

779

2-325

Record No. 1370

VERNA E. SOUTHWORTH, Appellant,

v.

5.00
8.50
16.50
25.00

FANNIE SULLIVAN AND OTHERS, Appellees

5.00
7.50
12.50

FROM THE CHANCERY COURT OF THE CITY OF RICHMOND.

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, Clerk.

162 Va 325

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

VERNA E. SOUTHWORTH, Appellant,

against

FANNIE SULLIVAN AND OTHERS, Appellees.

*To the Honorable Justices of the Supreme Court of Appeals
of Virginia:*

Your petitioner, Verna E. Southworth, respectfully represents that she is aggrieved by a final decree of the Chancery Court of the City of Richmond, entered July 19, 1932, in the suit depending in the said court, wherein petitioner was the plaintiff and Fannie Sullivan and others were the defendants. A transcript of the record of the case is exhibited with this petition.

STATEMENT OF FACTS.

This suit was instituted by Verna E. Southworth to have the last will of Benjamin F. Marshall, deceased, construed. The testator died in March, 1909, and his will was admitted to probate by the Chancery Court of the City of Richmond, March 16, 1909. The will is as follows:

“Richmond, Va.
February 26, 1907.

I Benjamin F. Marshall being of sound and disposing mind do make this my last will and testament.

I desire that all my just debts be paid as soon as can be conveniently done.

I give and bequeath to my beloved wife, Louisa Marshall my entire estate both real and personal of every description

to have in fee simple to use as she may best see fit for Her maintenance while she may live even if it consumes all. Whatever may be left at her death I desire shall go to my beloved niece and Adopted Daughter Verna E. Southworth save any article of personal property as she may see fit to bestow upon some Friend that Kindly considered Her in her last days.

Haveing full confidence in my darling wife to carry out my wishes I nominate and appoint Her as Executrix of my estate without bond or security and further more that I desire that no appraisement be taken of my estate given under my hand this 26th day of February 1907.

BENJAMIN F. MARSHALL."

The testator owned the dwelling house known as No. 2612 East Clay Street, in the City of Richmond at the time of his death, which, of course, passed under his will to his wife, Louisa Marshall. The property was never disposed by Mrs. Marshall and she died June 2, 1929, intestate. At the death of Louisa Marshall, did the title to the property vest in Verna E. Southworth under the will of Benjamin F. Marshall, or did it descend to the heirs at law of Louisa Marshall? This is the sole question in the case.

ASSIGNMENT OF ERROR.

The Court erred in deciding and holding that Verna E. Southworth took nothing under the last will and testament of Benjamin F. Marshall, deceased.

ARGUMENT.

Whether the assignment of error is well taken depends upon the true meaning and construction of section 2418 of the Code of 1887 which, as amended by the Act of 1908, page 181, reads as follows:

"Any interest in or claim to real estate may be disposed of by deed or will. Any estate may be made to commence *in futuro* by deed, in like manner as by will, and any estate, real or personal, may be disposed of by deed or will with power of absolute disposition by the grantee, devisee, or legatee, with limitation over by way of remainder, of executory interest, of such portion of such estate so granted, devised, or bequeathed, which shall not have been absolutely disposed of by such grantee, devisee, or legatee, in his or her life time,

which said remainder, or executory interest, shall be valid and shall pass as directed by such grantor or testator; provided, however, that a deed of trust or mortgage shall not be construed to be such absolute disposition of the estate thereby conveyed, unless there be sale thereunder; and any estate which would be good as an executory devise or bequest, shall be good if created by deed."

This statute, so far as we know, has never been construed by the court of appeals. In *Steffey vs. King*, 126 Va. 120, the will took effect before the act was passed. In that case the will before the court was in these words:

"It is my will and desire that my wife, Sarah E. Kasey, have absolute control of all of the aforesaid property during the term of her natural life. If at my wife's death there remains anything over and above her support, it is my will and desire that Bessie H. Foster, a girl that I have raised, have all of the personal property and real estate to have and to hold forever."

Kelly, J., in delivering the opinion of the court, said:

"It is assigned as error that the court erred in holding that Mrs. Kasey upon a proper construction of her husband's will took a fee simple title in the real estate.

"We have no difficulty in disposing of this assignment. It cannot be sustained without overturning the rule generally designated as the doctrine of *May vs. Joynes*, 20 Gratt. (61 Va.) 692. The many cases in which this court has approved that rule are collected by Judge Burks in a note to the opinion in *Conrad vs. Conrad*, 123 Va. 711, 97 S. E. 337, and need not be cited here. Taking the language of the will as a whole, there is no escape from the conclusion that Mr. Kasey intended to give his wife the absolute power of disposal during her lifetime, and therefore under the decisions just mentioned the remainder over was void.

