

June 1934

Future Interests--Meaning of "Heirs"--Construction of Limitations, "A for life, then to A's children in fee; and in default thereof, to the heirs of the testator," Where A is Sole Heir at Law of Testator

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Recommended Citation

Edward S. Bock Jr., *Future Interests--Meaning of "Heirs"--Construction of Limitations, "A for life, then to A's children in fee; and in default thereof, to the heirs of the testator," Where A is Sole Heir at Law of Testator*, 40 W. Va. L. Rev. (1934).

Available at: <https://researchrepository.wvu.edu/wvlr/vol40/iss4/11>

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FUTURE INTERESTS — MEANING OF "HEIRS" — CONSTRUCTION OF LIMITATION, "A FOR LIFE, THEN TO A'S CHILDREN IN FEE; AND IN DEFAULT THEREOF, TO THE HEIRS OF THE TESTATOR," WHERE A IS SOLE HEIR AT LAW OF TESTATOR. — Testatrix bequeathed to A and B, her only heirs at her death, for life with the remainder to their children; but should they die without issue surviving either, the estate is bestowed upon the heirs of the testatrix. The sons died without issue. *Held*: The heirs of the testatrix are determined upon the death of the last surviving son. *National Bank of Fairmont v. Kenney*.¹

The fundamental rule of construction of testamentary devises is the determination of the intent of the testator; for when such intent is clearly expressed and rests within the bounds of the law, the testator's intent is the basis of the creation of all of the rules for interpretation.² If the actual intent of the testator is not definite or readily ascertainable on the face of the instrument, courts then shape the limitations to conform to the supposed intent. This primary rule of construction is the basis for the determination of the word "heirs" to mean those members of an inheriting class, ascertained upon the death of the testator, — in the absence of clear language to the contrary.³

The primary rule does not apply to those situations in which the donor has by express language avoided determination of heirs upon his death.⁴ Nor does the rule apply to those situations in

¹ 170 S. E. 177 (W. Va. 1933).

² *In re Estate of Newman*, 68 Cal. App. 420, 229 Pac. 898 (1924); *Estate of Wilson*, 184 Cal. 63, 193 Pac. 581 (1920); *Himmel v. Himmel*, 294 Ill. 557, 128 N. E. 641 (1920); *In re Carter's Will*, 99 Vt. 480, 134 Atl. 581 (1926).

³ *In re Newman*, *supra* n. 2; *Bentley v. Consolidated Coal Co.*, 209 Ky. 63, 272 S. W. 48 (1925); *Old Colonial Trust Co. v. Sullivan*, 268 Mass. 318, 167 N. E. 648 (1929); *Thompson v. Clark*, 264 Mass. 56, 161 N. E. 889 (1928); *Brown v. Spring*, 241 Mass. 565, 135 N. E. 701 (1922); *Rotch v. Lamb*, 232 Mass. 233, 122 N. E. 650 (1919); *State Street Trust Co. v. Sampson*, 228 Mass. 411, 412, 117 N. E. 832 (1917) "A bequest or devise to the heirs or the heirs-at-law of a testator is to be construed as referring to those who are such at the time of the death of the testator, unless a different intent is plainly manifested by the will." *Baker v. Kennedy*, 238 S. W. 790 (Mo. 1922); *In re Thomas' Estate*, 128 Misc. Rep. 290, 219 N. Y. S. 318 (1926); *Cf. Craig v. McFadden*, 191 S. W. 203 (Tex. Civ. App. 1916).

⁴ *Thompson v. Clark*, *supra* n. 3; *Brown v. Spring*, *supra* n. 3, ("Then . . . among my heirs" is not sufficient to take the case from the primary or *prima facie* meaning). *Potter v. Potter*, 306 Ill. 37, 137 N. E. 425 (1922); *Morimore v. Mortimore*, H. L. 1879, L. R. 4 App. Cas. 448, (" . . . to such person or persons as will be entitled to receive the same . . ." held, heirs to be construed as of the time of the expiration of the preceding limitation). *Lee v. Roberson*, 297 Ill. 321, 130 N. E. 774 (1921); *Carr v. New England Anti-Vivisection Society*, 234 Mass. 217, 125 N. E. 159 (1919), ("To my heirs then living" prevents the application of the primary rule).

which its application would defeat the intentions of the testator; then another rule of construction is necessary. If there is a contingent estate following a life estate to the sole heir of the testator and a gift over after the failure of the contingency, the limitation over to the heirs of the testator is interpreted and determined at the death of the life tenant or owner of the particular estate.⁵ This rule laid down by the courts indicates an interpretation of the intent of the testator to exclude the holder of the particular estate from the class of heirs; should the testator have intended otherwise, he would have indicated his desire to do so by another limitation.⁶ The fact that other heirs existed at the time of the death of the donor prevents the interpretation of the limitation to heirs at the termination of the particular estate, and nothing may remove the case from the construction placed upon it by the primary rule.⁷ "Heirs at the death of the testator" is further useless in the construction of the testator's intent when the donor devised to one, the only heir at his death, in fee simple, subject to being divested upon the failure of issue of him to whom the fee has given, then over to the testator's heirs.⁸ It is absurd to give to one in fee simple, to divest him of it, and to return it to him again; therefore, a pointless application of the primary rule should be abandoned to be replaced by a rule ascertaining the heirs upon the death of the devisee.⁹ The situation, however, is

