

1903

# Does the Power to Alienate in Fee Simple Defeat an Executory Devise?

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## Recommended Citation

Thompson, Bradley M. "Does the Power to Alienate in Fee Simple Defeat an Executory Devise?" *Mich. L. Rev.* 1 (1903): 427-43.

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# MICHIGAN LAW REVIEW

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Vol. I

MARCH, 1903

No. 6

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## DOES THE POWER TO ALIENATE IN FEE SIMPLE DEFEAT AN EXECUTORY DEVISE?

UNDER the common law one who held an estate in lands in fee simple absolute was the sole owner of such lands, and his right to enjoy the estate and exercise all the powers and privileges incident thereto could not be restricted by the deviser or grantor. The rights and privileges incident to an estate in fee simple constituted the estate—they were all essential, they were its bone, sinew and blood, and in the absence of any one of them the estate was regarded as less than a fee simple. Among those essential rights were the right of possession, the right to alienate by deed, or devise by will, or to have the estate descend to the heir at law. Since those rights are incident to a fee simple, when a testator devises such an estate, the devisee obtains those rights, not under the will but as incident to the estate devised. Giving and withholding being incompatible acts, a testator can not devise an estate in fee simple and withhold from the devisee any of the rights, privileges and powers, incident and essential to the estate devised.

This rule of law, or rule of property, is clearly stated by Justice James, in *Stringer's Case*<sup>1</sup>:—

“It is settled by authority, that if you give a man some property, real or personal, to be his absolutely, then you cannot by your will, dispose of that property which becomes his. You cannot say that, if he does not spend it, if he does not give it away, if he does not will it, that which he happened to have in his possession, or in his drawer, or in his pocket at the time of his death, shall not go to his heir at law if it is realty, or to his next of kin if it is personal, or to his creditors who may have a paramount claim to it. You cannot do that if you once vest property absolutely in the first donee. That is because that which is once vested in a man, and vested *de facto* in him, cannot be taken from him out of the due course of devolution at his death by any expression of wish on the part of the original testator.”

It follows that this rule of property does not permit a testator to limit a remainder, or a fee simple, after a fee simple. The testator

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<sup>1</sup> 6 Ch. Div. 1.

having given the first devisee a fee simple, has necessarily given him every whit of the estate and he has nothing left to give to another; in such a case there can by no possibility be a remainder. Neither may the testator limit, restrict or direct the exercise of the rights and powers incident to the estate given and, therefore, if he seeks to restrict the devisee's power to alienate or to devise, all such restrictions are void as repugnant to the estate devised, or, in other words, having given him the power to alienate and devise, he cannot withhold those powers, and penalize the devisee if he exercises or refrains from exercising any of them.

This common law rule of property is not found in the Scotch law. Under the common law of Scotland a testator may devise a fee simple, which the devisee has the unrestricted power to alienate in fee or to devise, with a proviso that if the devisee dies intestate without issue, the estate shall go to a devisee named. Thus there may be a devise in fee to the first taker and in the event indicated, a devise in fee to a second devisee. This rule of the Scotch law was clearly stated by the judges in *Barstow v. Black*.<sup>1</sup> Testator devised certain premises to his brother and—

“To his heirs and assigns whomsoever . . . . without prejudice in any respect to, or limitation, . . . to exercise the most full and absolute control in the disposal of said estates and effects, either during his lifetime, or by settlements or other writings, to take effect at his death, that in the event of his dying intestate and without leaving heirs of his body, and of his not otherwise disposing of the subjects and estate hereby conveyed to him, the same shall fall and devolve . . . to the persons after-mentioned.”

Lord Cairns speaking of the validity of this executory devise said:—

“The position of an unlimited fiar, with a conditional gift over is unknown to the English law; but the position of an unlimited fiar—that is, a fiar with unlimited power of ownership and disposition,—followed by substitutions or limitations over is well known to the Scotch law.”

Lord Westbury remarked:—

“This is the proper province of a conditional substitution. In the English law of real property it is called a conditional limitation. But there is this important difference between the two systems. By the English law the grantee in fee subject to a shifting use or conditional limitation, *cannot defeat the limitation*, or prevent its taking effect, but in Scotland the first disponee is absolute fiar, and, unless fettered, may, by alienation *inter vivos*, or settlement *mortis causa*, make an absolute conveyance of the estate . . . .  
 . . . In England you cannot make a gift over dependant on a condition which is repugnant to the estate first given. Neither can you prohibit the

<sup>1</sup> 1 Sc. & Div. App.:392.

first taker from doing something which it is incidental to his estate that he should be able to do, and take away the estate from him on his breach of the prohibition. Nothing of that kind however, occurs here. The law attaches to the disposition in favor of Alexander Dunn (the devisee) and his heirs the right of alienation *inter vivos*, or *mortis causa*, and the words of the gift over, if Alexander Dunn shall not have exercised this right of alienation, thereby remaining far of the estate, and shall die leaving no issue, are not at variance with, or derogatory from, the prior estate, but simply in affirmance of what the law has already said . . . . The legal mind is often the victim of its own ingenuity. The language of the deed, when read by a man of plain understanding simply amounts to this: if Alexander Dunn dies without leaving issue, I make a different disposition of my estate, but this is not to affect the right of Alexander Dunn to dispose of the estate by deed or will."