"It may be, as argued by counsel for the appellants, that the rule in question often operates to defeat the real intention of the testator. The legislature seems to have thought so when it passed the act effective June 26, 1908 (Acts 1908, c. 146) amending section 2418 of the Code. The will in the instant case, however, took effect before that act was passed, and nothing remains for us to do with this branch of the case

but to follow the rule which, as Judge Harrison, said in *Farish vs. Wayman*, 91 Va. 430, 21 S. E. 810, has become a canon of property. See also *Conrad vs. Conrad*, 123 Va. at 722, where this is said:

“A list of the cases decided by this court on this subject is given in the margin for convenience of reference. In none of these cases, however, is the effect of the act of 1908 (Acts 1908, p. 187) amending section 2418 of the Code considered, nor is it necessary now to consider it, as Mrs. Conrad is still living and the will provides that, under the circumstances therein mentioned, ‘she may use the principal to any extent that she may desire’.”

In *Barnett vs. Blain*, 126 Va. 175, the court held:

“Wills—*Jus Disponendi*—Testator Gave Will *Jus Disponendi*—Remainder Over Void.—The gift of a life estate in personal property, followed by the language that the testator shall have ‘the privilege of disposing of any of the personal property during her life, as she may think proper, and use the proceeds thereof for her comfort’ (or equivalent phraseology), invests her with the absolute estate therein, *where the will was made and testator died prior to the act of 1908 amending and re-enacting section 2418 of the Code of 1904.*” (Italics supplied.)

Judge Burks, in his Address on the Code of 1919, 5 Va. Law Reg., U. S. 97, 109, said:

“Perhaps no statute in Virginia has been the subject of more speculation as to its meaning than the act of 1908 amending section 2418 of the Code of 1887, the primary object of which amendment was to abolish the rule commonly known as the doctrine of *May vs. Joynes*. The revisors redrafted the amendment, and have sought to improve its phraseology. Its meaning also has probably been changed. The revised section is expressly restricted to devises and bequests for life, with absolute power of disposition. The act of 1908 did not contain the words ‘for life’ and the language was broad enough to apply to a class of limitations which was probably not intended to be affected by the act.” See note to section 5147 of the Code of 1930.

In Harrison on Wills, Section 243 (7), p. 485, Judge Harrison, after quoting section 2418 of the Code of 1887, as amended by the Acts of 1908, says:

"*This statute applies to any estate.* The words are very broad. It may be a life estate or a fee simple. It may apply to real or personal property or to a legal or equitable estate. 'Any estate' is the broad language of the statute. The statute also saw the power of disposition may be absolute. The remainder may be of any such portion of the estate as is not absolutely disposed of by the devisee or legatee. Is the property liable for the debts of first taker? Even a deed of trust or mortgage thereon is to have no effect unless the mortgage or deed of trust be enforced in the lifetime of the first taker. How about a sale under an execution? No decision of the court has yet construed this statute, but it is a complete reversal of all the decisions we have cited in Virginia, if full effect is given to its purport. There are a few jurisdictions in which such limitations on a devise in general terms are given effect, but the general authority throughout the United States is to the effect that where an estate is created in general terms with an absolute power of disposition, any limitation of what remains undisposed of is void. The statute really impairs the power of absolute disposition because where the first taker is not permitted to mortgage the interest given him, unless the mortgage is enforced in his lifetime, but is only given the power to make an absolute sale of the property, it cannot be said he has an unqualified power of disposition. The statute hardly intends to interfere with a power to mortgage expressly given in the will, but presumably does not intend to include within the power of absolute disposition the right to mortgage.

"It would be entirely within the power of the first taker to destroy the remainder by an absolute conveyance to a third party even though such third party would reconvey to the first taker.

"Again could the first taker dispose of the property by will? The will would be executed in the lifetime of the first taker, but as such will does not take effect until after his death, it is presumed the statute would apply.

"The revisors of the Code of 1919 in Section 5147, have *materially changed the Act 1908*. By the amendment the 'estate' is a life estate in *express* terms. The section in this respect now reads:

"If any interest in or claim to real estate or personal property be disposed of by deed or will *for life*, with a limitation in remainder over, and in the same instrument there be conferred expressly or by implication a power upon the life tenant in his life time or by will to dispose absolutely of said

property, the limitation in remainder over, shall not fail, or be defeated, except to the extent that the life tenant shall have lawfully exercised such power of disposal; provided, however that a deed of trust or mortgage executed by the life tenant shall not be construed to be an absolute disposition of the estate thereby conveyed, unless there be a sale thereunder."

"Except then, as to *express estates* for life the old construction is restored." (Italics supplied.)

The Act of 1908 was in full force and effect when Benjamin F. Marshall died in March, 1909. His will was, therefore, subject to the law. In Schauler on Wills, section 11, this is said:

"Hence it follows that 'a statute passed after the making of a will, but before the death of the testator, by which the law is changed, takes effect upon the will? * * *'"

In Cooley's Constitutional Limitations (Seventh edition), page 512, this is said:

"No one is heir to the living; and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents. But this promise is no more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession,—a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descents be declared. * * *"

The testator, it has been observed, gave to his wife his entire estate, both real and personal, "to have in fee simple to use as she may best see fit for her maintenance while she may live even if it consumes all". He then provided that "whatsoever may be left at her death I desire shall go to my beloved niece and adopted daughter Verna E. Southworth". It is plain that the language of the will brings the case within the rule generally designated as the doctrine of *May vs. Joynes*, 20 Gratt. 692. *Farish vs. Wayman*, 91 Va. 430; *Conrad vs. Conrad*, 123 Va. 711, and the cases cited in a note by Judge Burks.

