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Contributors to the May Issue/Notes

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NOTES

ESTATE INCLUDING AN ABSOLUTE POWER OF DISPOSITION.—When a person receives property, by way of executory devise or *inter vivos* deed, with an absolute power of disposing the property, what interest has the person to whom the limitation over is directed? For instance, to A and his heirs, but if A does not dispose of the estate during his lifetime then to B. Such a limitation over from the first taker, who has the fee, is evidently inconsistent and repugnant and should be declared void. In a superficial investigation of the decisions it is found that the courts are by no means agreed as to the effect of such a conveyance. Many courts construe the conveyance strictly, holding it void whereas others look to the intent and relation of such limitation

to the other clause to give effect to it. It is readily seen why there is a difference, when a few questions are noted. What is the intention of the grantor; although the limitation is apparently inconsistent and repugnant, does it not cut down the fee or can it cut down the fee; what clause should govern; what effect would it have in a codicil, following after the principle grant had been given in a will; could it be an exception or provision in a deed; is it a condition precedent or condition subsequent? Such questions and others of like import may be asked.

Although generally an estate may be devised to one in fee simple, or fee tail, with a limitation over by way of executory devise, yet when the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over is void.¹ Where an absolute power to dispose of the fee is given to the first taker, a devise over is void as a remainder or an executory devise.² Where a deed granting a fee shows as a whole an intention to vest the grantee with a fee, an attempted limitation on the fee will be disregarded, but where on the whole instrument it appears that the grantor's intention was to vest a less estate than a fee in the grantee, such intention will be carried into effect.³ When the limitation is clear and unmistakable, it is to be taken and considered in determining the intent of the testator, and the whole instrument must be considered together in determining the character and extent of the estate given.⁴ The devise construed as being the entire estate under Pub. St., c. 127, § 24.⁵ In *Cornwell v. Wullf*⁶ the dissenting opinion upholds the principle but argues that the intention should prevail. In order to bring the case within the rule stated the first donee must have an unfettered and unlimited right and power of disposition.⁷ But where there is, by the terms of the deed, a conveyance of the fee, words which merely indicate the motive of the grantor in making the conveyance cannot be deemed sufficient to create a remainder after the death of the grantee.⁸

Executory devise may be limited after fee simple but in such case the fee must be made determinable on some contingent event. It must be provided that the fee is to cease, and the executory devise to vest, on a contingency that must happen, if at all, within a life or lives in

¹ *Howard v. Carusi*, 109 U. S. 725, 27 L. Ed. 1089 (D. C. 1884).

² *Wilson v. Wilson*, 261 Ill. 174, 103 N. E. 743 (1913).

³ *Dinger v. Tucken*, 143 Ky. 850, 137 S. W. 776 (1911).

⁴ *Wilson v. Linder*, 110 Pac. 274 (Idaho 1910).

⁵ *Foster v. Smith*, 156 Mass. 379, 31 N. E. 291 (1892).

⁶ 148 Mo. 573, 50 S. W. 448, 45 L. R. A. 62 (1898).

⁷ *Cox v. Willis*, 49 N. J. Eq. 134, 22 Atl. 794 (1891).

⁸ 23 R. C. L. 495; *Fackler v. Berry*, 93 Va. 565, 25 S. E. 887, 57 A. S. R. 819 (1896).

being and twenty-one years and a fraction thereof.⁹ An exception to executory devise, whereby the testator may limit a fee upon a fee, by way of qualification of the first estate granted, in such a way that upon the happening of some contingency the estate first granted may be cut down to a base or determinable fee.¹⁰ The exception is recognized in Indiana.¹¹ Unequivocal language in any part of a deed cutting down apparently absolute title granted in another part cannot be ignored.¹² Since intention of one writing either deed or will is to be gathered from the instrument's entire contents, grantor of deed, containing usual *habendum* clause, may include clause in deed placing limitation upon the conveyance of the absolute fee.¹³ A fee may be limited after a fee by executory devise.¹⁴ Cannot cut down a fee.¹⁵ Can modify, limit, and explain but cannot defeat it.¹⁶ The narrow common law rules having given way to more enlightened and broader doctrines, the whole deed must be construed together and a condition limiting the use of the land although coming after a grant of fee, will not be rejected as surplusage.¹⁷

Trust inferred by pecatory words.—As a general rule, when property is given absolutely to any person and the same person is, by the giver who has power to command, recommend or entreated or wished to dispose of that property in favor of another, the recommendation or entreaty or wish shall be held to create a trust: (1) If the words are so used that, upon the whole they ought to be construed as imperative; (2) If the subject of the recommendation or wish be certain; (3) If the objects or persons intended to have the benefit of the recommendation or wish be also certain.¹⁸ Devise to A and her heirs for ever "in the fullest confidence that after her decease she will devise the property to my family" being restrained to an estate for life.¹⁹ But on appeal devisee took estate absolutely.²⁰

⁹ *Combs v. Combs*, 67 Md. 11, 1 A. S. R. 359 (1887), citing cases on when devisee takes a fee, remainder over being void for repugnancy.

