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## Wills--Construction--"Share" Construed as Remainder

H. P. B. Jr.  
*West Virginia University College of Law*

H. L. W. Jr.  
*West Virginia University College of Law*

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WILLS — CONSTRUCTION — “SHARE” CONSTRUED AS REMAINDER. — By an holographic will, *T.* devised one-half her realty to *A* for life, and if *A* die without heirs of his body, “his share” to go to *T.*’s granddaughters, *X* and *Y*; she devised the other half of her realty to *B* for life and at his death “his share” to go to *X* and *Y*. In proceedings for the construction of the will and for the authorization of certain guardians to join in trust deeds, the circuit court held that *T.* died intestate as to the remainders after the expiration of the life estates of *A* and *B*. On appeal, the decision of the circuit court was reversed. Held, that as to *A*’s “share,” there is a remainder in fee to *X* and *Y*, contingent upon *A*’s dying without heirs of his body, and as to *B*’s “share,” there is a vested remainder in fee to *X* and *Y*. *In re Conley*.<sup>1</sup>

As the “shares” of *A* and *B* were merely life estates, it would appear, at first thought, that the language of the will can pass no interest to *X* and *Y*. However, inasmuch as the intent of the testator is the polar star for the construction of wills,<sup>2</sup> it has been the practice of courts to construe testamentary dispositions so as to give effect to the intent of the testator, rather than be misled by isolated words or phrases of an uninformed holographic author, and to regard the substance rather than the strict form of the instrument.<sup>3</sup> There can be little doubt that the testatrix, in the instant case, actually intended that these remainders should pass as such; otherwise, the words have no meaning at all. The difficulty arose only through her expressing this intent by the inapt and nontechnical words “his share.” In accordance with a rule of long standing in this state,<sup>4</sup> the court first ascertained the intent of the testatrix and then construed the provisions in the instrument so as to give effect to that intent. The holding of the court is in perfect accord with the principles that, where a provision in a will is capable of two different constructions, a construction resulting in an intestacy as to any part of the estate will not be adopted, if by

<sup>1</sup> 12 S. E. (2d) 49 (W. Va. 1940).

<sup>2</sup> *Hays v. Freshwater*, 47 W. Va. 217, 34 S. E. 831 (1899); *Neal v. Hamilton Co.*, 70 W. Va. 250, 73 S. E. 971 (1912); *Woodbridge v. Woodbridge*, 88 W. Va. 187, 106 S. E. 437 (1921); *Hobbs v. Brennenman*, 94 W. Va. 320, 118 S. E. 545 (1923); 1 Page, *Wills* (2d ed. 1928) § 808, n. 1; see also 1 HARRISON, *WILLS & ADMINISTRATION* (1927) § 184, for a collection of Virginia and West Virginia cases.

<sup>3</sup> *Graham v. Graham*, 23 W. Va. 36, 41 Am. Rep. 369 (1883).

<sup>4</sup> *Liston v. Jenkins*, 2 W. Va. 62 (1867).

<sup>5</sup> See *Irwin v. Zane*, 15 W. Va. 646, 652 (1879); *Houser v. Ruffner*, 18 W. Va. 244, 256 (1881); *Carney v. Kain*, 40 W. Va. 753, 811, 23 S. E. 650, 657 (1895); *Cowherd v. Fleming*, 84 W. Va. 227, 231, 100 S. E. 84, 86 (1919); *Bunyon v. Mills*, 86 W. Va. 388, 391, 103 S. E. 112, 113 (1920).

any reasonable construction it can be avoided;<sup>5</sup> and that a construction which will sustain the will, if consistent with the testator's intention and with existing rules of law, must be adopted.<sup>6</sup> Having ascertained that a remainder passed to the grandchildren, under our present statutory law it would necessarily follow that an estate in fee passed,<sup>7</sup> there being no words of limitation thereon. Thus, it would seem that our court has merely echoed the express holdings of many former cases and has applied sound principles of law upon which, it appears, West Virginia lawyers can rely.

Although the parties and the court made no mention of it, the present case might have been considered as one of mistake in the description of the property. Had *T* said "*the share*," indicating the moiety held by *A* and *B* respectively, instead of "*his share*," which seemed to refer to the life estate preceding the remainder, then the remainders would have been clearly designated. The appellant in the instant case could have proceeded from this viewpoint, introducing evidence to show that the language meant "*the share*."<sup>8</sup> The court could then have construed the will in the light of that testimony on the theory of *falsa demonstratio non nocet* — a false description does not harm a document.<sup>9</sup>

H. P. B., Jr.

H. L. W., Jr.

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WORKMEN'S COMPENSATION ACT — EMPLOYER'S RIGHT TO SUBROGATION. — *P* brought an action against *D* to recover the amount that *P* had been compelled to pay into the workmen's compensation fund as a result of *D*'s allegedly wrongful act. *D* operated a railroad which had a spur track that ran under *P*'s tipple. One of *D*'s engines pushed a train of empty cars onto this spur, and one of the cars struck and killed *P*'s employee. Because

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<sup>5</sup> *Leary v. Kerber*, 255 Ill. 433, 99 N. E. 662 (1912); *In re Gallien*, 247 N. Y. 95, 160 N. E. 8 (1928); and see *Chicago Bank of Commerce v. McPherson*, 62 F. (2d) 393, 397 (C. C. A. 6th, 1932), "Nothing is better settled than that the law strives to uphold testamentary dispositions of property wherever it can, and that *no matter what words are used* by the testator to express his intention, or in what *peculiar* or technical language he expresses it, courts will give effect to it as it may be gathered from the entire will." Italics supplied.)

<sup>7</sup> W. VA. CODE (Michie, 1937) c. 36, art. 1, § 11.

<sup>8</sup> HARRISON, WILLS & ADMINISTRATION § 197 (5).

<sup>9</sup> ATKINSON, WILLS (1937) § 111; Warren, *Interpretation of Wills—Recent Developments* (1936) 49 HARV. L. REV. 689, 699; Note (1930) 78 U. OF PA. L. REV. 1035; Warren, *The Progress of the Law* (1920) 33 HARV. L. REV. 556, 560-565.