The language of the Act of 1908 is very broad. Under it any estate may be disposed of by deed or will with power of absolute disposition by the grantee, devisee, or legatee with limitation over by way of remainder, and the remainder is preserved as to the estate undisposed of by the grantee, devisee or legatee in his life time, so that such undisposed of es-

tate shall pass as directed by the grantor or testator. The act was lawful exercise of legislative power and the doctrine of *May vs. Joynes* was destroyed by it. The will, then, must be considered in the light of this statute in order to determine the rights of the parties claiming under it. The will could not confer a greater or higher estate upon the first taker than the law allowed. "Any estate," says the Act, "may be disposed of by * * * will with power of absolute disposition by the devisee * * * with limitation over by way of remainder. * * *."

Now, Louisa Marshall took an estate under the will with absolute power of disposition because she had the right to use it as she saw fit for her maintenance while she lived "even if it consumed all". What character of estate then did she take? It could not have been an estate in fee simple, as that kind of an estate is defined and understood, because a remainder cannot be limited after a fee, and there was a limitation over by way of remainder, which the statute allows, which remainder, under the statute, was valid in this case because the house and lot was a portion of the estate devised to Louisa Marshall that remained undisposed of at her death.

Mrs. Marshall was, however, armed with the power of absolute disposition, and, to that extent, had an estate with one of the qualities of a fee simple. But the estate which she took under the will was liable to be defeated, by the statute, by her failure to dispose of the property during her life time, and the portion thereof which remained at her death, the statute made effective as a remainder to pass as directed by the testator.

The Act created such an estate in Mrs. Marshall, the first taker, as was not known to the law prior to the passage of the statute. Her estate, then, might well be called a defeasible fee under the Act of 1908, since it was defeated by her failure to dispose of it during her life time.

The house and lot belonged to the testator, Benjamin F. Marshall, who died in March, 1909. His wife, Louisa Marshall, did not dispose of the property during her life time, and, by force of the statute, it passed under his will to Verna E. Southworth, the remainderman, at the death of Mrs. Marshall. See *Steffey vs. King*, 126 Va. 120; *Barnett vs. Blain*, 126 Va. 179; Harrison on Wills, Section 243 (7), p. 485.

The statute is mandatory, and rights which vested under it should not and cannot be taken away. Petitioner's right as remainderman under the will, although contingent, was fixed by the statute at the death of the testator. The remainder was contingent upon Louisa Marshall, the first taker, not disposing of the estate during her life time. If she had disposed

of the property during her life time, as she had the right to do, the remainderman would have taken nothing, but since Mrs. Marshall did not dispose of the said house and lot at her death, it constituted the remainder of the estate of the said Benjamin F. Marshall, deceased, and passed under his will to Verna E. Southworth, the remainderman. This is true because such is the plain mandate of the statute, it is respectfully submitted.

In *Skinner vs. Skinner's Admr.*, 163 S. E. 90, Browning, J., speaking for the court, said:

"In 1908, the Virginia Legislature passed an act the purpose of which was to abolish or modify the doctrine so as to *preserve the remainder*, when the life tenant died, *leaving undisposed, unused or unconsumed any portion of the estate or property acquired under the will*.

"In the wisdom and judgment of the revisors of the Code of Virginia of 1919, this act went too far. They seemed to see it probably sweeping away what had become a canon of property, and so out of their crucible came the present section of the Code. * * * ."

The court referred to the statute as amended by the revisors, and held that where a testator had given his wife "absolute dominion" over the property devised she took a fee simple, and the limitation over was void "because it is against the law". In the light of this decision, we could not successfully contend in the instant case that the remainder over, under the present law, would be valid. But we have seen that the Act of 1908 was materially changed by the revisors of the 1919 Code.

The learned chancellor of the lower court decided that Louisa Marshall took a fee simple estate under the will of her deceased husband and for that reason held that the remainder over to Verna E. Southworth was void. The decision was the result of a misconception of the Act of 1908, which is mandatory and binding, it is respectfully submitted. The language of that statute is, "Any estate, real or personal, may be disposed of by * * * will with power of absolute disposition by the * * * devisee * * * with limitation over by way or remainder, * * * ." The words, "any estate" are sufficiently broad to include, and did include, the estate or interest devised to Louisa Marshall by her husband by his will whatever that interest might have been. Her powers over

the estate, under the will, were extensive. She could have conveyed, disposed of, or consumed all of the property during her lifetime. To that extent her powers were similar to those of a fee simple owner. But she did not possess the power to transmit by inheritance, at her death, to her heirs the undisposed portion of the estate. The statute absolutely arrested the descent of so much of the estate as remainder undisposed of at her death and directed that such portion of the estate should pass as directed by the testator. The language of the statute being "with limitation over by way of remainder * * * of such portion of such estate so * * * devised * * * which shall not have been absolutely disposed of by such * * * devisee, * * * in his or her life time * * * shall be valid and shall pass as directed by * * * such testator; * * * ." The language of the statute, it has been observed, is *mandatory*. The estate undisposed of was the remainder which the statute protected, and at the death of Louisa Marshall it passed to Verna E. Southworth to whom it was given by the testator. To hold otherwise would be tantamount to nullification of the plain language of the statute, it is respectfully submitted.