The state of Alabama has adopted, substantially, the Scotch rule, her statutes permitting a fee simple to be limited upon a fee simple.<sup>1</sup>

This rule of property, that the right to the free and unrestricted use of all the powers and privileges incident to the ownership of property cannot be abridged or unreasonably trammled, which was adopted for the purpose of protecting and promoting the interest of both the owner of property and the public, has been disregarded in certain cases, when the reason which sustains the rule fails. *Williams v. Ash*,<sup>2</sup> was a case where a Mrs. Greenfield devised a number of slaves to her nephew, "provided he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events, I will and desire said negroes to be free for life." The nephew sold one of the slaves, Ash, who thereupon petitioned the court to be declared a free man. It was contended by counsel<sup>1</sup> representing the master who had purchased Ash, that the condition which supported the executory devise was void, since it was a restraint upon alienation. The contention was not without force. Under the law permitting this kind of property the master had a right, incident to the estate held, to sell his slave or transport him. But this property was of a special and peculiar description. And so far as the public was concerned, the courts have always considered that the public good would be promoted by its abolition and the rights of the subject of that kind of property were sometimes regarded with favor by them. Chief Justice Taney delivered the opinion of the court, saying:—

"It is said that this was a restraint on alienation inconsistent with the right of property bequeathed by the will. But if, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of

<sup>1</sup> Hood v. Bramlett, 105 Ala. 660.

<sup>2</sup> 42 U. S. (1 How.) 1.

his being sold, or removed out of the state by the first taker, it is evident upon common law principles, that the limitation over would have been good. . . . We think that the bequest in the will was a conditional limitation of freedom to the petitioner and that it took effect the moment he was sold."

If the subject of the property had been a horse, instead of a man, it is very far from evident that the limitation over, in case of sale, would have been good upon common law principles. Human liberty is of more importance than a mere rule of property. The chief justice stood by freedom and against the rule, but he failed to define his position and while his conclusion is sound the reasons given cannot be commended.

The supreme court of the United States and the courts of very many states have sustained what is known as spendthrift trusts. A testator desiring to make provision for the support and maintenance of a bankrupt or spendthrift, devises property in trust for such a person with a proviso that the absolute interest in the property so devised shall not be taken by creditors or alienated by the *cestui que trust*. This is clearly a restriction upon the enjoyment of rights incident to the estate devised, but the restriction is upheld on the ground that the property devised, being that of the testator, the creditors of the bankrupt have no claim upon it and because the benefit the testator desires to confer upon the devisee can only be accomplished by enforcing the limitations. So far as the public is concerned, it has not been injured and has, perhaps, been benefited by being relieved from supporting the spendthrift and those dependent upon him.<sup>1</sup>

But while this rule of the common law, that a fee cannot be limited after a fee has been upheld by the courts, they have, at the same time, recognized the power of a testator to devise a fee which may terminate upon the happening of some event, and his power to designate the person who shall in that event take the estate. This gift over is termed an executory devise.<sup>2</sup>

The testator, in *Pells v. Brown*,<sup>3</sup> devised lands to the devisee and the heirs of his body, provided that if he died leaving no issue him surviving the estate should go to X. The devisee suffered a common recovery. In an action by X to recover the lands from the purchaser, it was claimed by defendant that the estate devised was

<sup>1</sup> *Nichols v. Eaton*, 91 U. S. 716; *Broadway Bank v. Adams*, 133 Mass. 170.

<sup>2</sup> *Pells v. Brown*, 2 Cro. 590 (1620); *Porter v. Bradley*, 3 D. & E. 146; *Roe v. Jeffery*, 7 D. & E. 590.

<sup>3</sup> 2 Cro. 590.

an estate tail, and that, by suffering a common recovery, the tenant had barred the entail and conveyed an estate in fee simple. The court held that the estate devised was not a fee tail but a fee determinable upon the death of the devisee without issue; and that the common recovery did not bind X as he was not by privity of estate or otherwise a party to those proceedings. This case established two important principles: *first*, that a fee can be devised which shall terminate upon the happening of a designated event with an executory devise over; and *second*, that the devisee has no power incident to the estate devised to defeat such executory devise.

