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PROPERTY AND ESTATES

LIFE ESTATE WITH A LIMITED POWER OF DISPOSITION

The testator gave real and personal property to his widow, his sole heir, for the duration of her life with a remainder to a hospital and church. He also gave his widow a power of sale or gift in fee simple, but provided that the property remaining at her death should not descend to her heirs or pass by her will. The widow, without mention of her power of alienation, executed a quit claim trust deed and an assignment of the personal property to the defendant in trust for herself for life and on her death, in trust for charities of her own choice. The testator's executor asks for a construction of the will. Held, the widow had only a life estate in the real and personal property but her deed and assignment executed her power of alienation and conveyed a fee simple.¹

It is usually stated that the interest given by a will depends upon the intent of the testator.² However, where an estate is given to the first tennant in general terms, without words of inheritance, and is coupled with an absolute power of disposition,³ a fee simple will be created.⁴ The same result is reached although the will provides for a remainder in case of intestacy.⁵ But, even though the estate is given in general terms in the introductory clause, a life estate is created if the testator limits the power of alienation and provides for a remainder of the undisposed property.⁶ At one time, the Indiana

¹ *Crawfordsville Trust Co. v. Elston Bank & Trust Co.*, 25 N.E. (2d) 626 (Ind. 1940). The will in the principal case did not in express terms give the widow a power to convey more than her life estate but the court assumed that she had the power to convey a fee simple. This would seem to be correct. *Clark v. Middlesworth*, 82 Ind. 240 (1882). If the widow had had a fee simple interest in the property then, of course, she conveyed that interest even though she did not properly exercise her power of alienation.

² *Grise v. Weiss*, 213 Ind. 3, 11 N.E. (2d) 146 (1937).

³ The Indiana courts have not always used the expression "absolute power of disposition" to mean the same thing. As used in the principal case and in this note it means a power to convey by deed or will without limitation to classes or purposes.

⁴ *Mulvane v. Rude*, 146 Ind. 476, 45 N.E. 659 (1896). Note (1931) 75 A.L.R. 71. See *South v. South*, 91 Ind. 221, 222 (1883); *Wiley v. Gregory*, 135 Ind. 647, 652, 35 N.E. 507, 508-9 (1893). "A devise of an estate generally, or indefinitely with a power of disposition over it, carries a fee." 4 KENT, COMM. (13th ed. 1884) § 319.

⁵ *Mulvane v. Rude*, 146 Ind. 476, 45 N.E. 659 (1896), held that a fee simple was created and that such remainder was void. *Logan v. Sills*, 28 Ind. App. 170, 62 N.E. 459 (1902).

⁶ *John v. Bradbury*, 97 Ind. 263 (1884) (could sell for necessities and comfort); *accord*, *Rusk v. Zuck*, 147 Ind. 388, 45 N.E. 691 (1897); 2 SIMES, LAW OF FUTURE INTERESTS (1936) § 596. These rules should probably be regarded as aids to ascertain the testamentary intent. *Wiley v. Gregory*, 135 Ind. 647, 35 N.E. 507 (1893). The court in the principal case seemed to say that the intent was clear from the reading of the document and that the dispute was

Supreme Court held that if an estate was expressly limited for life in the first instance, it would not be enlarged into a fee simple by an absolute power of disposition.⁷ Later *Van Gorder v. Smith* modified this doctrine to the extent that an express life estate, at least in personal property, will be enlarged into an absolute interest if the testator makes no disposition of the remainder.⁸ It was conceded that the widow had the power under the will to create a trust and provide that, at her death, the beneficial or legal interest⁹ should pass to specified beneficiaries. Such a power is as great as the power of disposition by will, and since the widow could alienate by deed, she had the equivalent of an absolute power of disposition.¹⁰ Since both *Van Gorder v. Smith*¹¹ and the principal case involved personal property,¹² the cases are distinguishable only because the will in the principal case disposed of the property remaining at the death of the life tenant.¹³

whether this intent was in conflict with these established rules of law.