The able Judge of the lower court overlooked the fact that the statute absolutely cuts off descent from the first taker of "such portion of such estate so * * * devised * * * which shall not have been disposed of by such * * * devisee * * * in his or her life time" by directing that such estate shall pass as directed by the testator. Harrison on Wills, section 243 (7), p. 485.

The court erred, therefore, in holding that Verna E. Southworth took nothing under the said will, it is respectfully submitted.

After the Chancery Court had decided this cause, it was agreed that the appellees might take charge of the said house and lot and hold the same until the final decision of this court. Somebody should look after the property during the pending litigation, and the arrangement is satisfactory to petitioner. Under the circumstances nothing would be gained by a *superseas*.

For the foregoing reasons, petitioner prays that she be granted an appeal from the decision and decree complained of; that the record be reviewed and the decree reversed; that this court enter such decree as the lower court should have entered and decree that petitioner is entitled to the said house

and lot under the said will, and that petitioner be granted all other relief to which she may be entitled; and your petitioner will ever pray, etc.

VERNA E. SOUTHWORTH,
By Counsel.

DAVID MEADE WHITE,
MILLAN & SMITH,
Attorneys for petitioner.

I, David Meade White, an attorney at law, practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion, the said decision and decree complained of should be reviewed and reversed by this honorable court.

DAVID MEADE WHITE.

We, the attorneys who represented the defendants in the lower court, do hereby acknowledge receipt of a copy of the foregoing petition, this 22nd day of December, 1932.

GEO. E. HAW,
WM. C. MILLER, JR.

Received Dec. 22, 1932.

H. S. J.

An appeal allowed. Bond \$300.00.

January 19, 1933.

VIRGINIA:

Pleas before the Judge of the Chancery Court of the City of Richmond, the 19th day of July, 1932.

Be it Remembered, that heretofore, to-wit: That on the 20th day of August, 1930, came the complainant, Verna E. Southworth, by counsel, and sued out of the Clerk's Office subpoenas in Chancery against the defendants, directed to proper officers and returnable to first Monday in September, 1930, which subpoenas in Chancery *are* returns of the officers thereon are in due form.

And at another day, to-wit:

At Rules held in the Clerk's Office of said Court, on the first Monday in September, 1930, came the complainant, by counsel, and filed her bill, which bill and the exhibit therewith are in the words and figures following, to-wit:

BILL.

Verna E. Southworth, Plaintiff,

vs.

Fannie Sullivan, Lena Sweet, Sadie Blake, Birdie Moran,
Alma Sweet, Landon Sweet, Wilmer Sweet, Everett A.
Sweet and Clarence Sweet, Defendants.

To the Honorable W. A. Moncure, Judge of the said Court:

Humbly complaining sheweth unto Your Honor, your complainant, Verna E. Southworth, the following facts:

(1) That Benjamin F. Marshall died in March, 1909, leaving a last will and testament, which was admitted to probate by this Court March 16, 1909, and recorded in Will Book No. 16, page 530. The second clause of the said will is in these words:

"I give and bequeath to my beloved wife, Louisa Marshall, my entire estate both real and personal of every description to have in fee simple to use as she may best see fit for her maintenance while she may live even if it consumes all.

"Whatsoever may be left at her death I desire shall go to my beloved niece and adopted daughter, Verna E. Southworth, save any article of personal property as she may see fit to bestow upon some friend that kindly considered her in her last days.

"Having full confidence in my darling wife to carry out my wishes."

A certified copy of the said will is herewith filed, marked

Exhibit No. 1 and complainant prays that it may be
page 2 } read, considered and treated as a part of this bill.

(2) Complainant further shows that the said Benjamin E. Marshall owned in fee simple a certain house and lot in the City of Richmond, Virginia, known and designated as No. 2612 East Clay Street, and, at his death, it passed to his wife, the said Louisa Marshall, who took such an interest in the

property as was given her by the will. Complainant is advised and believes that the said Louisa Marshall had the right, under the said will, to make such use of the said property as she deemed best for her maintenance and support during her life, but that if she did not consume all of it for her maintenance and support, then, in that even, what was left at her death passed under the said will to complainant in fee simple.

