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Wills -- Remainders -- Life Tenant Vested with Absolute Power of Disposal

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litigation.[14] It would seem inferentially, therefore, that the title of the plaintiff in the instant case was now clear of the restriction even to the extent of being free from the possibility of liability for damages because of breach of the restriction. In short, the net effect of the North Carolina cases is that the restriction may be terminated by changed conditions, and when so terminated it is ended for all purposes.

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Wills—Remainders—Life Tenant Vested with Absolute Power of Disposal.

The testator devised his real property to his wife giving her the "right and privilege to use, sell or dispose of the same as she may see fit during her lifetime," and he further provided that any property remaining at his wife's death should belong to the plaintiff. At her death the wife devised the property to the defendant. The West Virginia Supreme Court of Appeals adhered to an "ancient rule" in holding that the testator's will vested a fee simple estate in the wife thereby cutting off the plaintiff's remainder.[1]

It is generally accepted that a remainder over after a devise of an unlimited estate plus an absolute power of disposal is invalid since the first taker is vested with a fee simple.[2] A few jurisdictions, including West Virginia, have held that a devise of a *life estate* and the attachment thereto of an unlimited power of disposition created a fee simple in the life tenant to the exclusion of any remainder.[3] The fee simple estate thus vested was subject to all incidents normally attended upon

[14] Wesley v. Eells, 177 U. S. 370, 44 L. ed. 811, 20 Sup. Ct. 661 (1900).

[1] Hustead v. Murray, 177 S. E. 898 (W. Va., 1934).

In this case note the author has endeavored, in so far as it was possible, to consider only those cases in which a life estate in realty was expressly limited to the first taker and in which his power of disposal was unlimited. However, some of the difficulties involved in any classification or generalization concerning the construction of wills are indicated in the following quotation: "Seldom, if ever, will two wills be found the exact counterpart of each other, either in language or circumstances. We may look to cases for general rules as guides, but, after all, each case must be decided upon the language used by the testator, and upon his intention, to be gathered from the whole instrument." Jones v. Denning, 91 Mich. 481, 51 N. W. 1119 (1892).

[2] Hambright v. Carroll, 204 N. C. 496, 168 S. E. 817 (1933); see Gildersleeve v. Lee, 100 Ore. 578, 198 Pac. 246 (1921). ROOD, WILLS (2nd ed. 1926) 534. Note (1931) 75 A. L. R. 71.

[3] Gibson v. Gibson, 213 Mich. 31, 181 N. W. 41 (1921); Van Deventer v. McMullen, 157 Tenn. 571, 11 S. W. (2d) 867 (1928); Steffey v. King, 126 Va. 120, 101 S. E. 62 (1919); National Surety Co. v. Jarrett, 95 W. Va. 420, 121 S. E. 291 (1924); Notes (1925) 36 A. L. R. 1218; (1932) 76 A. L. R. 1166.

However, the attachment of a limited power of disposition would not enlarge the life tenant's interest to a fee. Waller v. Sproles, 160 Tenn. 11, 22 S. W. (2d) 4 (1929); Woodbridge v. Woodbridge, 88 W. Va. 187, 106 S. E. 437 (1921); Note (1930) 8 TENN L. REV. 209.

such an estate.[4] This rule was based upon the theory that the remainder was subordinate and repugnant to the power of disposition and was consequently void.[5] In this effort to be consistent the courts violated the primary axiom[6] of testamentary construction by ignoring, at least partially, the apparent intention of the testator; and, motivated by a desire to protect this intention these jurisdictions have enacted statutes which preserve the remainder if the life tenant fails to exercise his power to dispose of the property.[7] The West Virginia statute was not applied in the principal case because the will involved took effect several years prior to the statute's adoption.[8]

However, the prevailing authorities hold that the addition of a power of disposal does not enlarge a life estate into a fee,[9] but in exercising the power the holder of the life estate may convey a fee.[10] Only a few jurisdictions limit his power of disposition to his own life estate.[11] Thus the life tenant is vested with authority sufficient to

[4] For example, the first taker could convey a good title in fee simple to a purchaser. Van Deventer v. McMullen, 157 Tenn. 571, 11 S. W. (2d) 867 (1928). The property could be subjected to execution for obligations of the holder. National Surety Co. v. Jarrett, 95 W. Va. 420, 121 S. E. 291 (1924). If the holder died intestate the property passed to his heirs under the canons of descent. Bradley v. Carnes, 94 Tenn. 27, 27 S. W. 1007 (1894).

