* recognizes that the implication should not be made when "a contrary intent of the conveyor is found from additional language and circumstances."³⁸ The court, in its decision, took note of just such additional language and circumstances. It observed that immediately preceding the devise in question was a devise of land to the testator's daughter for life, which "at her death shall go to her bodily heirs."³⁹ The testator, therefore, knew the proper way to provide for a remainder in the life tenant's issue; yet, he did not express his intention in like manner with regard to his nephew and his nephew's children. The court stated that "this is a clear indication that the testator had no intention to devise a remainder to the heirs of the body of his nephew."⁴⁰

Despite the dicta in *Fisher* and the failure of the court to imply a remainder in the life tenant's surviving children, the holding in *Fisher* does not irrevocably place West Virginia among the minority of states following English case precedent.⁴¹ West Virginia can,

³⁷2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 323, at 740-41 n.7 (rev. ed. 1971).

³⁸3 RESTATEMENT OF PROPERTY § 272 (1940).

³⁹The applicable portion of the will states that:

I give and bequeath to my daughter, Eliza Ann Ranson, fifty acres running the same as the Stiles line which she shall hold and enjoy during her life and at her death shall go to her bodily heirs. I give and bequeath to Charles L. Fisher, my nephew, sixty acres of land. . . . He is to have and enjoy said land during his natural life and if the said C. L. Fisher dies without bodily heirs the said land shall revert back to the heirs of John M. Fisher [the testator].

127 W. Va. at 647, 34 S.E.2d at 125.

⁴⁰*Id.* at 652, 34 S.E.2d at 127.

⁴¹West Virginia has implied remainders in previous cases. The use of implication by the West Virginia Supreme Court of Appeals has been limited, however, to the situation in which it was necessary to find a cross remainder in order to effectuate the court's determination of the intent of the donor. See *Bank of Greenbrier v. Effingham*, 51 W. Va. 267, 41 S.E. 143 (1902) and *Lazier v. Lazier*, 35 W. Va.

in a subsequent decision, adopt the more modern American majority view in favor of implication without overruling *Fisher*. The trend in the United States is toward adopting the *Restatement* rule as the rule of construction that best promotes the testator's intent. If a case should again arise in West Virginia in which the court is confronted with the phrase, "to A for life and if A dies without issue to B," the court should distinguish *Fisher* on its facts and adopt the *Restatement* rule which would imply a remainder in favor of the life tenant's surviving children.

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567, 14 S.E. 148 (1891). In the early case of *Graham v. Graham*, 23 W. Va. 36, 42 (1883), the court used the language, also used in *Fisher*, of Lord Eldon in *Wilkenson v. Adam*, 35 Eng. Rep. 163, 182 (Ch. 1812). However, the court also set forth a second test more in line with the modern view: "When implications are allowed they must be such as are *highly probable*, and not merely possible." (Emphasis added). Compare this second test with Lord Eldon's rule in the text accompanying note 4 *supra*.