(3) Complainant further shows that the said Louisa Marshall died June 2, 1929, intestate, without issue, and without having used or disposed of the said real estate for her maintenance and support; that she left surviving her one sister, Fannie Sullivan, and eight nieces and nephews, the children of a deceased sister, namely, Lena Sweet, Sadie Blake, Birdie Moran, Alma Sweet, Landon Sweet, Wilmer Sweet, Everett A. Sweet and Clarence Sweet; that the said sister and the said nieces and nephews are the only heirs at law of the said Louisa Marshall; that if the said Louisa Marshall owned the said real estate in fee simple, then, at her death, it descended to the said sister and the said nieces and nephews as her sole heirs at law, subject to any debts due by the said Louisa Marshall, deceased. Complainant further shows that the Act of June 26, 1908, was in force when the said Benjamin F. Marshall died, and the gift to her of what was left of his estate at the death of the said Louisa Marshall was valid; that the said house and lot, No. 2612 E. Clay Street, Richmond, Virginia, was a part of the estate of the said Benjamin F. Marshall, deceased, left at the death of the said Louisa Marshall, and, at her death, it passed under the said will to complainant in fee simple.

page 3 } (4) Complainant further shows that it is necessary to have the will of the said Benjamin F. Marshall, deceased, construed in order that her rights in and to the said real estate under the said will may be settled and determined; that she has possession of the said real estate, but she cannot sell or dispose of it until her rights have been adjudicated and decided by a proper construction of the said will; that the heirs at law of the said Louisa Marshall, deceased, deny that complainant is the owner of the said property and contend that the said real estate belongs to them.

In tender consideration whereof, complainant prays that the said Fannie Sullivan, Lena Sweet, Sadie Blake, Birdie Moran, Alma Sweet, Landon Sweet, Wilmer Sweet, Everett A. Sweet, and Clarence Sweet may be made parties defend-

ants to this bill and be required to answer the same, but not under oath, answers under oath being hereby expressly waived; that the last will and testament of the said Benjamin F. Marshall, deceased, be construed; that the rights of complainant in and to the said real estate under the said will be decided and determined; that complainant be adjudged to be the owner of the said real estate in fee simple; and that complainant may have such other further and general relief as the nature of her case may require or to equity may seem meet, and your complainant will ever pray, etc.

VERNA E. SOUTHWORTH,
By Counsel.

DAVID MEADE WHITE,
MILLAN & SMITH,
p. q.

EXHIBIT NO. 1, WITH BILL.

Richmond, V...
February 26, 1907.

I Benjamin F. Marshall being of sound and disposing mind do make this my last will and testament.

I desire that all my just debts be paid as soon as page 4 } can be conveniently done.

I give and bequeath to my beloved wife Louisa Marshall my entire estate both real and personal of every description to have in fee simple to use as she may best see fit for Her maintenance while she may live even if it consumes all.

Whatsoever may be left at her death I desire shall go to my beloved niece and Adopted Daughter Verna E. Southworth save any article of personal property as she may see fit to bestow upon some Friend that kindly considered Her in her last days.

Having full confidence in my darling wife to carry out my wishes I nominate and appoint Her as Executrix of my estate without bond or security and further more that I desire that no appraisement be taken of my estate given under my hand this 26th day of February 1907.

BENJAMIN F. MARSHALL.

Virginia:

In the Chancery Court of the City of Richmond, the 16th day of March, 1909.

A paper writing bearing date the 26th day of February, 1907, purporting to be the last will and testament of Benjamin F. Marshall, deceased, late of this City, was this day produced to the Court for proof; and there being no subscribing witnesses to said paper writing, Irvin Hudson and W. W. Taylor, being first duly sworn for the purpose, severally deposed that they were well acquainted with the handwriting of the said Benjamin F. Marshall, deceased, having frequently seen him write, and that they verily believed the said paper writing and signature thereto be wholly in the handwriting of the said Benjamin F. Marshall, deceased, and they further deposed that at the time said paper writing bears date the said Benjamin F. Marshall was of sound mind and memory.

Thereupon the said paper writing is established and ordered to be recorded as and for the trust last will and *and* testament of the said Benjamin F. Marshall, deceased.

And on the motion of Louisa Marshall, the only page 5 { Executor named in said will, she was permitted by the Court to qualify as such; and thereupon she made oath as the law directs, and entered into and acknowledged a bond as such Executor in the penalty of One Thousand Dollars, payable and conditioned according to law, but without security, the said will directing that none should be required of her.

And certificate is granted the said Louisa Marshall for obtaining a probate of the said will in due form.

JOINT AND SEVERAL ANSWERS AND CROSS-BILL
FILED IN COURT UNDER DECREE,
JANUARY 22, 1931.

The joint and several answers and cross-bill of the defendants, Fannie Sullivan, Lena Sweet, Sadie Blake, Birdie Moran, Alma Sweet, Landon Sweet, Wilmer Sweet, Everett A. Sweet and Clarence Sweet to a bill of complaint exhibited in the Chancery Court of the City of Richmond against themselves and others, by Verna E. Southworth.

These respondents for answer unto the bill of the complainant, jointly and severally answering, so far as they are advised it is necessary to answer, answer and say:

1. That they deny each and every allegation of the bill of the complainant, except as the same may be hereinafter specifically admitted.

2. That they admit that Benjamin F. Marshall died in the year 1909, leaving a last will and testament dated February 26th, 1907, and which was probated in the Chancery Court of the City of Richmond on the 16th day of March, 1909, a copy of which is filed with the bill of the complainant; and further, that the said Benjamin F. Marshall owned the fee simple title to a certain house and lot in the City of Richmond, Virginia, known as #2612 East Clay Street, and that Louisa Marshall who took under the terms of the will of the said Benjamin F. Marshall died on June 2nd, 1929, intestate, and without issue, and without having used or disposed of the real estate aforesaid, and that she left surviving
page 6 } her as her heirs at law the defendants as set forth in the bill of the complainant.