⁷ In *Dunning v. Vandusen*, 47 Ind. 423 (1874), the widow was given an express life estate coupled with a power of disposition by deed or will without limitation. The court held that she had but a life estate, citing 4 KENT, COMM. (13th ed. 1884) § 319, that, ". . . where the estate is given for life only, the devisee takes an estate for life, though a power of disposition or to appoint the fee by deed or will, be annexed; unless there should be some manifest general intent of the testator which would be defeated by adhering to this general intent." However, this case was incorrect on another point, which had it been decided correctly, would have made this statement dictum.

⁸ *Van Gorder v. Smith*, 99 Ind. 404 (1885) (precatory words indicating a trust held to fail and the widow had a fee simple subject to no trust whatsoever); *Grant v. Mullen*, 15 Del.Ch. 174, 138 Atl. 613 (ch. 1926). *Contra*: *Funk v. Eggleston*, 92 Ill. 515 (1879). But an express life estate is not enlarged into a fee simple if the power of alienation must be exercised by deed. *Wiley v. Gregory*, 135 Ind. 647, 35 N.E. 507 (1893) (emphasized that testator disposed of the remainder); *Wood v. Robertson*, 113 Ind. 323, 15 N.E. 457 (1887); *see Downie v. Buennagel*, 94 Ind. 228, 233 (1884).

⁹ This case goes no further than to hold she might create an equitable interest to take effect at her death, but it would seem that she might also have provided that, at her death, the trustee should convey the legal interest to the beneficiaries named.

¹⁰ The court said that the widow was not given an unlimited (absolute) power of disposition probably because she could not dispose of the property by will. But she could, and did, do the same thing that she could have done by will.

¹¹ *Van Gorder v. Smith*, 99 Ind. 404 (1885).

¹² The court in *Van Gorder v. Smith*, 99 Ind. 404 (1885), refused to extend the rule of that case to real estate because only personal property was in dispute. Although the principal case involved real estate, it does not clear up that difficulty and indicate a different rule in regard to real estate because the cases are distinguishable on the ground that this will disposed of the remainder.

¹³ It might have been argued that the deed of trust executed by the widow was beyond her power since the testator provided that she could not dispose of the property by will. In general, the authorities in other states are in accord with Indiana on the rules above. Notes (1925) 36 A.L.R. 1177, (1932) 76 A.L.R. 1153.

The remainder to the church and hospital vested at the death of the testator because it was certain to come into effect although the time when it would do so was uncertain.¹⁴ The fact that it might be reduced in amount or even destroyed by the exercise of the power of alienation acts merely as a condition subsequent to vesting.¹⁵ Furthermore, the fact that the amount of the remainder could not be ascertained at the death of the testator should not be held to render it void.¹⁶

It was admitted that the widow had the power to convey a fee simple, but her quit claim deed did not refer to her power of disposition and the assignment of the personal property held by her husband's executor contained inconsistent statements.¹⁷ A life tenant may exercise his power of alienation in fee even though he does not refer to his power in the conveyance if his intent is otherwise clear.¹⁸ However, this intent cannot be inferred but must be clearly proved.¹⁹ It may be shown by the fact that the instrument describes the interest which is the subject of the power or would be inoperative unless it acted upon that interest.²⁰ If the widow had had no interest in the property, her conveyance would have exercised her power, but she had a life estate upon which the instrument could operate. If a warranty deed sufficient to convey a fee simple had been executed and

¹⁴ Wood v. Robertson, 113 Ind. 323, 15 N.E. 457 (1888); Bruce v. Bissell, 119 Ind. 525, 22 N.E. 4 (1889); Heilman v. Heilman, 129 Ind. 59, 28 N.E. 310 (1891); Summers v. Old First National Bank & T. Co., 105 Ind. App. 9, 13 N.E. (2d) 320 (1938).

¹⁵ Wood v. Robertson, 113 Ind. 323, 15 N.E. 457 (1888) (Life tenant had power to sell and pay debts of testator and to make advancements to children); Rumsey v. Durham, 5 Ind. 71 (1854); 23 R.C.L. 511-13.

¹⁶ See cases cited notes 12, 13 *supra*. Cotton v. Town of Danville, 301 Mass., 380, 17 N.E. (2d) 209 (1938). The authorities in Illinois may be contra, Mills v. Newberry, 112 Ill. 123, 1 N.E. 156 (1885); Coulson v. Alpaugh, 163 Ill. 298, 45 N.E. 216, (1896); Wilce v. Van Alden, 248 Ill. 358, 94 N.E. 42. But a later authority in that forum implies that the remainder will be held void only where the power of disposition is sufficient to elevate the life estate into a fee simple.

