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times will not be litigated by the plaintiff, thus opening the door to petty extortion.<sup>33</sup> The type of civil action for damages would have no effect on the relevancy of these reasons.

The conflict in the cases, nevertheless, leaves the question still open. It is submitted that section 1208 of the Motor Vehicle Code should be reasonably interpreted and give the justice of the peace jurisdiction in *all* actions arising from the use and operation of any vehicle, if

1. the action involves a sum no greater than \$100;
2. the plaintiff produces a receipted bill, properly sworn to by said party making such repairs;
3. the defendant is not a resident of the same county as the plaintiff.

Any other limitations would be judicial legislation, and would preclude the effectiveness of the Act.

W. R. Mark

#### CONSTRUCTION OF THE WORD "SURVIVING" IN WILLS IN PENNSYLVANIA

In a recent decision by the Pennsylvania Supreme Court, the opinion being written by Chief Justice Kephart, an ancient and peculiar rule of Pennsylvania once more is enunciated and applied.<sup>1</sup> The rule is that where the word "surviving" is used in a will, the survivorship refers to the time of the death of the testator unless a contrary intention appears in the will.<sup>2</sup> The facts in the case at hand were that the testator left part of his property to trustees in trust for his daughters for life and on the death of any of them, their share was to go to the child or children of the deceased daughter. The will then provided, "In case of the decease of my said daughters or either of them without leaving lawful issue, then and in such case I give, devise and bequeath the said part or share hereinbefore given, unto my surviving child or children absolutely and forever." At the time of the testator's death, there were four children living but at the time of the decease of one of the daughters without issue, there was but one child of the testator living, although there were lineal descendants living of the two remaining children. The court applying the rule previously discussed, said that the

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<sup>33</sup>Orlosky v. Haskell, 304 Pa. 57 (1931).

<sup>1</sup>In *Re Nass's Estate*, 182 At. 401 (1936).

<sup>2</sup>*Johnson v. Morton*, 10 Pa. 245 (1849); *Woelpper's Appeal*, 126 Pa. 562, 17 At. 870 (1889); *Black v. Woods*, 213 Pa. 583, 63 At. 129 (1906); *Kohl v. Keppler*, 266 Pa. 522, 110 At. 239 (1920).

time of survivorship intended by the testator was at his decease and therefore the deceased daughter's share was to be divided among the surviving child and the children of the deceased son and daughter. The net result of the application of the rule generally, is to give to all those children surviving the testator, a vested remainder which opens up to let in after born children and which is not divested by the death of any of the children before the life tenant.

This seems on its face to be a result contrary to the intention of every normal testator. For when he says, "surviving children" after giving a prior life estate, he normally intends to take care of only such children who are living at the time of the determination of the life estate. That this is so, is evident by the fact that the English rule and the rule of the majority of the states in the United States is contrary to the Pennsylvania rule.<sup>3</sup>

Usually there are four reasons given for the Pennsylvania rule. They are (1) an estate will be construed if possible as vested instead of contingent, (2) it avoids disherision of the issue of the first taker, (3) in some cases it avoids intestacy, (4) the normal testator intends his children to share alike.<sup>4</sup>

These arguments can not be of much cogent force, for the same reasons were given for the rule that if there was a gift to "heirs" after a life estate, the "heirs" were to be determined as of the time of the testator's death.<sup>5</sup> The legislature was of such a decided opinion that this was not the normal testator's intention, that they changed the rule by statutory enactment.<sup>6</sup> Since it was deemed best to change the rule in regard to "heirs", it is submitted that the same thing should be done in regard to this ancient rule of construction in regard to "surviving". Some states have done so<sup>7</sup> while one state has by statute changed its rule to conform to the Pennsylvania rule.<sup>8</sup>

The rule is not one of inflexible application. If there is an intention expressed on the part of the testator that only those surviving the life tenant's death should share, such an intention will be given effect.<sup>9</sup> The following have been held sufficient to change the rule of construction: (1) if there is a gift to the "then surviving" or "then living";<sup>10</sup> (2) an express provision that it is to be only those living at the life tenant's death who shall share; (3) if the gift is "the share of any deceased one shall go to the *other or others*";<sup>11</sup> (4) if the gift

<sup>3</sup>69 C. J. 340, 344; Simes, "Law of Future Interests" Vol. 2, p. 87, sec. 349.

<sup>4</sup>In *Re Nass's Estate*, supra; *Craig's Estate*, 24 Dist. 851 (1915).

<sup>5</sup>*Murphey's Estate*, 276 Pa. 498, 120 At. 455 (1923).

<sup>6</sup>Act of June 29, 1923 P.L. 914; 21 *Purd. Stat. sec. 11, 12.*

<sup>7</sup>*Cal. Prob. Code, sec. 122*; Simes, "Law of Future Interests," supra.

<sup>8</sup>*Ga. Civ. Code, sec. 3680.*

<sup>9</sup>*Woelpper's Estate*, supra.