3. That they deny the correctness of the interpretation sought to be placed upon the will of Benjamin F. Marshall, by the complainant, and on the other hand assert and charge that the true and correct interpretation of the will of the said Benjamin F. Marshall, and the true and correct construction thereof is that he left to the said Louisa Marshall, his wife, the fee simple estate in and to all of the property of which he died possessed, and that under and by reason of the terms of the will aforesaid, the said Louisa Marshall took a fee simple estate in the house and lot aforesaid, and that upon her death intestate, the same passed and descended to these defendants. Further, that the will aforesaid having given to and vested in Louisa Marshall the fee simple title to said property, the words thereafter used referring to what might be left at her death were repugnant to a fee simple title, and therefor have no effect.

4. Further answering by way of a cross bill, your defendants pray that this answer be considered and treated as a cross-bill, and that in conformity herewith the Court will construe the will of the said Benjamin F. Marshall, and will construe the same as having vested in the said Louisa Marshall

a fee simple title, which at her death, intestate, passed and descended to these *defendant*.

And now having fully answered they pray to be hence dismissed, etc.

FANNIE SULLIVAN,
LENA SWEET,
SADIE BLAKE,
BIRDIE MORAN,
ALMA SWEET,
LANDON SWEET,
WILMER SWEET,
EVERETT A. SWEET,
CLARENCE SWEET.

By HAW & HAW &
W. C. MILLER, JR.,
Their Counsel.

page 7 { DECREE OF JANUARY 22, 1931, FILING AND
ANSWERING CROSS-BILL AND DOCK-
ETING CAUSE.

Upon the motion of Fannie Sullivan, Lena Sweet, Sadie Blake, Birdie Moran, Alma Sweet, Landon Sweet, Wilmer Sweet, Everett A. Sweet, and Clarence Sweet, by counsel, they are allowed to file in open Court their answer and *and* cross-bill in this suit, which is accordingly done.

And thereupon upon motion of all parties by counsel, this cause is docketed and set down for hearing upon the bill of the complainant, and the exhibits therewith, and upon the answer and cross-bill of the defendants.

DECREE OF JULY 19TH, 1932—FINAL DECREE.

This cause which has been duly matured at rules, docketed and set for hearing, came on this day to be heard on the bill of complaint; and the exhibit therewith; on the joint and several answers of the defendants heretofore filed herein and prayed to be treated as a cross-bill, and was argued by counsel.

On consideration whereof, for reasons in writing ordered filed as part of the record, the Court is of opinion that by the terms of the will of Benjamin F. Marshall, his wife, Louisa

Marshall, was expressly given a fee simple estate (absolute estate) in and to all of his estate, real and personal, and that any limitation of "whatsoever may be left" to Verna E. Southworth is repugnant to the absolute estate already given to Louisa Marshall, is therefore void, and it is accordingly so adjudged, ordered and decreed.

And it being admitted that Louisa Marshall died intestate, and that Verna E. Southworth is no blood kin to the said Louisa Marshall, it is further adjudged, ordered and decreed that the estate of Louisa Marshall, upon her death intestate, passed as provided by the statutes of descents and distributions in Virginia, and that the bill of complaint be dismissed at the cost of Verna E. Southworth.

page 8 } OPINION OF THE COURT.

Virginia:

In the Chancery Court of the City of Richmond.

Verna E. Southworth

vs.

Fannie Sullivan, et al.

Benjamin F. Marshall and his wife, Louisa Marshall, had no children, and lived in their home 2612 East Clay Street, Richmond, Virginia. Verna E. Southworth, a niece of B. F. Marshall and who was called his adopted daughter lived in their home with them.

B. F. Marshall died in the early part of the year 1909, and his holographic will, dated February 26, 1907, was duly probated in this Court on March 16, 1909.

So much of the will as is necessary for an understanding of the issue involved in this suit is as follows:

"I give and bequeath to my beloved wife, Louisa Marshall, my entire estate both real and personal of every description to have in fee simple to use as she may see fit for her maintenance while she may live even if it consumes all." "Whatsoever may be left at her death I desire shall go to my beloved niece and adopted daughter Verna E. Southworth save any article of personal property as she may see fit to bestow upon some friend that kindly considered her in her last days."

Louisa Marshall died intestate, and the sole issue here is whether the house and lot 2612 East Clay Street, belongs to the plaintiff Verna E. Southworth, or did Louise Marshall take a fee simple title under the will of Benjamin F. Marshall which passed upon her death, intestate to her heirs at law.

Questions of this character have been fruitful of much litigation, due, no doubt, to the fact that no two wills are alike, the language being different in each.

To properly construe any will the intent of the page 9 } testator must be ascertained; this intent must be gathered from the language used and effect must be given to that intent so expressed, unless it violates some rule of law or is against public policy.

Of course the whole will must be considered, the meaning of the words must be given their usual significance, and technical words must be given their technical meaning.

