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EXECUTORS AND ADMINISTRATORS - DISTRIBUTION OF SURPLUS PROCEEDS WHEN REALTY DEVISED SUBJECT TO A CONDITION IS SOLD FOR DEBTS

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EXECUTORS AND ADMINISTRATORS — DISTRIBUTION OF SURPLUS PROCEEDS WHEN REALTY DEVISED SUBJECT TO A CONDITION IS SOLD FOR DEBTS — Testatrix devised a house and lot to the trustees of the First Methodist Church on the condition that it be used for a parsonage. In administering the estate it became necessary to sell this real estate. Seven thousand dollars was realized by the sale, of which five thousand remained after debts were paid. This action was brought by the executors to determine the respective rights of the trustees of the First Methodist Church, the residuary legatee, and the heirs at law to this five thousand dollar surplus. *Held*, the condition relating to the use of the realty was rendered impossible by the forced sale and the trustees of the church were entitled to the whole of the surplus. *Scobey v. Beckman*, (Ind. App. 1942) 41 N. E. (2d) 847.

Although the problem as to the effect of a forced sale of premises devised subject to a condition was dealt with rather summarily in the instant case it seems worthy of greater consideration. At least two possible solutions, other than the one adopted by the court, may be suggested. First is the one, apparently urged on behalf of the residuary legatee in the instant case, that by the provisions of the will the testator intended the devisee to get the particular property and since that property is no longer available for distribution, the provision is of no effect. This is based on analogy to the doctrine that where the subject matter of a specific devise or legacy does not form a part of the testator's estate at the time of his death the gift is adeemed.[1] As a practical matter it would seem to

[1]ATKINSON, WILLS, § 243 (1937).

make little difference as to the legatee's enjoyment of the specific thing whether it was alienated during the testator's lifetime or sold in the administration of his estate before distribution. However, it is doubtful that the court would ever adopt such a position in these cases. It would seem equally logical in any case where devised property is sold for debts, but the general rule is that the surplus proceeds from such sales go to the person or persons who would have taken the property if the sale had not been necessary.[2] This general rule suggests the next possible solution. The surplus proceeds could be divided between the owner of the base fee and the owner of the power of termination in proportion to the relative value of their respective interests, disregarding the sale. In a number of cases this solution has been used in distributing eminent domain awards when the land condemned was held on a condition subsequent as to its use.[3] The two situations seem quite analogous. In both the condition relates to the use of the land and in both the only possible breach of the condition is the involuntary alienation. The fact that in the eminent domain cases the base fee has ordinarily taken effect in possession, while in cases like the instant one it has not, would seem of no significance. If this approach had been used in the instant case the result would no doubt have been the same. In the eminent domain cases it has generally been held that when the happening of the condition is not probable in the ordinary course of events the whole award goes to the owner of the base fee, the courts in effect saying that the chances of the power of termination becoming exercisable are so remote that the power is of no present value.[4] But situations may be imagined in which it would be of considerable consequence whether the court

[2] Wolfe v. Lewisburg Trust & Safe Deposit Co., 305 Pa. 583, 158 A. 567 (1932); Freeman v. Banks, (Tex. Civ. App. 1936) 91 S. W. (2d) 1078; 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed. § 562a (1923).

[3] First Reformed Dutch Church of Gilboa v. Croswell, 210 App. Div. 294, 206 N. Y. S. 132 (1924); Lyford v. Laconia, 75 N. H. 220, 72 A. 1085 (1909); Simes, "The Effect of Impossibility Upon Conditions in Wills," 34 MICH. L. REV. 909 (1936); 34 MICH. L. REV. 530 (1936); 1 PROPERTY RESTATEMENT, § 53 (1936); EXPLANATORY NOTES ON PROPERTY RESTATEMENT (Tentative Draft No. 2), pp. 18-25 (1930). However, in some of the eminent domain cases the courts have used the theory of the court in the instant case, that the condition relating to use is excused by impossibility so that the owner of the base fee takes the entire award. Scoville v. McMahon, 62 Conn. 378, 26 A. 479 (1892); Cincinnati v. Babb, 4 Ohio Dec. 464 (1893). See Lancaster School District v. Lancaster County, 295 Pa. 112, 144 A. 901 (1929), holding that the condition was not excused but that the condemnation made the power of termination exercisable and, therefore, the owner of the power of termination was entitled to the whole award. In First Reformed Dutch Church of Gilboa v. Croswell (supra) the court very nicely avoided considering the condemnation as a breach of condition by reasoning that, since the condemnation cut off the base fee and the power of termination at the same time, there was no time at which the power of termination could be exercised. Such reasoning would seem equally applicable to a case where the premises are sold to pay the testator's debts.

[4] First Reformed Dutch Church of Gilboa v. Croswell, 210 App. Div. 294, 206 N. Y. S. 132 (1924); Lyford v. Laconia, 75 N. H. 220, 72 A. 1085 (1909); Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544 (1878); 1 PROPERTY RESTATEMENT, § 53 comment b (1936).

followed this theory or applied the doctrine of impossibility as the court did in the instant case. For example, a case might arise in which the happening of the condition was probable. Under the doctrine of impossibility the whole of the surplus would go to the devisee of the base fee, while under the suggested procedure the surplus would have to be divided. Also, according to the better view, impossibility will have the effect of excusing the condition and creating a fee simple absolute in the devisee of the base fee only in cases where it may be said that the testator would have intended this result if he had foreseen the impossibility.[5] Under the suggested procedure of dividing the proceeds according to the relative value of the interests, the rights of the parties in no way depend on the intent of the testator. It may safely be assumed in most cases that the testator never considered the happening of the contingency which makes the condition impossible. Therefore, it would seem better to put the parties in a position as close as possible to that which they would have occupied if the contingency had not occurred [6] than to speculate as to the probable wishes of the testator had he foreseen the contingency.

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[5] In re Hill's Will, 215 Wis. 72, 253 N. W. 787 (1934) (legacy not devise); Simes, "The Effect of Impossibility Upon Conditions in Wills," 34 MICH. L. REV. 909 (1936); 3 SIMES, FUTURE INTERESTS, § 748 (1936). While the results of the cases are largely consistent with this, the rule is usually stated without qualification, that when the condition becomes impossible, the owner of the base fee takes absolutely. Bryant's Admr. v. Dungan, 92 Ky. 627, 18 S. W. 636 (1892); Harrison v. Harrison, 105 Ga. 517, 31 S. E. 455 (1898).

[6] In two eminent domain cases the court went considerably further to accomplish this end than merely dividing the award between the owner of the base fee and the owner of the power of termination. In Lutes v. Louisville & N. Ry., 158 Ky. 259, 164 S. W. 792 (1914), the owner of the base fee conveyed to a railroad in order to avoid condemnation and used the proceeds to buy other land. It was held that the condition attached to this land and that on breach thereof it would go to the grantor of the original land. In the case of In re Cook's Will, 243 App. Div. 706, 277 N. Y. S. 26 (1935), where only part of the premises were condemned, the owner of the base fee was directed to invest the proceeds, use the income for its own purpose (which would be in compliance with the condition as to the use of the land) and hold the principal in trust to pay over to the one having the power of termination in event the condition was breached as to the remaining land.

[1] 28 U. S. C. (1940), § 41 (1) (b).
[2] 36 Stat. L. 1102 (1911), 28 U. S. C. (1940), § 118.