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Wills--Class Gifts--Determination of Members of Class

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WILLS—CLASS GIFTS—DETERMINATION OF MEMBERS OF CLASS.—*T*'s will read: "I bequeath to the children of my daughter . . . [A] the one-half of my land, and the other half I give to . . . [X]. I bequeath also to my widow her third of my land, her lifetime, to include the mansion house." *T* died the following day, March 21, 1875. Twenty months later, within the widow's lifetime, *P* was born to *A*. *Held*, that the class of *A*'s children closes as of *T*'s death, thereby excluding *P*, the after-born child. *Dawson v. Christopher*.¹

The court viewed the devise to the widow as a mere confirmation of her dower rights rather than an undivided life estate.² It is possible, however, that under the existing laws at the time of the testator's death the devise did more than merely confirm these claims. Although frequently, when no injustice was done to the heirs, the widow was assigned the mansion house of the decedent, yet, as a matter of right, the widow could not require its assignment to her, together with the part of the decedent's land in kind to which she was entitled.³ At common law, the widow's right to the occupation of the mansion house embraced only the period of the widow's quarantine.⁴ It would thus seem that the widow did not take simply a dower share, but rather a conventional life estate in one-third of the testator's land including the mansion house.

In the determination of a class of testamentary beneficiaries, courts have been influenced largely by two underlying principles or policies: the desire to avoid *inconvenience* by as early a distribution as possible and the desire to let in as many children as

¹ 11 S. E. (2d) 175 (W. Va. 1940).

² In so doing, the court gives effect to the doctrine of worthier title, that is, where the same quantity and quality of estate is devised by a will that would result to the devisee by operation of law, the law casts the title upon the devisee by descent. *Gilpin v. Hollingsworth*, 3 Md. 190, 56 Am. Dec. 737 (1852); *Thompson v. Turner*, 173 Ind. 593, 89 N. E. 314, Ann. Cas. 1912A 740 (1909); *Denny v. Denny*, 123 Ind. 240, 23 N. E. 519 (1890). Also see *Jones v. Hudson*, 12 S. E. (2d) 533 (W. Va. 1940), in which the court considered a testamentary disposition dividing equally all of the testator's stock and realty as requiring a distribution in conformity with the law of intestacy.

³ *De Vaughn v. De Vaughn*, 19 Gratt. 556 (Va. 1870), cited in the instant case; *Simmons v. Lyle*, 32 Gratt. 752 (Va. 1880). But see *Le Fevre v. Le Fevre*, 109 W. Va. 260, 153 S. E. 918 (1930), citing the *De Vaughn* case simply for the proposition that "unless injustice will thereby be done to the heirs, it is usual to assign to the widow the home or residence of the deceased."

⁴ 2 BL. COMM. 135 (1770); 4 KENT'S COMM. 61 (1896). W. VA. CODE 1870, c. 65, § 8. This section, which was in force at the time of the testator's death in the instant case, is merely declaratory of the common law. Today, however, the widow has the statutory right to occupy the mansion house until the youngest minor child becomes of age, if she be left with minor children by the testator at his death. W. VA. CODE (Michie, 1937) c. 43, art. 1, § 11.

possibly consistent with the principle of convenience.⁵ In giving effect to the first principle it has been uniformly held that where there is a devise "to the children of A" and no life estate intervenes, the class closes at the testator's death and after-born children are precluded from taking under the will.⁶ When, on the other hand, a life estate intervenes, that is, "to A for life and then to the children of B", the class is held to increase at least until the death of the life tenant.⁷ Nevertheless, in the instant case, the court construed the devise to the widow only as a testamentary confirmation of her dower rights, and then held the class closes at the testator's death. While the doctrine favoring the early vesting of estates should normally control, it is obvious that no inconvenience would result here (at least as to the mansion house) where the devise was "to A for life, and after her death to the children of B". "Here the remainder vests at once in the children living at the death of the testator, but will open and let in all children of B born after that time, but before the death of A."⁸ In other words, the remainder to the children living at the testator's death might have been regarded as vested, subject to partial divestment by the birth of more children after the testator's death. Presumably this possibility was not sufficiently apparent in the disposition of the present litigation.

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WILLS—MUTUAL WILLS OF HUSBAND AND WIFE—INTENT OF SURVIVOR.—*H* and *W* executed wills, each leaving all of his or her estate to the other. *H* had typed both wills, and the provisions were practically identical. They were signed by *H* and *W* and witnessed by the same witnesses, at the same time, all in the presence of each other. *W* died, and *H* probated her will. Fifteen months later *H* died, and his will, leaving his estate to *W*, was offered for probate by the illegitimate daughter of *W*. There was ample evidence that *H* informally indicated an intent that his will continue in effect. Heirs-at-law of *H* contested the probate, which was denied. The lower court held that the testamentary intent was to make the survivor the sole beneficiary, and that on the death of one of the parties, the remaining will became inoperative. *Held*, that mere

⁵ 2 SIMES, LAW OF FUTURE INTERESTS (1936) § 378.

⁶ KALES, FUTURE INTERESTS IN ILLINOIS (1905) c. 10, § 226.

⁷ *Id.* at pp. 326-327; *Hamletts v. Hamlett's Ex'r*, 12 Leigh 350 (Va. 1841); *Cooper v. Hepburn*, 15 Gratt. 551 (Va. 1860); *Bently v. Ash*, 59 W. Va. 641, 53 S. E. 636 (1906); *Sleeper v. Killion*, 182 Iowa 245, 164 N. W. 241 (1917).

⁸ Note (1899) 4 VA. L. REG. 624 (*italics supplied*).