[5] See Bowen's Adm'r v. Bowen's Adm'r, 87 Va. 438, 12 S. E. 885 (1891); Morgan v. Morgan, 60 W. Va. 327, 55 S. E. 389 (1906).

[6] "It has been declared a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and practically observed so far as it is consistent with established rules of law." ROOD, WILLS, (2nd ed. 1926) 352.

[7] MICH. COMP. LAWS (1929) §13003; TENN. CODE (1932) §8093; VA. CODE ANN. (Michie, 1930) §5147; W. VA. CODE (1931) c. 36 art. 1 §16. See Quarton v. Barton, 249 Mich. 474, 229 N. W. 465 (1930); Southworth v. Sullivan, 162 Va. 325, 173 S. E. 524 (1934).

[8] This will under which the plaintiff claims became effective in 1926 while the West Virginia statute was not enacted until 1931. In speaking of the statute, Judge Kenna, the author of the opinion in the principal case, said, "It is to be hoped that it may be the means of freeing the courts of the state from adherence to an ancient rule, the effect of which is to defeat in part the apparent purpose of the testator."

[9] Paxton v. Paxton, 141 Iowa 96, 119 N. W. 284 (1909); Greenwalt v. Keller, 75 Kan. 578, 90 Pac. 233 (1907); Cagle v. Hampton, 196 N. C. 470, 146 S. E. 88 (1929); Notes (1925) 36 A. L. R. 1177; (1932) 76 A. L. R. 1153; ROOD, WILLS (2nd ed. 1926) 535.

[10] Heney v. Manion, 14 Del. Ch. 167, 123 Atl. 183 (1924); Cagle v. Hampton, 196 N. C. 470, 146 S. E. 88 (1929) (the court grants specific performance of a contract to convey land where the seller was a life tenant possessing an absolute power of disposal); Auer v. Brown, 121 Wis. 115, 98 N. W. 966 (1904).

[11] Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 23 L. ed. 927 (1876); Patty v. Goolsby, 51 Ark. 61, 9 S. W. 846 (1888); Douglas v. Sharp, 52 Ark. 113, 12 S. W. 202 (1889); Bachtell v. Bachtell, 135 Md. 474, 109 Atl. 198 (1920). But *cf.* Archer v. Palmer, 112 Ark. 527, 167 S. W. 99 (1914); Reeside v. Annex Building Ass'n, 165 Md. 200, 167 Atl. 72 (1933).

Some courts follow this rule: where a power of disposal accompanies a devise of a life estate, the power is limited to such a disposal as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended. Pratt v. Skiff, 289 Ill. 268, 124 N. E. 534 (1919); Winchester v.

defeat the remainder, but it must be used in good faith.[12] A fraudulent conveyance for the sole purpose of cutting off the remainder will be void.[13] Liability for waste will attach where the value of the remainder is diminished by reckless and extravagant use.[14] Many states have statutes which enlarge the life tenant's estate to a fee where the interests of creditors and purchasers for value are involved,[15] but in the absence of statute the creditors of the life tenant cannot subject the fee to execution for the satisfaction of his obligations.[16] In the assessment of inheritance taxes[17] and the allotment of dower[18] the holder's interest is deemed to be only a life estate. While the power of disposition authorizes the life tenant to transfer an estate in fee he cannot convey such an interest by gift *inter vivos*[19] or by devise,[20] and the authorities differ as to his ability to encumber the remainder with a mortgage.[21]

Hoover, 42 Ore. 314, 70 Pac. 1035 (1902). However, words indicative of the larger power are usually uncovered. Gildersleeve v. Lee, 100 Ore. 578, 198 Pac. 246 (1921).