The rule established by *Pells v. Brown*, does not change or modify the common law rule, that a fee simple cannot be devised and the devisee's power to enjoy the estate given be restricted or limited. An estate, under the rule laid down in *Pells v. Brown*, upon a conditional limitation may be devised with an executory devise over, but such an estate is not a fee simple, and the important and essential elements of a fee simple—power to alienate, to devise and have the estate descend to the heir at law,—are not incident to that estate. The devisee has no power, *incident to the estate devised*, to defeat the executory devise.

The essential difference between an estate in fee simple absolute and in fee simple upon a conditional limitation is this: the tenant of a fee simple absolute has the right and power incident to the estate given, to alienate, to devise and have the estate descend to his heirs, while the tenant of a determinable fee possesses no such power incident to that estate. Consequently if the testator gives the devisee an estate in fee simple, any condition or restriction upon his power to alienate is void as repugnant to the grant; but if he gives a determinable fee, any alienation in fee simple by the devisee is void, since the estate granted him is less than a fee simple and there is no power incident to the estate to enlarge, change or modify it. The words granting these two estates are similar. The testator usually devises real property to the devisee and his heirs. The condition and limitation, then follows, *provided*, or, *in the event*, etc, followed by the executory devise over.

It is sometimes difficult to determine whether the devisee takes an absolute or a determinable fee, the words of grant being the same in both cases. To ascertain therefore the nature of his estate we must look to the whole will and especially to that part creating the executory devise. The condition upon which the estate is limited must be valid. Under the rule of the common law, which

we have stated, if an absolute fee is devised, any limitation depending upon a condition that the devisee shall not exercise some right incident to the estate given is void. An estate cannot be given and the donee denied the right to enjoy that estate. This principle has been established by a large number of cases.<sup>1</sup> In *Ware v. Cann*,<sup>2</sup> the devise was to A and his heirs, but if A dies without heirs then to B or, in case A offers to mortgage, or to suffer a fine or a common recovery, then to B, etc. The court held that A took an estate in fee and therefore the conditions were void; "dying without heirs," could not be held as meaning "dying without issue," following in that regard, Lord Hardwicke in *Filburgh v. Barbut*.<sup>3</sup> The other conditions were all restraints upon the enjoyment of the estate given. In *Bradley v. Peixoto*,<sup>4</sup> bank stock was devised to A, provided that if he attempted to dispose of any part of it, he should forfeit his interest in the whole, and the property should go to another. The court held the gift absolute and the condition void as being a restraint upon selling, which was a power incident to such a gift. In *Ross v. Ross*,<sup>5</sup> personal property was devised to A on his attaining the age of twenty-five, or at any time after attaining twenty-one in the discretion of the executors named, with a devise over if A should not dispose of it by will or otherwise. The court held again that the gift was absolute and the condition supporting the executory devise void because a restraint upon alienation. In *Howard v. Carusi*,<sup>6</sup> there was a devise of real estate in fee simple. The supreme court in that case says:—

"This will gives, first, an estate in fee simple to Samuel Carusi; it contains, second, the expression of a hope and trust that he will not unnecessarily diminish the estate; and, third, it gives to the nieces of the testator so much of his estate as Samuel Carusi shall not at his death have disposed of by will or devise."

Since the estate devised was in fee simple, the executory devise over was void. The rule seems to be well established that the event which shall terminate a fee and permit an executory devise over to be created, must not be the refusal or neglect of the devisee to exercise any right or power incident to the estate devised.

Suppose a testator devises lands to A and his heirs, provided that if A dies without leaving issue him surviving, then to B, and

<sup>1</sup> *Ware v. Cann*, 10 B. & C. 433; *Bradley v. Peixoto*, 3 Ves. 324; *Cuthbert v. Purrier*, Jac. 415; *Ross v. Ross*, 1 Jac. & W. 154; *Howard v. Carusi*, 109 U. S. 725.

<sup>2</sup> 10 B. & C. 433.

<sup>3</sup> 1 Ves. Sr. 89.

<sup>4</sup> 3 Ves. 324.

<sup>5</sup> 1 Jac. & W. 154.

<sup>6</sup> 109 U. S. 725.

the testator, by the express terms of the will gives A the power to alienate the lands devised in fee simple, and to thus defeat the executory devise as to all lands actually alienated; what effect will such a power have upon the executory devise of the lands not alienated? Different courts give conflicting answers. This precise question came first before the English courts in *Doe v. Glover*.<sup>1</sup> The testator gave his wife an estate for life in certain lands, remainder to his son A, in fee, provided, "If A shall die leaving no issue, and shall not have disposed and parted with his interest in such lands," then the estate should go to E. A died testate, without issue. A contest arose over the title between the devisee claiming under the will of the son, and the claimant of the executory devise under the father's will. The court found that the son took an estate in the lands devised in fee upon a conditional limitation, death without issue, and that the will gave him the power to alienate the lands devised in fee simple. The language of the judges is clear and explicit, and leaves no doubt as to the scope of the decision. Chief Justice Tindal said:

"The testator, in the first place, gives the estate to his son and to his heirs, should he have any; and he gives him full power to dispose of it in his lifetime."