In *Allison vs. Allison*, 101 Va., page 543, the Court said:

“The object in construing wills is to arrive at the true intent of the testator, but that intent is to be gathered from the language used, for the object of construction is not to ascertain the presumed or supposed intention; but the expressed intention, of the testator; that is the meaning which the words of the will, correctly interpreted convey, *Wooters vs. Redd's Exor.*, 12 Gratt. 206; *Hatcher vs. Hatcher*, 80 Va. 171; *Waring vs. Bosher*, 91 Va. 286.”

“In construing wills the words used should be given their ordinary and usual signification; but, where technical words are used, they are presumed to be used technically, and words of a definite legal signification are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument.”

In *Conrad vs. Conrad, Exor.*, 123 Va., at page 716, the Court said:

“The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In ascertaining the intention the language used and the sense it is used by the testator, is the primary source of

information as it is the expressed intention of the testator which is sought. * * *

"Nothing is to be added to or taken from the language used, and every clause and every word must be given effect, if possible. Generally, ordinary words are to be given their usual and ordinary meanings, and technical words are presumed to be used in a technical sense." See also *Foster vs. Wilson*, 139 Va., page 82.

Now what is fee simple? In *Minor or Real Property*, Vol. 1, page 180, it is defined:

"An estate in fee simple is the entire and absolute property of the subject matter, and therefore when one grants such an estate he can make no further disposition of the property (save by way of substitution), for he has already granted the whole and entire interest that is possible for him to have, and, consequently nothing remains in him." Citing 2 *Minors Ins.*, pp. 80-81.

In reading the will under consideration one is impressed with the fact that the testator's primary object and concern was his wife and to her he said: "I give and bequeath to my beloved wife, Louisa Marshall my entire estate both real and personal of every description to have in fee simple to use as she best sees fit * * * even if it consumes all."

It is perfectly manifest from that language the testator gave to his wife "the entire and absolute property of the subject matter" and by the definition of fee simple just above quoted the testate could make no further disposition of the property for he had already given the whole and entire interest possible for him to have, and hence nothing remained in him. It is true in the quotation from his will in the next previous paragraph these words are omitted after the word fit, "for her maintenance while she may live". Putting these words back and considering the paragraph with the words inserted I think the words were used by the testator as expressing a motive for giving all of his property in fee simple to his wife, and he could not have intended (in view of the language, "to have in fee simple to use as she best see fit * * * even if it consumes all) to give her only a life estate with the power to consume the entire property.

I, therefore, am of the opinion that by the first clause fully quoted he gave an absolute and unqualified title (fee simple) to all of his estate to his wife Louisa Marshall, and that nothing remained in the testator.

Though it possibly might have been his wish, that if his wife had any property at her death, it should go to his niece Verna E. Southworth, he could not effect that wish having given his wife his property in absolute right, for the simple reason it is contrary to the law as there can be no limitation after a fee simple.

page 11 } The case of *Wornom vs. Hampton, etc., Institute*,
144 Va. 533, is quite illustrative of the case here. Simon Bryant, the testator, died in 1912, by the third clause of his will he gave and bequeathed to his wife Catherine Bryant, absolutely and in fee simple all his property, real and personal to use and dispose of as she may desire "upon condition, however, should she not dispose of the same before her death, then I give to my daughter Mary L. Bryant, all of the personal property so remaining undisposed of at the time of the death of his said wife, Catherine Bryant, absolutely to dispose of as she may desire. I also give to my daughter, Mary L. Bryant in fee simple my lot on West Queen Street in the town of Hampton, &c., &c." In the fourth clause of his will Simon Bryant gave and bequeathed to his niece, Sallie Wornom, in fee simple to use and dispose of as she may think proper a house and lot on the road leading from Gatewood's corner to Zion Church."

The Court, Judge Prentiss, construing the will of Simon Bryant, decided that Catherine Bryant the wife took title to all of the property of testator in absolute right (fee simple). On pp. 540-541 this language is used:

"We, therefore conclude that as Catherine Bryant took a fee simple, the inconsistent gift over is void, because the testator undertook to do that which is legally impossible. The fact that the gift over appears in the fourth clause has no special significance, and is invalid because it is subject to the fee simple and absolute power of disposition so clearly vested in Catherine Bryant by the third clause of the will."

In a very recent case, *Skinner vs. Skinner, Admr.*, decided March 24, 1932, 163 S. E., page 90, the Court, quoting from *Davis vs. Kendall*, 130 Va. 175, says:

"The estate conveyed being the testators his will is the law of the land."

"Hence, when he plainly intends a fee, even though the testator's expression is inartificial, a fee is given, but his intent to limit a remainder on a fee is avoided, not that the Court fails to perceive the intent, but because it is against the law."

page 12 } It is admitted at the bar and in the brief of counsel for Verna E. Southworth that Louisa Marshall "took therefore under the will of her husband a fee simple estate", but they say she took this "by reason of that fixed principle of law known as the doctrine of *May vs. Joynes*", and it is claimed by them for her that the principle of law known as *May vs. Joynes* was abolished by the legislature, in its amendment of Section 2418 of the then Code. That this amendment was in effect in 1909 when B. F. Marshall, died, and the rights of the plaintiff should be accorded her according to the then amended statute.