[12] See Braley v. Spraggins, 221 Ala. 150, 128 So. 149 (1930); Reddin v. Cottrell. 178 Ark. 1178, 13 S. W. (2d) 813 (1929); Shapleigh v. Shapleigh, 69 N. H. 577, 44 Atl. 107 (1899); Gibony v. Hutcheson, 20 Tex. Civ. App. 581, 50 S. W. 648 (1899).

[13] Cales v. Dressler, 315 Ill. 142, 146 N. E. 162 (1924); *In re* Davies' Estate, 242 N. Y. 196, 151 N. E. 205 (1926).

[14] Cross v. Hendry, 39 Ind. App. 246, 79 N. E. 531 (1906) (an injunction against waste was granted); see Shapleigh v. Shapleigh, 69 N. H. 577, 44 Atl. 107 (1899); Ballinger v. Bartolett, 3 N. J. Misc. Rep. 80, 127 Atl. 671 (1925); Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61 (1894). *Contra:* Young v. Campbell, 175 S. W. 1100 (Tex. Civ. App., 1915) (a plea for an injunction to prohibit wasteful disposition denied); see Brant v. Va. Coal & Iron Co., 93 U. S. 326, 23 L. ed. 927 (1876).

[15] For example: ALA. CODE ANN. (Michie, 1928) §6928; N. Y. CONSOL. LAWS (Cahill, 1930) c. 51, §149; OKLA. COMP. ST. (1921) §8522; WIS. REV. ST. (1927) §232.08.

[16] Pace v. Pace, 41 Ohio App. 130, 180 N. E. 81 (1931).

[17] Kemp v. Kemp, 223 Mass. 32, 111 N. E. 673 (1916); *In re* Meldrum's Estate, 149 Minn. 342, 183 N. W. 835 (1921); *In re* Sonnenburg's Estate, 133 Misc. Rep. 42, 231 N. Y. S. 191 (1928).

[18] *In re* Davies' Estate, 124 Misc. Rep. 541, 209 N. Y. S. 296 (1925).

[19] Methodist Episcopal Church v. Walters, 50 F. (2d) 416 (W. D. Mo. 1928); Adams v. Prather, 176 Cal. 33, 167 Pac. 534 (1917); Evans v. Leer, 232 Ky. 358, 23 S. W. (2d) 553 (1930); Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61 (1894); see Quarton v. Barton, 249 Mich. 474, 229 N. W. 465 (1930); Holland v. Bogardus-Hill Drug Co., 314 Mo. 214, 284 S. W. 121 (1926). *Contra: In re* Cooksey's Estate, 203 Iowa 754, 208 N. W. 337 (1926) (the life tenant received a nominal consideration); see Bynum v. Swope, 201 Ala. 19, 75 So. 170 (1917); *In re* Ithaca Trust Co., 220 N. Y. 437, 116 N. E. 102 (1917).

In some instances gifts to charity are permissible. Dana v. Dana, 185 Mass. 156, 70 N. E. 49 (1904); Thrall v. Spear, 63 Vt. 266, 22 Atl. 414 (1891).

[20] Smith v. Judge, 133 Kan. 112, 298 Pac. 651 (1931); Struck v. Lilly, 219 Ky. 604, 293 S. W. 153 (1927); Selig v. Trost, 110 Miss. 584, 70 So. 699 (1916); Jones v. Fullbright, 197 N. C. 274, 148 S. E. 229 (1929) (personal property); Mooy v. Gallagher, 36 R. I. 405, 90 Atl. 663 (1914). *Contra:* Burbank v. Sweeney, 161 Mass. 490. 37 N. E. 669 (1894). But *cf.* Ford v. Ticknor, 169 Mass. 276, 47 N. E. 877 (1897).

[21] The life tenant has no difficulty making a valid mortgage on the fee where the terms constituting the power of disposition expressly include this authority.