Cresswell, J. :—

"I am entirely of the same opinion. . . . There was no condition that was repugnant to, or inconsistent with, the prior devise to the son. The son might have prevented the devise over from taking effect, by disposing of the property in his lifetime. But, in the event of his not exercising that power, the estate is given over."

Erle, J. :—

"The intention of the testator evidently was, to give to his son *absolute dominion* over the estate, provided he chose to exercise that dominion in his lifetime, but not to leave to him the selection of the object of his bounty by his will. Such appears to me to have been the intention of the testator; and I think the words he has used are incompatible with any other construction."

Not only do the judges state that the son, under his father's will, took a determinable fee, and was given by the will power to alienate in fee, a power not incident to the estate given him, but the argument of counsel make this if possible still clearer. Counsel for the claimant, under the son's will, argued that the son took a fee simple, since he had the power to alienate in fee, and therefore the condition which supported the executory devise, of all the lands devised, not alienated, was void. To sustain that contention he

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<sup>1</sup> 1 Com. B. 448 (1845).

quoted from Jarman on Wills. The chief justice interrupted with the remark:—

“The author is there shewing the distinction between conditions strictly so-called and limitations. The limitation over here is clearly good.”

*Doe v. Glover* has never been overruled. Its authority has been weakened by criticisms made by the judges in *Holmes v. Godson*,<sup>1</sup> and *Shaw v. Ford*.<sup>2</sup> The criticisms, however, are mere dicta. This question was not decided in *Holmes v. Godson*. There the testator devised lands in fee to his son, provided that if the son should not make a will, such lands should go to X.

Justice Turner states the question involved in *Holmes v. Godson*, as follows:—

“The sole question, therefore, on the plaintiff’s title is, whether the fee which was thus vested in the son was defeated, and the estate carried over to the widow and Mr. Godson, by the event which happened, of the son having afterwards died *without having made a will*.”

Justice Turner in his opinion refers to, and relies principally upon *Gulliver v. Vaux*.<sup>3</sup> That is a case on all fours with *Holmes v. Godson*. In that case the testator, after having devised certain lands to his three sons, in fee, adds:—

“And for prevention of any difference which may hereafter arise concerning the inheritance of my real estate, in case it shall so happen that all my three children shall depart this life without leaving issue, lawfully begotten and born of any of their bodies, and *without appointing the disposal of the same*, then, and in such case, I give,” etc.

When the case was submitted, both Chief Justice Willes and Justice Abney held that the gift over was a good executory devise. Justice Burnett called their attention to the fact that the condition which supported the executory devise was repugnant to the estate devised. He said:—

“But I am clearly of opinion that this condition or contingency, annexed to the estate of the children, and precedent to that of the devisee’s estate, *is a void condition*, and consequently the devise dependent on it can never take place. A condition, or contingency, repugnant to the estate devised, must be void; thus a devise to one in fee, upon condition that he shall not alien, is void. Co. Litt. 223. So a devise in fee, upon condition that the wife shall not be endowed or, the husband be tenant by the curtesy, is void, because repugnant to the estate devised. 10 Co. Rep. 38, 6 Co. Rep. 41 a. So feoffment in fee, upon condition, that the feoffee’s daughters shall not inherit, is void because repugnant to the nature of the estate.

<sup>1</sup> 8 DeGex, M. & G. 152, 23 Eng. Rul. Cas. 54.

<sup>2</sup> 7 Ch. D. 669.

<sup>3</sup> (1746) 8 DeGex. M. & G. 167, 23 Eng. Rul. Cas. 65.

“What is the condition here? That if Thomas dies without issue, his heirs shall not take *by descent but by appointment*, whereas a devise to a man’s heir at law, or grant to heirs, is void and he will take by descent. Hob. 30.

“In this case, therefore, a *devise in fee*, upon the condition that his heirs shall not take by descent, *unless he especially appoints them*, is a void condition, and consequently the devise subsisting on that condition is void.”

The cases of *Holmes v. Godson* and *Gulliver v. Vaux*, are not in conflict with *Doe v. Glover*, but the authority of the later case is questioned by a remark made by Justice Bruce in his opinion in *Holmes v. Godson*, that he must dissent from it if in conflict with his present conclusion, but he added, that the two cases might be reconciled.

