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distinct from the jurisdiction exercised by the courts of general jurisdiction. In probate the procedure is more lax than in other fields of law and the statutes are loosely construed. Strictness and technical meaning are not always followed where method and procedure are concerned. It is submitted by the writer that due to the peculiar nature of probate this is a desirable situation.

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SUBSTITUTIONAL CONSTRUCTION AS PERTAINING TO DIE WITHOUT ISSUE

In *Howard* v. *Reynolds*[1] testator apparently drafted his own will and in very informal language provided for his farm to go to his son Ellis. He further directed that Ellis should pay a share to another son within three years and then should borrow money against the land in order to pay two additional shares to persons named in the will. Testator also placed a fair value of four thousand dollars on each share and then wrote: ". . . if any heir was to die without *leving* [sic.] an *air* [sic.] his part should go to the other heirs." A declaratory judgment action was filed for a construction of the will and the chancellor held that Ellis took a fee simple interest in the land subject to equitable liens in favor of the other named persons in the amount of four thousand dollars a share. He also held that there should be no defeasance of these interests upon the death of Ellis without issue surviving him. The Court of Appeals of Kentucky affirmed the chancellor's holding and in its opinion held that the phrase "die without heirs" created defeasible interests which would be divested *only* if death without issue occurred before the death of the testator. Thus, since the devisee and the legatees survived the testator, the former took a fee simple absolute interest in the land subject to equitable liens in the legatees.

When used in a will to designate a condition of defeasance, the meaning of the phrase "die without issue" or its equivalent is clearly a matter of construction. The two possible meanings are: (1) the testator intended the condition to be death without issue at any time, or (2) he intended it to be only death without issue prior to his death. If the latter meaning is adopted, the theory of construction is that the testator merely intended for the second devisee or legatee to be substituted for the first devisee or legatee in order to prevent a lapse should the first taker die without issue before the will takes effect.

[1] 261 S.W. 2d 815 (1953).

This construction is referred to by the authorities as a "substitutional construction," if the testator's intention on this point can be determined from a reading of the will as a whole the court will do so, because its primary rule of construction is to construe the instrument as a whole.[2] Where it is necessary, however, to construe the phrase "die without issue" alone, substitutional construction becomes in effect a special rule of construction. Although the opinion of the court in the instant case does not assert the principle of substitutional construction, it was clearly applied to the devise of realty and, at least by inference, to the bequests of personalty in the form of equitable liens. The purpose of this comment is to examine the Kentucky law of "substitutional construction" in both its applications.

Prior to *Harvey* v. *Bell,* decided in 1904, Kentucky law on this problem was rather confused. In this case the Kentucky court attempted to clarify the meaning of the phrase, "die without issue," by laying down four rules of construction. The fourth rule is applicable here:

> . . . where there is no intervening estate, and no other period to which the words dying without issue can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee which is defeated by the death of the devisee at any time without issue then living.[3]

Between 1904 and 1925, several opinions of the court deviated from the rule of construction established in *Harvey* v. *Bell,* by applying substitutional construction to a devise of realty.[4] In *Atkinson* v. *Kern,*[5] the Kentucky Court of Appeals reaffirmed the rule of *Harvey* v. *Bell* and overruled all decisions in conflict with it, thereby clearly overruling these deviating decisions and repudiating substitutional construction in this application. This would seem to be the minority view,[6] and was the law prior to the decision in the instant case.

Except for the implications the principal case the rule of construction applied to the phrase "die without issue" in regard to personalty is clearly contra to the rule governing realty in Kentucky.[7] The personalty rule was best stated in *Ireland* v. *Cooper*[8] as follows:

> . . . when there is no intervening estate, and nothing appears in the will to the contrary, the presumption as to personalty is that dying

[2] Ireland v. Cooper, 211 Ky. 323, 277 S.W. 483 (1925); Muir v. Richardson, 201 Ky. 352, 256 S.W. 727 (1923).
[3] 118 Ky. 512, 523, 81 S.W. 671, 674 (1904).
[4] Rue v. Lisle, 200 Ky. 520, 255 S.W. 133 (1923); Prewitt v. Prewitt, 178 Ky. 346, 198 S.W. 924 (1917); Calloway v. Calloway, 171 Ky. 366, 188 S.W. 410 (1916).
[5] 210 Ky. 824, 276 S.W. 977 (1925).
[6] 16 Ky. L. J. at 81 (1927).
[7] Poore v. Poore, 226 Ky. 668, 11 S.W. 2d 721 (1928).
[8] 211 Ky. 323, 277 S.W. 483 (1925).