¹⁰ *DeFrees v. Brydon*, 275 Ill. 530, 114 N. E. 336 (1916).

¹¹ *Curry v. Curry*, 58 Ind. App. 567 (1915); *Hayes v. Martz*, 173 Ind. 279 (1910).

¹² *Stock v. Mann*, 221 N. Y. S. 656 (1927); *Stokes v. Hyde*, 14 App. Div. 530 (N. Y. 1897).

¹³ *King v. Wurts*, 13 S. W. (2d) 1043 (Ky. 1929).

¹⁴ *Boyd v. Campbell*, 135 S. E. 121 (N. C. 1926).

¹⁵ *Shealy v. Shealy*, 113 S. E. 131 (S. C. 1922); *Corrigan v. Corrigan*, 149 Atl. 374 (R. I. 1930).

¹⁶ *Bennett v. Bennett*, 107 Atl. 304 (Vt. 1919).

¹⁷ *Guilford County v. Porter*, 83 S. E. 564 (N. C. 1914); *Triplett v. Williams*, 63 S. E. 79, 24 L. R. A. (N. S.) 514 (N. C. 1908).

¹⁸ *Knight v. Knight*, 3 Beav. 148 (1840); POMEROY EQ. JURIS, 4 Ed. vol. 3, §§ 1014-1017.

¹⁹ *Wright v. Atkyns*, 1 V. & B. 313 (1813).

²⁰ *Wright v. Atkyns*, Turn. & R. 143 (1823).

In Indiana, when real estate is given absolutely to one person with gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void as repugnant to the absolute property first given, and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, it carries a fee and any limitation over is void for repugnancy.²¹

The only exception to this rule is when the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition.²²

A valid executory devise cannot subsist under an absolute power of disposition in the first taker says Kent.²³ But "it is difficult to perceive any good reason why the executory devise should not be considered valid, subject to be defeated by a disposition of all the property, just as a remainder after a life estate with power of appointment is valid, but subject to be divested by an appointment."²⁴

The statutes favor fee simple as giving the whole interest and unless it appears by express words or necessary implication thereof, a limitation over after a fee will not be considered, or it will be declared void.²⁵

The cases show mainly that where the limitation over is very apparently inconsistent and repugnant the limitation over will be rejected or held void.²⁶

²¹ *Mulvane v. Rude*, 146 Ind. 476 (1896); *Goudie v. Johnson*, 109 Ind. 427 (1886); *Allen v. Craft*, 109 Ind. 476 (1886); *Outland v. Bowens*, 115 Ind. 150 (1888); *Wiley v. Gregory*, 135 Ind. 647 (1893); *South v. South*, 91 Ind. 221 (1883); *Fullenwider v. Watson*, 113 Ind. 20 (1887); *Orth v. Orth*, 145 Ind. 194 (1896).

²² *Mulvane v. Rude*, *supra*, note 21; *Wiley v. Gregory*, *supra*, note 21; *South v. South*, *supra*, note 21; *Wood v. Robertson*, 113 Ind. 323 (1887); *Downie v. Buennagel*, 94 Ind. 228 (1883).

²³ 4 KENT COMM, 14 Ed. § 270.

²⁴ 4 KENT COMM, 14 Ed. § 270 note.

²⁵ CAL. CIVIL CODE (1929) § 1070; ILL. SMITH-HURD R. S. (1929) c. 30, § 12; IND. ANN. STAT. (1926) § 3502; IOWA CODE (1927) § 10042; KAN. GEN. STAT. (1915) § 2049; KY. CARROLLS KY. STAT. (1922) § 2342; MICH. COMP. LAWS (1915) vol. 3, § § 11600-11602; MINN. GEN. STAT. (1913) § § 6735-6737; MO. REV. STAT. (1919) vol. 1, § § 551, 555; NEB. COMP. STAT. (1929) c. 76 art. 1 § § 106, 109; N. D. REV. CODE (1925) § § 4762, 4781; N. Y. CAILL'S CONS. LAWS (1923) c. 51, § § 149, 150, 151; OHIO, PAGES ANN. GEN. CODE (1926) vol. 2, § § 8510-11; PA. STAT. (1920) § 8320; TEXAS COM. STAT. (1928) § 1921; UTAH REV. STAT. (1898) § § 1970, 1971; WIS. STAT. (1929) § § 232.08, 232.09.

²⁶ Ala.: *Park v. Powledge*, 73 So. 483 (1916); *Gamble v. Gamble*, 75 So. 924 (1917); *Long v. Holden*, 112 So. 444 (1927); *Ward v. Torain*, 112 So. 815 (1927). Cal.: *Bonnell v. McLaughlin*, 173 Cal. 213, 159 Pac. 590 (1916); *Las Pasas Water Co. v. Ventura County*, 275 Pac. 817 (1929). Fla.: *Omolundu v.*