There is no conflict between those cases. In *Doe v. Glover*, the estate devised was a fee upon a conditional limitation, the condition upon which the limitation depended being the death of the donee without issue. The donee was not prohibited from exercising any right or power incident to the estate granted, and consequently the condition was not repugnant to the grant. The court held that the fact that the testator had given the donee power to alienate in fee, did not enlarge the estate devised, but simply enabled him, by exercising the power, to defeat the executory devise. In *Holmes v. Godson* and *Gulliver v. Vaux*, the estate devised was a fee simple, and the power to dispose of it by will or deed was incident to the estate, and not held by the donee separate and apart from the estate. The condition in each of the later cases upon which the limitation depended was that the donee should not die intestate as to the lands devised, a condition repugnant to the grant, and therefore the limitation was void.

In this country there are several decisions in direct conflict with *Doe v. Glover*. One of the earliest is *Ide v. Ide*<sup>1</sup> There the devise was the same as in *Doe v. Glover*, an estate in fee with executory devise over, if the devisee died without issue, of “what estate he should leave.” The court held that the words, “what estate he should leave,” gave the devisee, by implication, power to alienate in fee, and that the executory devise was void. The court gave no reason for its conclusion, and seems to have relied wholly upon the authority of *Att’y. Gen. v. Hall*.<sup>2</sup> But that case is not in point. There the testator gave:—

“All my real and personal estate unto my son, Francis Hall, *and to the heirs of his body*, to his and their use. . . . and if my said son Francis Hall, shall die, leaving no heirs of his body living, then I give and

<sup>1</sup> 5 Mass. 500 (1809).

<sup>2</sup> Fitzg. 314.

bequeath so much of my said real and personal estate, as my son shall be possessed of at his death, to the Goldsmiths Company of London."

The son suffered a common recovery of the real estate, died testate without issue, possessed of a portion of the personal property devised. He made his widow executrix, and the Attorney General filed a bill, on the relation of the Goldsmiths Company, for an accounting. The court held that the will gave the son *an estate tail in the realty*, and that the gift of the personalty was absolute. It was a rule of law at that time, and a rule which remained in force for more than a century afterwards, that where realty and personalty are devised together and an estate tail is given in the realty, the gift of the personalty is absolute. The following is the opinion of the court in full:—

"The court was unanimous that the limitation over was void, as an absolute ownership had been given to F. H., for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent; and therefore he had a power, to dispose of the whole; which power was not expressly given to him, but *it resulted from his interest*. The words that give an estate tail in the land must transfer the entire property of the personal estate, and then nothing remains to be given over."

An estate in fee tail cannot be devised upon a conditional limitation, since the power to suffer a common recovery is incident to that estate and cannot be restricted or suspended by the instrument creating it.<sup>1</sup> In *Att'y Gen'l v. Hall* the devisee took an estate tail in the lands and a gift absolute in the personality, the power to alienate in fee given the devisee of a determinable fee was not therefore before the court and neither the principles of law involved nor the language of the court, give the slightest support to *Ide v. Ide*.

*Ide v. Ide* although resting altogether upon a misconception of the principle laid down in *Att'y Gen'l v. Hall* has since been followed in Massachusetts with only now and then a mutter of protest. In the late case of *Kelly v. Meins*,<sup>2</sup> the court held that an otherwise valid executory devise was made void by the testator giving the devisee power to alienate in fee simple. The court cites *Ide v. Ide* and several other decisions of its own and the following English cases: *Att'y Gen'l v. Hall*,<sup>3</sup> *Holmes v. Godson*,<sup>4</sup> *Gulliver v. Vaux*;<sup>5</sup> *In re Wilcocks Settlement*;<sup>6</sup> *In re Stringers Estate*,<sup>7</sup> and *Shaw v. Ford*.<sup>8</sup> No further comment is necessary upon *Att'y Gen'l*

<sup>1</sup> Corbet's Case, 1 Co 83.

<sup>2</sup> 135 Mass. 231.

<sup>3</sup> Fitzg. 314.

<sup>4</sup> 8 DeGex. M. & G. 152.

<sup>5</sup> 8 id. 167.

<sup>6</sup> 1 Ch. Div. 229.

<sup>7</sup> 6 Ch. Div. 1.

<sup>8</sup> 7 Ch. Div. 669.

v. *Hall*, *Holmes v. Godson*, and *Gulliver v. Vaux*. In the case of *In re Wilcocks Settlement*,<sup>1</sup> the testator gave certain personal property to his illegitimate daughter for life and in the event she died unmarried to her absolutely, provided that if she did not dispose of such property, remainder over; the evident purpose of the testator being to prevent the property going to the crown if the daughter died intestate. The court held that the gift to the daughter was absolute and consequently that there could be no remainder over. In *In re Stringers Estate*,<sup>2</sup> the testator gave real and personal property to his brother with full power to dispose of the same by deed, will, or otherwise provided that if he died not having so disposed of all the property the remainder should go over. Here was an absolute gift with a gift over. In *Shaw v. Ford*,<sup>3</sup> the testator gave certain lands to his four sons, share and share alike, upon condition that they should not divide the property without the written assent of all, and lastly that if there was *no lawful distribution*, then at the death of his sons the property should go to their issue and upon failure of issue to, etc. Justice Fry said:

