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## Evidence--Circumstantial Evidence in a Homicide Prosecution

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power over the property which was not subject to an ascertainable standard and, therefore, the property subject to the power was included in *H's* gross estate in computing the federal estate tax. The court further held that although W. VA. CODE ch. 36, art. 1, § 36 (Michie 1966) limits the exercise of such powers to *lawful exercise*, such a limitation is not sufficient to be termed an ascertainable standard and thereby gain the favored exclusionary treatment under the federal estate tax. *Potter v. United States*, 269 F. Supp. 545 (N. D. W. Va. 1967).

The granting of a life estate with a power of disposition over the remainder no longer creates a fee simple in West Virginia. W. VA. CODE ch. 36, art. 1, § 36 (Michie 1966). But even so, the estate planner should limit a power of appointment for the benefit of the life tenant to an ascertainable standard if he wants to keep the value of the property subject to the power from being included in the life tenant's gross estate for estate tax purposes. Treas. Reg. 20.2041-1(c)(2) (1958) as amended T.D. 6582, 1962 Cum. Bull. 177.

#### **Evidence—Circumstantial Evidence in a Homicide Prosecution**

*D* was indicted for murder of her lover's wife and, on the same indictment, was convicted of voluntary manslaughter. Testimony placed *D* at the scene of the crime at the proper time and with a motive; however, no homicide weapon was produced. Testimony of deceased's husband, the lover, was that *D* usually carried a gun. The only weapon introduced into evidence, said by the lover to have been in *his wife's* possession at the time of the shooting was found where the lover had hidden it. No ballistics tests were made to determine if the death bullet was fired from this gun. *Held*, affirmed. Positive evidence of *D* having a gun in her possession is not essential. The jury determines the truth of testimony and a reversal is prevented here because the evidence connecting the defendant with the commission of the crime was sufficient to warrant its submission to the jury. *State v. Bailey*, 155 S.E.2d 850 (W. Va. 1967).

This case attracts immediate attention, upon first reading, due to the failure to positively connect the defendant with a homicide weapon. However, research reveals no case in which the actual production of a homicide weapon is an essential element of a homicide offense. As stated by the court, circumstantial evidence can be used to convict one of a crime with the jury determining the weight

to be given the evidence. This being so, then the importance of producing a homicide weapon is a matter of fact, not law, to be determined by the jury.

### Habitual Criminals—Jury Trial

The petitioner, *P*, was convicted of a felony punishable by an indeterminate prison sentence. Pursuant to the habitual criminal statutes an information was filed by the State charging that *P* had previously been convicted of a felony and imprisoned. *P* denied being the same person named in the information. The court, without informing *P* of the necessity of impaneling a jury to try the issue of identity, proceeded without a jury to try the issue raised by the information. The court held the charges in the information to be correct and added an additional five years to *P*'s indeterminate sentence. In his habeas corpus petition *P* alleged that because the court did not impanel a jury to determine the issue of identity the court was without jurisdiction to impose the additional sentence. *Held*, void as to the additional sentence, but the petitioner must serve the remainder of his indeterminate sentence. The right to trial by jury in habitual criminal proceedings is of such character that it cannot be waived. Habitual criminal proceedings providing for additional punishment of felons are wholly statutory. Thus courts have no inherent or common law power or jurisdiction in such proceedings. It is generally held that statutes in derogation of common law are strictly construed in favor of the felon. The statute, W. VA. CODE ch. 61 art. 11 § 19 (Michie 1966), specifically states that when the identity alleged in an information is at issue, a jury *shall* be impaneled to determine the issue. This clearly confers jurisdiction, in such matters, upon the jury and not upon the court acting in lieu of a jury. The court has consistently held habitual criminal statutes to be mandatory and jurisdictional. *Ringer v. Boles*, 157 S.E.2d 554 (W. Va. 1967).

The narrow holding of this case is that in the habitual criminal statutes the word *shall* means *must* and the lower court must follow, to the letter, the procedure set out in the statute.

### Mandamus—Eminent Domain

In an original proceeding in mandamus, the petitioner sought to compel the State Road Commissioner to institute against the petitioner a proceeding in eminent domain in order to ascertain and