> without issue, has reference to the death of the devisee before the testator, but as to realty it refers to his death at any time.[9]

In adopting a rule of substitutional construction in regard to personalty the Kentucky court has taken the majority position. When the will directs a separation of the realty and personalty the appropriate rule applies,[10] but when there has been no separation of the property, the court has concluded that the rule governing realty must prevail and a defeasible estate is created as to both classes of property[11]—for instance, where personalty and realty are devised jointly and also where both have been placed in the hands of a trustee.

At first glance it might appear that the Kentucky Court of Appeals in the *Howard* case reversed its previous decisions in regard to the rule of construction concerning realty. But a careful reading of the rule of *Harvey* v. *Bell* shows that if there is a *contrary intent* expressed in the will, that intent will be given effect. In other words if the testator, in the instrument as a whole, manifests an intention for death without issue to have significance regardless of when it occurs, a substitutional construction will not be attributed to him. In this sense the *Howard* case reaffirms the cardinal rule of construction which has been followed in this jurisdiction for many years to the effect that the testator's intention must be ascertained from a consideration of the will as a whole, that is, by looking to the four corners of the instrument.[12]

In the instant case the language of the whole will is at complete odds with a construction which would require the devisee's interest to be defeated at any time by death without issue. The testator surely did not intend that Ellis should pay the legatees their respective shares and retain merely a defeasible estate, which would be defeated if he died without issue at *any time*. He expressly directed that Ellis was to *own* one-half of the worth of the estate after he paid the second son his share. The testator was a layman and his concept of *owning* property implies a complete, unrestricted absolute fee simple title. This concept is in direct conflict with the technical nature of a defeasible title. Even stronger evidence of the testator's intention is

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[9] *Id.* at 326, 277 S.W. at 484.

[10] Whitlow's Administrator et al. v. Saunder's Administrator, 237 Ky. 842, 36 S.W. 2d 659 (1931).

[11] In Mitchell v. Dauphin Deposit Trust Company, 283 Ky. 532, 142 S.W. 2d 181 (1940), it was said: "In this case there was no separation of realty and personalty, both being placed in the hands of the trustee under the same devise to one person and in these circumstances clearly the real estate rule must prevail and the clause of the will in controversy must be construed to mean a death of the daughter at any time without issue."

[12] Zelia Donelson's Ex'r v. Zelia R. Coates, 299 Ky. 608, 186 S.W. 2d 240 (1945).

shown by his direction that Ellis was to borrow enough money to pay the other two legatees their respective shares, pledging the land as security. This is also at odds with a construction which would create a defeasible fee, for a lender would not loan money and take as sole security property in which the mortgagor had only a defeasible fee. Thus, it can readily be seen how the court, using the paramount rule of construction, arrived at its conclusion that the words die without issue in this will meant die without issue before testator's death.

As to the equitable liens, which the court properly classified as personalty (the monetary shares devised to the other legatee's) the result of the case is in strict conformity with what seems to be the established rule in Kentucky.[13]

It is submitted that there is no rational basis for a distinction between the rule of construction governing the phrase "die without issue" as it applies to personalty and as it applies to realty. Although the court in construing the will in the *Howard* case correctly reached the same result with respect to the two types of property, it failed to reconcile the principles of *Harvey* v. *Bell* and *Atkinson* v. *Kern* in the situation where the intent of the testator cannot be determined from the will as a whole. To this extent the opinion can be interpreted as continuing to recognize the existence of different rules for realty and personalty. In a 1940 case, *Haggin's Trustee et al.* v. *Haggin*,[14] the court inferred that the rule should be the same for both classes of property. It is submitted that this is the better view and that the Court of Appeals should adopt it.

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WILLS: REMAINDER OVER FOLLOWING PURPORTED FEE

In the recent decision of *Collings* v. *Collings Ex'rs*,[1] the Kentucky Court of Appeals applied certain principles of will construction which it has established for determining the validity or a gift over following the attempted disposition of a fee simple absolute interest in an earlier clause of the instrument. In continuing to classify the funda-

[13] *Supra* note 8.

[14] 283 Ky. 821, 143 S.W. 2d 522 (1940), the court said: "In the Atkinson opinion and in cases preceding that opinion there is at least an intimation of a distinction to be drawn as to the interpretation to be given between a case involving the transfer of real property and one involving a transfer of personalty, but that distinction if it exists, requires a more mandatory adherence to the incorporated rules laid down in the Atkinson opinion where the property conveyed was personalty than where it was realty."

[1] 260 S.W. 2d 935 (Ky. 1953).