<sup>10</sup>*Milliken v. Earnshaw*, 209 Pa. 561, 58 At. 286 (1904); *Handy's Estate*, 314 Pa. 61, 170 At. 277 (1935).

<sup>11</sup>*Anderson's Estate*, 243 Pa. 34, 89 At. 306 (1914).

is "to be paid to such survivors at the time appointed";<sup>12</sup> (5) if the testator provides a substitutionary gift at the time of the death of the life tenant;<sup>13</sup> (6) if the gift is "to the survivor or survivors of them."<sup>14</sup>

The following, however, has been determined not to be of sufficient force to change the rule. If there is a gift to A for life and it further provides, "then"<sup>15</sup> or "then and in such case"<sup>16</sup> to the surviving children, the words "then" or "then and in such case" refer to the event and not to the time of survivorship. Also some cases have decided that if the life tenant is one of the children included in the group, this does not prevent his children from sharing with the survivors or children of the deceased child or children.<sup>17</sup> There are, however, other cases indicating the contrary view.<sup>18</sup> The latter view would seem to be the correct reasoning for when the normal testator gives one child a life estate and a remainder to his "surviving children", he intends that this is to be the extent of the child's interest and he is not to share with the other children in the remainder.

The application of the rule in some cases forces the court into a peculiar position. If the rule is applied and survivorship is determined as of the testator's death, the result is that those who survive the testator's death, take a vested remainder.<sup>19</sup> If, however, there is a gift to "A" for life and remainder to his issue and a remainder over to the surviving children of the testator if "A" should die leaving no issue, then if the rule is applied, the children of the testator who survive him, have by the application of the rule a vested remainder.<sup>20</sup> But if we look at the facts above, it is easy to see that the remainder can not be vested but rather it is contingent upon an event, that is the death of the life tenant without issue. Then and only then can the remainder to the surviving children take effect. So if the rule is applied, the court will hold that the children surviving the testator took a vested estate which was in fact contingent. Some courts have recognized that this would be the effect of the application of the rule in this case and have held that this is sufficient to change the effect of the rule and have

<sup>12</sup>Bartholemew's Estate, 155 Pa. 314, 26 At. 550 (1893).

<sup>13</sup>Alburger's Estate, 274 Pa. 15, 117 At. 452 (1922).

<sup>14</sup>Lewis's Estate, 203 Pa. 219, 52 At. 208 (1902). It is also interesting that in the Nass case, the will bore the words, "child or children" which would seem to indicate that the testator contemplated the possibility that there might be but one survivor, thus indicating definitely that the survivorship was to be determined as of the life tenant's death.

<sup>15</sup>Buzby's Appeal, 61 Pa. 111 (1869); Fitzpatrick's Estate, 233 Pa. 33, 81 At. 815 (1911).

<sup>16</sup>In Re Nass's Estate, supra.

<sup>17</sup>Buzby's Appeal, supra; Stewart's Estate, 147 Pa. 383, 23 At. 599 (1892); Fuller's Estate, 225 Pa. 626, 74 At. 623 (1909).

<sup>18</sup>Black v. Woods, supra; Kohl v. Keppler, supra.

<sup>19</sup>In Re Nass's Estate, supra.

<sup>20</sup>Vance's Estate, 209 Pa. 561, 58 At. 1063 (1904). The same situation is involved in the Nass case, for there was a gift of life estates to the daughters and remainders to their issue and the gift to the surviving children was to take effect only if the life tenant died without issue.

determined the survivorship as of the time of the life tenant's death.<sup>21</sup> A possible theory to solve this problem would be to say that the children took a vested estate subject to divestiture at the birth of issue to the life tenant. But this would lead to a scrambled situation where it would be divested upon birth of issue of the life tenant, to be revested upon death of such issue before the life tenant and sub- to a scrambled situation where it would be divested upon birth of issue of the life tenant.<sup>22</sup>

A practical solution to the difficulty in these cases, is indicated in a lower court decision.<sup>23</sup> They indicate that if the rule is applied and the determination of survivorship at the time of the testator's death will prevent the contingent remainder from failing, or will prevent intestacy, or will prevent the property from going off into a line of inheritance which the testator did not desire, then the survivorship should be determined at the testator's death but that in all other cases, the court should give effect to the intention of the normal testator and determine it as of the life tenant's death.

For these reasons, it is submitted that this "artificial and arbitrary rule"<sup>24</sup> should be changed in Pennsylvania either by legislative enactment or by a decision of the Supreme Court.

Neil J. Ward

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<sup>21</sup>Reiff's Appeal, 124 Pa. 145, 16 At. 636 (1889); Woelpper's Estate, *supra*; Patrick's Estate, 162 Pa. 175, 29 At. 639 (1894); Steinmetz's Estate, 194 Pa. 611, 45 At. 663 (1900).

<sup>22</sup>Woelpper's Estate, *supra*.

<sup>23</sup>Craig's Estate, 24 Dist. 851 (1915).

<sup>24</sup>That was the description which the court gave the rule in Fox's Estate, 222 Pa. 108, 70 At. 954 (1908).