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WILLS-GIFT OVER OF UNCONSUMED RESIDUE FOLLOWING AN ABSOLUTE GIFT

WILLS—GIFT OVER OF UNCONSUMED RESIDUE FOLLOWING AN ABSOLUTE GIFT—*A* died leaving certain securities which she had received under a will giving her the property "absolutely." *B* claimed the securities under a subsequent clause in the same will which gave her any part of the above bequest which "should . . . remain" at *A's* death. The trial court found that the testator intended to give *A* an absolute gift, so that the gift over was void. *Held*, that while such a gift over following a fee simple bequest is void, an absolute gift may subsequently be cut down to a lesser estate if it be clear that such was the testator's intention. Since it was the testator's intention in this case to give only a life estate coupled with an absolute power of disposal, the gift over was good. *In re Byrne's Estate*, (Pa. 1935) 181 A. 500.

This case departs from the usual rule that when a provision in a will is sufficient to create a fee simple interest,[1] a gift over of what remains at the death

[1] To the effect that "absolutely" carries the fee, see Bradford v. Martin, 199 Iowa 250, 201 N. W. 574 (1925); Schoen v. Israel, 168 Ga. 779, 149 S. E. 124 (1929).

of the first taker, is void on the ground that it cannot be construed to cut down the fee simple estate previously granted.[2] The departure is not made by finding a defeasible fee,[3] but by construing the former clause in the light of the latter, thereby determining that the testator meant to give only a life estate plus a power of disposal.[4] For while it is generally held that the intention of the testator is to be determined from the entire instrument [5] and that the gift of an absolute estate can be cut down to a lesser estate by subsequent provisions if the intention be clear,[6] these rules are normally of no effect in this situation. For it is said that the accompanying grant of an absolute power of disposal [7] necessarily creates a fee simple interest and any gift over is void for repugnancy.[8] This conclusion appears to be unsound.[9] An absolute power of disposal does not necessarily create a fee. This is shown by the fact that most jurisdictions hold that an absolute power of disposal, coupled with an express life estate, does not create a fee simple interest.[10] An examination will show that these cases cannot be explained on the

Note that the former case also stands for the minority proposition that a fee once granted cannot be cut down.

[2] 5 L. R. A. (N. S.) 323 (1907); Whicker v. Strong, 258 Ky. 135, 79 S. W. (2d) 388 (1935); Sweet v. Arnold, 322 Ill. 597, 153 N. E. 746 (1926); Adams v. Sanders, 111 N. J. Eq. 255, 162 A. 120 (1932); Thompson, "Does the Power to Alienate in Fee Simple Defeat an Executory Devise?" 1 MICH. L. REV. 427 (1903); 17 COL. L. REV. 625 (1917).

[3] For cases apparently finding a defeasible fee in this situation, see Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930); In re Darr's Estate, 114 Neb. 116, 206 N. W. 2 (1925); Johnson v. Schultz, 214 Wis. 414, 253 N. W. 179 (1934). However, none of these except the Darr case expressly find such an estate, and that case has been considerably weakened by a recent Nebraska decision, Merrill v. Pardun, 125 Neb. 701 at 706, 251 N. W. 834 (1933), indicating that In re Darr's Estate stands for the proposition that an absolute gift may be cut down to a life estate plus a power of disposal.

[4] See also, Southworth v. Sullivan, 162 Va. 325, 173 S. E. 524 (1934), decided under a statute; Krause v. Krause, 113 Neb. 22, 201 N. W. 670 (1924); Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834 (1933). For a discussion of the several constructions given to this type of bequest by the American courts, see 2 SIMES, FUTURE INTERESTS, § 594 et seq. (1936).

[5] Noth v. Noth, 292 Ill. 536, 127 N. E. 113 (1920); Reed v. Williams, 194 Ky. 662, 240 S. W. 391 (1922).

[6] In re Gould's Estate, 144 Misc. 670, 259 N. Y. S. 258 (1932); Liesman v. Liesman, 331 Ill. 287, 162 N. E. 855 (1928); Weitzman v. Weitzman, 87 Ind. App. 236, 161 N. E. 385 (1928).

[7] The power may be expressly granted, or implied by the gift over of the "remaining" property.

[8] Whicker v. Strong, 258 Ky. 135 at 138, 79 S. W. (2d) 388 (1935); Sweet v. Arnold, 322 Ill. 597 at 602, 153 N. E. 746 (1926).

[9] See 1 TIFFANY, REAL PROPERTY, 2d ed., § 167 (1920); 32 AM. L. REG. (N. S.) 1035 (1893); 16 HARV. L. REV. 458 (1903). For a discussion of the curiously unsubstantial precedent on which the rule was founded, see GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, 2d ed., §§ 66-70 (1895).

[10] 6 L. R. A. (N. S.) 1186 (1907); Cochran v. Groover, 156 Ga. 323, 118 S. E. 865 (1923); Iowa City State Bank v. Prichard, 199 Iowa 676, 202 N. W. 512 (1925).

ground that the subsequent clause is ambiguous or precatory.[11] It would appear that the courts, in their refusal to find a mere life estate plus a power of disposal, are in fact applying what is supposedly a discarded [12] or minority rule—that an estate once granted cannot be cut down.[13] Since the rule results in a disposition which the testator obviously did not intend, there is no justification in logic or policy for these decisions.[14]

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[11] For example, provisions that "property shall go to" or "I direct that remainder" are certainly not precatory. For examples of subsequent precatory clauses, see Melies v. Beatty, 313 Ill. 418, 145 N. E. 146 (1924); Hollway v. Atherton, 205 Mich. 129, 171 N. W. 413 (1919).

[12] See Greenway v. White, 196 Ky. 745 at 749, 246 S. W. 137 (1922).

[13] For an application of this rule, see Appeal of Clements, 122 Me. 164, 119 A. 115 (1922). Also note 1, supra. Notice that most of the cases pay lip service to the rule that an absolute estate may be cut down, but conclude that because of the power of disposition, the subsequent clause does not express such intention.

[14] See In re Nugent's Will, 142 Misc. 594, 255 N. Y. S. 236 (1932), applying a statutory modification of the common law.