¹⁷ The assignment recited that it was executed under the authority given by the will but further stated that the widow was assigning all *her* right, title and interest in and to the personal property mentioned.

¹⁸ Johnson v. Commissioner of Internal Revenue, 76 F. (2d) 55 (C.C.A. 9th, 1935) *cert. denied*, 296 U.S. (1935); South v. South, 91 Ind. 221 (1883). Of course, the conveyance must be sufficient to convey a fee simple.

¹⁹ Equitable Trust Co. v. Causey, 9 A. (2d) 714 (Del. Ch. 1939); Butler v. Prudden, 182 Ga. 189, 185 S.E. 102 (1936). *Contra*: Boston Safe Deposit & Trust Co. v. Prindle, 290 Mass. 577, 195 N.E. 793 (1935).

²⁰ Bullerdick v. Wright, 148 Ind. 477, 47 N.E. 931 (1897) (disposition by will).

for an adequate consideration, the power would have been exercised.²¹ But a quit claim conveyance, as in the principal case, will not ordinarily show an intent to exercise the power because it purports to convey only the interest possessed by the grantor.²² However, the widow's conveyance executed her power because her intent was clear; she attempted to set up a trust to exist after her death and her own property was insufficient for that purpose.²³ The absence of a consideration was immaterial because she intended the conveyance to operate as a gift. V.R.B.

TORTS

RIGHT OF PRIVACY OF PUBLIC CHARACTERS

The defendant published and advertised a biographical sketch of the plaintiff, a much publicized child prodigy of 30 years ago, under the title of "Where Are They Now?" showing the present poverty-stricken position of plaintiff. Plaintiff sued for damages for violation of his common law right of privacy in states where publication occurred. Held, for defendant. The invasion of the plaintiff's common law right of privacy was privileged because he is still a subject of public interest.¹

Where the common law right of privacy is recognized,² it is agreed

²¹ Downie v. Buennagel, 94 Ind. 228 (1884); South v. South, 91 Ind. 221 (1883); Rinkenberger v. Meyer, 155 Ind. 152, 56 N.E. 913 (1900).

²² Fraizer v. Hassey, 43 Ind. 310 (1873); Meister v. Francisco, 229 N.W. 643, 127 A.L.R. 242, 248 (Wis. 1940).

²³ O'Brien v. Flint, 74 Conn. 502, 51 Atl. 547 (1902). Note (1940) 127 A.L.R. 248.

¹ Sidis v. F-R Pub. Corporation, 113 F. (2d) 806 (C.C.A. 2d, 1940). The court also denied recovery under the NEW YORK CIVIL RIGHTS LAW, Secs. 50, 51, (Consol. Laws, C. 6) on the ground that neither defendant's article nor the picture of plaintiff was published for purposes of trade within the meaning of the statute. The court admitted that defendant's article was forecast 'for advertising purposes' but held that the advertisement shared the same privilege as the article. Cf. Almind v. Sea Beach Railway Co., 157 App. Div. 230, 141 N.Y. Supp. 842 (2d Dep't 1913). The fact that plaintiff's name and picture, as required for recovery under the statute, was not used in the advertisement was stressed. But that situation is analogous to the principle in libel that reference to plaintiff need not be direct in publication to constitute libel. Shaw Cleaners and Dyers, Inc. v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932).

² The right of privacy, usually defined as a personal right "to be left alone," did not exist at early common law, but was afforded inarticulate protection in equity when its violation involved: a property right, *Gee v. Pritchard*, 2 Swanst. 402, 36 Eng. Rep. R. 670 (ch. 1818); an implied contract, *Abernethy v. Hutchinson*, 1 H. & Tw. 28, 47 Eng. Rep. R. 1313 (ch. 1825); or a breach of faith, *Yovatt v. Winyard*, 1 J. & W. 394, 37 Eng. Rep. R. 425 (ch. 1820). The first advocacy of an explicitly recognized right of privacy was presented by Warren and Brandeis, *The Right To Privacy* (1890) 4 Harv. L. Rev. 193. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) was the first unequivocal