So far as I am able to ascertain the meaning of the statute, Acts of Assembly 1908, page 181, has never been passed on by our Court of last resort. The statute itself was changed by the revisors of the Code of 1919, Sect. 5147. By the revised Act "the paragraph is expressly restricted to devises and *bequests for life* with absolute power of disposition. (Revisors' note to section.)

In the case of *Skinner vs. Skinner, supra*, considerable reference is made to the Act of 1908, amending Section 2418 of the Code as well as the language in the revised Code of 1919, Section 5147, but the meaning of the Act of 1908 is not construed.

In Minor on real property, Section 858, page 942, last paragraph of the section reads:

"Whether the statute just referred to applies to the first class of cases, namely, where the first taker takes an *express fee simple*, or a general devise or grant (not designating any particular estate) or whether it shall be construed to apply only to the second class of cases, where the first taker takes only a *life estate expressly*, but which is enlarged by implication under the doctrine of *May vs. Joynes*, remains to be seen,

while the primary object of the statute seems to have been to abolish the latter doctrine, the language of the act is broad enough to cover both classes of cases."

Considering the effect to be given to the Act of Assembly, 1908, amending the section 2418 of the then Code of Virginia, I am of opinion, it was not the intent of the legislature and that the Act should not be construed to embrace a situation where an *express* fee simple estate is given to the first taker because having disposed of his absolute estate to page 13 { the first taker there was nothing left in the donor or grantor to dispose of and hence any limitation or gift over is void because repugnant to the absolute fee simple already disposed of.

In *Davis vs. Kendall*, 130 Va., at pages 189-90, Judge Saunders said:

"In *Crutchfield vs. Greer*, 113 Va. 232, the devise of the wife to the husband was in the following comprehensive and sweeping terms, Should I die without heirs (i. e. children) the entire property I own I give to my beloved husband (G. M. Helms) to dispose of as he may wish."

Plainly this language passes in fee simple. The Court held as follows:

"Where an estate is given with the absolute power of disposition, either express or implied, it comprehends everything, and the donee takes the fee. Any subsequent limitation over to another is repugnant and void."

In the case of *Wornom vs. Hampton Institute*, *supra*, is interesting because the will of Simon Bryant who died in August, 1912, and whose will was probated August 16, 1912, was being construed the Act amending Section 2418 of the then Code was in force.

In the fourth clause of his will Simon Bryant gave to his niece in fee simple to dispose of as she may think proper a house and lot on the road leading from Gatewood's Corner to Zion Church.

The Court held that by his will Simon Bryant gave and devised to his wife, Catherine Bryant his entire property, real and personal in absolute right, fee simple and that the limi-

tation over to his daughter, Mary L. Bryant, of all the personal property so remaining, undisposed of at the death of the wife, as well as the gift of the house and lot in Hampton was void, because repugnant to the absolute and fee simple estate given to his wife, Catherine Bryant.

Considering the gift to Sallie Wornom the Court said bottom of page 540 and top of page 541 :

“We think there can be no doubt whatever that this rule should also be applied in construing this fourth clause of the will, under which the appellant, Wornom, here claims, and that the testator had no idea of thereby revoking the previous gift to his wife in favor of the appellant, but page 14 } that he attempted to give the property described to Sallie Wornom only in the event that his wife failed to dispose of it. This, we feel is the true construction to be here applied. We therefore conclude that as Catherine Bryant took a fee simple, the inconsistent gift over is void, because the testator undertook to do that which is legally impossible.

To the same effect, *Skinner vs. Skinner, Admr.*, 163 S. E. R., page 90.

My opinion therefore is that the Act of 1908 amending Section 2418 of the then Code was not intended to apply and does not apply to a fee simple estate expressly given to the first taker.

When a testator, or grantor plainly intends an absolute fee simple in the first taker, and expressly so states, an absolute fee simple in the first taker is given, and that any intent to limit a remainder on an absolute fee simple expressly given to the first taker is void, not because the Court fails to perceive the intent, but because any limitation over after an absolute fee simple is against the law.

My conclusion is that under the will of Benjamin F. Marshall his wife Louisa Marshall took an absolute fee simple in his estate which upon her death intestate passed to her heirs at law, and that Verna E. Southworth took nothing under his will.

A decree dismissing the bill can be prepared.

WILLIAM A. MONCURE.

June 2, 1932.

page 15 }

CLERK'S CERTIFICATE.

I, Charles O. Saville, Clerk of the Chancery Court of the City of Richmond, do hereby certify that the foregoing is a true transcript of the record, as ordered by counsel, and that notice in obedience to Section 6339, Code of Virginia has been duly given.

CHAS. O. SAVILLE, Clerk.

A Copy—Teste:

H. STEWART JONES, C. C.

INDEX

	Page.
Petition	1
Record	10
Bill	11
Will of Benjamin F. Marshall	13
Will Probated	14
Answer and Cross-Bill	14
Decree	16
Opinion of the Court	17
Certificate	24