Once he has exercised his power of disposition, the life tenant is under no obligation to account for the proceeds,[22] but at his death any of the proceeds which remain in his possession, whether in the form of money or other property, will pass to the remainderman.[23]

As a whole these conclusions are satisfactory. By permitting the life tenant to transfer a fee and yet protecting the remainder by the regulations attendant upon the disposition of the proceeds, the courts have succeeded in giving full effect to the apparent intention of the testator. Furthermore, substantial justice has resulted as the rights of all interested parties are amply protected.

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Wills—Requirements for Holographs—Printed Forms.

The testatrix's will, attested by two witnesses, was written by her own hand in the blanks of a printed will form, a part of which was torn

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Reeside v. Annex Building Ass'n, 165 Md. 200, 167 Atl. 72 (1933); Selig v. Trost, 110 Miss. 584, 70 So. 699 (1916). If the power of disposition is absolute the life tenant's mortgage on the fee is valid. Kent v. Morrison, 153 Mass. 137, 26 N. E. 427 (1891); Whitfield v. Lyon, 93 Miss. 443, 46 So. 545 (1908); Grace v. Perry, 197 Mo. 550, 95 S. W. 875 (1906); Lord v. Roberts, 84 N. H. 517, 153 Atl. 1 (1931); Rose City Co. v. Langloe, 141 Ore. 242, 16 P. (2d) 22 (1932); see Hamilton v. Hamilton, 141 Iowa 321, 128 N. W. 380 (1910). However, there is some conflicting authority. Downie v. Downie, 4 Fed. 55, (C. C. Ind. 1880); see Thrall v. Spear, 63 Vt. 266, 22 Atl. 414 (1891). In Rhode Island a mortgage of the fee by a life tenant who has a power of disposal is good provided the proceeds are used to erect improvements on the property. *In re* Jenks, 21 R. I. 390, 43 Atl. 871 (1899).

[22] Keniston v. Mayhew, 169 Mass. 612, 47 N. E. 612 (1897); Redman v. Barger, 118 Mo. 568, 24 S. W. 177 (1893); see Alford v. Alford, 56 Ala. 350 (1876).

[23] Bynum v. Swope, 201 Ala. 19, 75 So. 170 (1917) (the proceeds from the sale of the property had been invested in other real estate); Walker v. Pritchard, 121 Ill. 221, 12 N. E. 336 (1887) (the life tenant still retained some of the money received as the purchase price of the property); Barton v. Barton, 283 Ill. 388, 119 N. E. 320 (1918); *In re* Beatty's Estate, 172 Iowa 714, 154 N. W. 1028 (1915) (the proceeds of the sale were traced to a bank deposit); Olson v. Weber, 194 Iowa 512, 187 N. W. 465 (1922) (the proceeds from the sale were used to buy another tract of land which was exchanged for a third); *In re* Eddy's Adm'r, 134 Misc. Rep. 511, 236 N. Y. S. 275 (1929) (the money received from the sale of the property was traced to certain stocks and bonds); see *In re* McCullough's Estate, 272 Pa. 509, 116 Atl. 477 (1922); *cf.* Davis v. Badlam, 165 Mass. 248, 43 N. E. 91 (1896). *Contra:* McMurray v. Stanley, 69 Tex. 139, 6 S. W. 412 (1887); Feegles v. Slaughter, 182 S. W. 10 (Tex. Civ. App., 1916).

In some instances the life tenant is only entitled to a share of the proceeds coexistent with his life estate with the residue immediately becoming the property of the remainderman. Darden v. Mathews, 173 N. C. 186, 91 S. E. 835 (1917); see *In re* Meldrum's Estate, 149 Minn. 342, 183 N. W. 835 (1921).

This problem was raised in a recent North Carolina case, Fletcher v. Bray, 201 N. C. 763, 161 S. E. 383 (1931), in which the life tenant was given the power to dispose of the growing timber. In holding that the proceeds from the sale of the timber belonged to the life tenant's heirs rather than the remainderman the court distinguished the case of Darden v. Mathews, 173 N. C. 186, 91 S. E. 835 (1917) on the ground that it involved a bare power of sale and not an absolute power of disposal.