“Now the first question is, what estate do the four son take in this specifically devised property, before we come to that portion of the will which gives it over in the event of there being no lawful distributions? In my opinion the sons take estates in common in fee simple. I think that it is clear they take, if at all, as tenants in common because they are to take ‘share and share alike.’ . . . . There is, in my opinion, a devise of this particular property to the four sons as tenants in common in fee . . . . The next inquiry is, what is the nature of the event which constitutes the contingency upon which the executory devise is to take effect. It is if there is no lawful distribution of the property amongst the four sons, in other words, in the absence of a partition during their joint lives. Now the right of all the tenants in common of an estate is, if they so think fit, to enjoy it, not in severalty, but as tenants in common of an undivided estate; and therefore the contingency, in its nature, is the exercise of a right which attaches to every tenant in common of an undivided estate.”

This same rule was adopted by the courts of New York in an early day. The leading cases are *Jackson v. Bull*,<sup>4</sup> and *Jackson v. Robins*.<sup>5</sup> *Jackson v. Robins* did not involve this question, but the court seems to have thought it did. The testator gave his wife all his real and personal estate, “but in case of her death without giving, devising, or bequeathing by will, or otherwise selling or assigning the said estate or any part thereof, then I do give, etc.” The testator clearly gave the devisee an estate

<sup>1</sup> 1 Ch. Div. 229.

<sup>2</sup> 6 Ch. Div. 1.

<sup>3</sup> 7 Ch. Div. 669.

<sup>4</sup> 10 Johns 19 (1813).

<sup>5</sup> 15 Johns 169.

in fee simple in the realty and an absolute gift of the personalty. The condition or limitation supporting the executory devise was, therefore, void. The case of *Jackson v. Bull* is directly in point and on all fours with *Ide v. Ide*.<sup>1</sup> The testator gave his son certain lands and provided that if his son should die without issue the property "he died possessed of" should go to X. Had the words "he died possessed of" been omitted the executory devise would have been good. Upon the death of the son without issue the estate given him would have terminated. But the testator had by implication given his son power to alienate the lands devised in fee simple and the court held that the power thus impliedly given defeated the executory devise and cite as authority *Ide v. Ide* and *Att'y Gen'l v. Hall*. The comments of the court in *Jackson v. Bull* upon *Att'y Gen'l v. Hall* show that courts occasionally drop into error as readily as sparks fly upward. After correctly stating that, in *Att'y Gen'l v. Hall*, an estate tail was given in the realty and that the devisee had barred the entail by suffering a common recovery the court adds that:—

"The executrix was not to account for the personal estate to the persons claiming under the limitations, for that was void as repugnant to the absolute ownership and power of disposal given by the will.

"Lord Hardwicke has given his sanction to the accuracy of that case and to the authority of that decision."<sup>2</sup>

Lord Hardwicke is correctly quoted; that eminent judge did say in *Flanders v. Clark*:—

"It was determined by Lord King, that he (the devisee) had the absolute property in the personalty, and therefore the devise over was void: for he had power to spend the whole, which was an absolute gift."

The court when it decided the case of *Jackson v. Bull* probably did not have access to the report of the case of *Att'y Gen'l v. Hall* and relied upon Lord Hardwicke's declaration, or, what the reporter made him declare. The only conclusion to be drawn from that language of Lord Hardwicke is that the court held in *Att'y Gen'l v. Hall* that because the devisee was given power to dispose of the personal property therefore the gift was absolute, when in fact the court found that the gift was absolute and therefore the devisee had power to sell.

The court in *Jackson v. Bull*, perhaps relying upon Lord Hardwicke's misleading comments upon *Att'y Gen'l v. Hall*, fastened the rule upon New York for more than seventy years. When a

<sup>1</sup> 5 Mass. 500.

<sup>2</sup> *Flanders v. Clark*, 1 Ves. Sr. 9.

judicial train is once derailed, whether the accident is due to color blindness, or an open switch, the courts are always loth to use the only wrecking machinery in their possession, reversal of a former decision. The legislature finally came to the rescue in New York and declared by statute that the gift of power to alienate in fee should not destroy an executory devise. The last case maintaining the rule in *Ide v. Ide* is *VanHorne v. Campbell*.<sup>1</sup> After that statute took effect this same question came again before the court in *Greyston v. Clark*,<sup>2</sup> and *Liggitt v. Firth*.<sup>3</sup> The opinion in *Greyston v. Clark*, written by Justice Peckham, now a member of the United States supreme court, does not speak kindly of the defunct rule. He says:—

“The plain intent of the testator was prevented from taking effect because it violated a wholly artificial and technical rule, not founded, as I think, upon any public policy or sound reasoning.”