⁵ To A for life, remainder to the children of A, but if A die without children, then to the testator's heirs. A is the sole heir at the death of the testator. The weight of stronger and more recent authority determines heirs at the death of the testator. *Estate of Wilson*, *supra* n. 2, (the language of the testator is opposed to the primary rule); *Johnson v. Askey*, 190 Ill. 53, 60 N. E. 76 (1906); *Lippincott v. Purtell*, 98 N. J. Eq. 569, 131 Atl. 210 (1925); *Jones v. Colebeck*, 8 Ves. 38, 32 Eng. Repr. 264 (1802). *Contra*: *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387 (1887); *Brown v. Higgins*, 180 Wis. 253, 183 N. W. 84 (1923); *Rawlinson v. Wass*, 9 Hare 673, 68 Eng. Repr. 683 (1852); *Bird v. Luckie*, 8 Hare 301, 68 Eng. Repr. 375 (1850); *Ware v. Rowland*, 2 Phil. Ch. 635, 41 Eng. Repr. 1088 (1847), (the case of *Jones v. Colebeck* is discredited; *semble*, *Ware v. Rowland* is a misapplication of the doctrine of *Holloway v. Holloway*, *infra* n. 7).

⁶ *Estate of Wilson*, *supra* n. 2; *Jones v. Colebeck*, *supra* n. 5.

⁷ *Himmel v. Himmel*, *supra* n. 2; *Kellett v. Shephard*, 139 Ill. 433, 28 N. E. 751 (1891); *Brown v. Spring*, *supra* n. 3; *Holloway v. Holloway*, 5 Ves. 399, 31 Eng. Repr. 649 (1800); PAGE ON WILLS (2nd ed. 1928), § 928.

⁸ To A in fee simple; but if he has no children, then to the testator's heirs. A is the only heir at the time of the death of the testator. *Pinkham v. Blair*, 57 N. H. 26 (1878).

Testator devised equal moieties, one to A and one to B, upon the death of one without issue to the survivor; on the death of the survivor without leaving issue, to the testator's heirs. *Welch v. Brimmer*, 169 Mass. 204 at pp. 212-213, 47 N. E. 699 (1897).

⁹ "It is argued that it is absurd to suppose from such indefinite language that a testator intended to give to an only child — a son, for example —

not absurd if the donor divests one heir in favor of others existing at the time of the testator's death.¹⁰ The doctrine established in *National Bank of Fairmont v. Kenney*, according to the foregoing rules of construction, is thoroughly sound and justifiable.¹¹

—EDWARD S. BOCK, JR.

HOMICIDE — RESPONSIBILITY FOR FAILURE TO PERFORM AFFIRMATIVE ACTS. — “Assuming that a woman takes the children into the water without the assistance of pulling them into the water by the man, but he stands by conniving to the act, (i. e. the wife's affirmative act of drowning her children and herself) what is the position from the standpoint of the law?” This interesting question was propounded to the court by the jury in the recent case of *Rex v. Russell*,¹ in which D, by his failure to act, was charged with the murder of his wife and children. The jury returned a verdict of manslaughter (1) as to the wife, and (2) as to the children. The court delivered seriatim opinions, concurring in the belief that D should be held criminally responsible for the death of the children. As to his responsibility for the death of the wife, however, there was total disagreement. One judge was of the opinion that the jury verdict should remain undisturbed; the second refused to uphold the conviction, and the third held the husband for manslaughter by aiding and abetting.

Merely from the standpoint of result, rather than the conflicting methodology of means, the case is important in reflecting a possible recognition in the law, of a change in moral values.

real estate in fee if he survive the testator, and then, if the son die leaving no issue surviving him, to divest him of it in order to give it back to him in fee under the designation of heir or heirs of the testator.” *Welch v. Brimmer*, *supra* n. 8.

¹⁰ *State Street Trust Co. v. Sampson*, *supra* n. 3.

¹¹ The suggestion may be offered that the testator intended to protect the children of the devisee taking a life estate, by giving the estate to the testator's only heir, remainder to the issue of the beneficiary, then on the failure of issue of the donee, to the stock of the donee generally. But, in West Virginia, such a result would to-day be accomplished by the simple limitation, “A for life, remainder to the heirs of A”, by reason of the abolishment of the Rule in *Shelley's Case*. Since this limitation is sufficient to arrive at the same result as that suggested by the advocates of the rule determining the testator's heirs at the time of his death, the deliberate language used by the testatrix would be superfluous, unless an intent other than that imposed by the primary construction was attributed to the testator.

¹ (1933) *Vict. L. R.* 59.