He might have added that it was not founded upon any well considered opinion and originated in every instance in a misconception of some previous decision.

Having fully discussed *Att'y Gen'l v. Hall*, *Ide v. Ide* and *Jackson v. Bull*, it is not necessary to call attention to a large number of decisions in this country that have followed *Ide v. Ide* and *Jackson v. Bull*. They all stand for a sure foundation upon those cases and lean upon each other for support.

There seems to be no foundation in reason for this rule. The condition which supports the executory devise is not repugnant to the estate granted, a determinable fee, since there is no power, incident to that estate, to convey in fee. To assert, as some courts have done, that, where an executory devise is created, the devisee cannot be given power to defeat such executory devise and therefore if he is given that power the devise over is void, is simply begging the question. As a rule the mere possession of a naked power to convey or mortgage, does not affect the estate in the lands to be conveyed or mortgaged, under the power, no matter who holds that estate. The power to alienate being incident to the ownership of a fee simple, the owner may convey by himself or another in his lifetime. If he gives the power to another, the conferring of the power does not pass the estate or have the slightest effect upon it. The owner, again, may devise his estate cutting it up into two estates, a life estate and a remainder, and he may give to each devisee power to alienate the estate given him. And he

<sup>1</sup> 100 N. Y. 287 (1835).

<sup>2</sup> 41 Hun, 125.

<sup>3</sup> 132 N. Y. 7.

may go a step further; he may give the devisee of the life estate absolute power to dispose of the remainder. Here we have a life estate with power in the tenant for life to convey in fee and defeat the remainder over. In such a case there are not only two separate and distinct estates, the life estate and the remainder, but a power to convey in fee which is not incident to either, but has been given the life tenant separate and apart from his estate. Perhaps it would be more correct to say, that the remainder has been given shorn of the power to alienate and that such power has been conferred upon the life tenant. But the mere possession of that power by the life tenant does not enlarge his estate, nor does it diminish the estate of the remainder man. If the tenant for life exercises the power and alienates in fee, the grantee takes the entire estate and the remainder over is defeated. But if the tenant dies, not having exercised the power, his death terminates both the life estate and the power and the remainder man takes the estate devised, or so much as the life tenant has not alienated. It is true that there are a few cases which hold that when a life estate is granted with power to alienate in fee, the devisee takes a fee simple. The great weight of authority is in accordance with the rule stated.<sup>1</sup>

When the power to convey in fee simple is not held separate and distinct from the estate but is incident to an estate less than a fee simple, the possession of the power by the tenant does not, by its own virtue and 'puissant force, enlarge his estate into the one he can convey. His estate remains the same. Thus a tenant in tail has power to suffer a common recovery and alienate in fee simple and that power is incident to the estate tail and cannot be separated from it.<sup>2</sup> Unless the tenant suffers a common recovery however, the entail is not barred and may continue forever.

There is nothing in the nature of a determinable fee compared with a life estate which discloses any reason why a life estate is immune to the effects of a power to convey in fee and the determinable fee is certain to fall a victim to its baleful influence. If a life estate is given to A and an estate upon a conditional limitation to B, A's estate will certainly terminate with his life and B's may. A cannot

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<sup>1</sup> The following are a few of the recent cases upon that point:—*Schimpf v. Rhodewald*, 86 N.W. 908 (Neb.); *Swarthout v. Swarthout*, 86 N.W.558 (Wis.); *Sawin v. Cormier*, 60 N. E. 936 (Mass.); *Jenkins v. Compton*, 123 Ind. 117; *Glover v. Reid*, 80 Mich. 228; *Cox v. Sims*, 125 Pa. St. 522; *Munro v. Collins*, 95 Mo. 33; *Wooster v. Cooper*, 53 N. J. Eq. 682; *Hall v. Otis*, 71 Me. 326.

<sup>2</sup> *Corbet's Case*, 1 Co. R. 83.

defeat the remainder; neither can B defeat the executory devise. A cannot commit waste, or injure the inheritance. He may work mines already opened, for in doing that he is merely using the estate in its present condition, but he may not open new mines. In this respect B has greater rights. He may commit waste; cut and sell timber; open mines; and the court will not restrain him even when the minerals constitute the principal, if not the sole value of the land.<sup>1</sup> The reason why the court will not interpose to protect the executory devisee is, because his interest is uncertain, a mere possibility. The powers therefore of the tenant of a determinable fee to enjoy his estate and to consume, if need be, the corpus itself, are much greater than those possessed by the tenant of a life estate. How then can it be said that the life tenant may be given the power to alienate in fee and be still merely a tenant for life, but if like power is given the tenant of a determinable fee, he becomes at once tenant in fee simple?

To devise an estate upon a conditional limitation and give the devisee, in addition to the determinable fee, the power to alienate in fee simple does not violate any rule of property or any rule of law. All rules of law established by the courts for the enjoyment and transfer of estates in land, worthy of that designation, have for their primary, if not their sole object, the protection of the rights of the private owner and the interests of the public. To protect the private owner in the full enjoyment of all the privileges incident to his estate, is the origin of the rule of property that any effort on the part of the grantor or testator to suspend or withhold the power to exercise those rights is void as being repugnant to the grant. The interests of the public are best subserved by having the free alienation of estates in land as little trammelled as possible and consequently the courts have adopted the rule that the grantor or testator cannot suspend the power to alienate the estate given for a longer period than lives in being and twenty-one years and a few months thereafter. If the power to alienate in fee is given the devisee of a determinable fee, which of these rules of property, or rules of law, have been violated? The right of the devisee to fully enjoy his estate, a determinable fee, has not been abridged or in any manner suspended. It has been greatly enlarged. He cannot complain. He needs no protection. And so far as the public interests are involved they have not been put in jeopardy. If the devisee had not been given the power to alienate in fee simple, the

<sup>1</sup> *Ganson v. Peterson*, 193 Ill. 372.

power to so alienate would have been suspended for the period of one life, at least. When he is given that power there is no suspension for a single moment. The only person who can be injured is the person who would take if the estate devised should terminate upon the happening of the event upon which it was limited. This rule that the power to alienate in fee, defeats the executory devise was not made, certainly, for his protection. Such a person is not given much at best, a mere possibility, and when the power is conferred upon the first devisee to defeat that possibility there is barely the savor of his possible feast left, and then comes this rule and fumigates that away. In short this rule, which is founded neither upon principle, authority, nor reason, is never invoked to protect any public or private right but always to defeat the clearly expressed intent of the testator and to deprive some object of the testator's bounty of the benefit of a possible gift.

It would seem that the statutes of descent in many of the states have by implication abrogated the rule laid down in *Ide v. Ide* and *Jackson v. Bull*. Those statutes provide in substance that if a minor child dies unmarried his estate shall go to his father, unless such estate was inherited from a deceased parent, in which case it shall go to his brothers and sisters of the full blood. Massachusetts has such a statute but the attention of the court has, apparently, never been called to it, when this rule was under consideration. It will be observed that, under such a statute, if a mother dies intestate leaving several minor children and one of the children dies in infancy, the estate it inherited from the mother goes to the deceased infant's brothers and sisters, while if the mother dies testate all the estate devised by her to such infant descends to the father. It becomes necessary, therefore, if the mother should desire that the property devised by her to one of her children shall go, in case of his death before he attains the age of twenty-one, to his brothers and sisters as provided for by the statute, that she give the child an estate determinable upon his death under age, with an executory devise over to his brothers and sisters. Such an executory devise is good. But in that case the estate could not be disposed of in fee simple for the benefit of the infant or his estate, and under the statute of descents he would inherit from his mother an estate in fee which might be sold at any time by order of the court in fee and only what remained undisposed of would descend to the brothers and sisters. How can this beneficial provision of the statute be attained by the mother through her will? If the rule in *Ide v. Ide* did not

stand in the way the mother could give the child a determinable fee with power to alienate in fee, with an executory devise over to his brothers and sisters of what remained undisposed of in the event of his death under age. This rule, however, makes the executory devise void and the child would take under such a will a fee simple, and in case he died during infancy his estate would go to his father under the statute and not to his brothers and sisters.

We say it would seem that these statutes have by implication abrogated the rule laid down in *Ide v. Ide*. It is not probable that any court will hold, when its attention is called to such a statute of descents, that a testator cannot by will provide for the support of a child by the sale in fee of the lands devised him in the manner regulated by law and also provide that what remains undisposed of shall go, in case of death during infancy, to the very persons designated to take when the estate is inherited, because such a disposition of his estate would violate a rule of law. The statute of descents is the will which the people have made for every person who does not make one for himself. This provision of the statutory will we are considering is identical with those before the court in *Ide v. Ide* and *Jackson v. Bull*. It provides that a person's real and personal estate shall be divided among his children, share and share alike, to them and their heirs forever, provided that if any one of the children shall die before attaining the age of twenty-one what remains of his estate "undisposed of" shall go to his brothers and sisters.

If a testator, in a state where the rule laid down in *Ide v. Ide* is in force, desires to devise property to A and give him absolute dominion over the same during his life and to provide that in case A dies without issue such property or so much as remains undisposed of shall go to B, he must give a life estate with unlimited power to alienate, remainder to A's children and in default of children remainder to B. Under such a devise, however, A could not commit waste, nor could he devise such an estate by will.

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