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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).

mental problem as one of construction, the court recognized that each will must be interpreted carefully to determine the particular testator's intention which is the decisive factor in each case. In this type of case, at least, the court apparently considers its role to be that of a probate court of last resort. The purpose of this note is to examine the application of construction principles which was made in this most recent decision, and to relate this case to a number of cases which have been decided by the court since the well known decision of *Hanks* v. *McDannell*[2] in 1948.

The pertinent clauses of the *Collings* will provided as follows:

> Clause 3. All the rest and residue of my estate, real, personal and mixed, of whatever kind and description and wherever situated, I will, devise and bequeath to my beloved wife, Bess H. Collings.
>
> Clause 4. Any part of my estate remaining undisposed of at the time of the death of my said wife, I will and bequeath to my cousin, Lowell Anderson Collings. Should he not survive her then to his decedents, [sic] if he leaves any, and if not, to my heirs at law.[3]

In an action for construction of the will, testator's widow maintained that the two clauses *read together* gave her an indefeasible fee interest in the residue. The designated benficiary of the attempted gift over and the testator's heirs contended that the widow took a life estate only, with the result that the former received a contingent remainder in fee in the whole residue, or at least a remainder interest in that portion of the residue remaining after any necessary encroachments on the corpus had been made by the widow during her lifetime. In support of this claim, the heirs contended that they had a remainder which was contingent on the first gift over failing to vest.

The Chancellor decided that the widow took an indefeasible fee simple interest under clause 3 of the will, and that clause 4 was "fatally vague and uncertain and therefore void."[4] The Court of Appeals reversed, concluding that the testator intended for his widow to have full rein in the use and management of all of the residue during her life, provided however, that she could "not wilfully waste it, nor give it away, nor dispose of it by will." Therefore, there was a valid contingent remainder which would vest in the cousin of the testator

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[2] 307 Ky. 243, 210 S.W. 2d 784 (1948).

[3] *Supra* note 1 at 935, 936.

[4] *Id.* at 936. It is interesting to note that the vagueness complained of by the Chancellor was not some latent or patent ambiguity in the wording of the clause, but rather it was the inconsistency of the two clauses when read together; the former apparently giving a fee simple, and the latter immediately limiting it. Since it could not legally be deemed to alter the prior clause, it must have been meant for some other reason, which reason is, of course, "vague and uncertain" because the testator had no other reason than the one expressed.

or testator's heirs depending on whether the cousin survived the widow and died without descendants. The court did not expressly identify the nature of the widow's estate of ownership under the will either as a life estate or otherwise but merely described her rights based on their interpretation of the testator's intention.

Prior to 1948, the court had consistently held that a gift over following the attempted disposition of a fee by will was void because one could not create a remainder after a fee, and the testator would be presumed to intend the creation of a fee where he first created absolute ownership in one clause and then attempted to cut down this devise or bequest in a subsequent clause.[5] In the *Hanks* decision, the court took the position that the problem was fundamentally one of construction and emphasized that the "polar star" rule of reading a will as a whole should be followed. Since this case, therefore, the practical problem for the court and the draftsman has been to isolate those decisive points of testamentary intent, from a reading of the will as a whole, which govern the validity of the attempted gift over.

As pointed out in a comparatively recent note[6] on this subject, the *Hanks* case and the case of *Wiglesworth* v. *Smith*,[7] decided soon thereafter, established clearly that the gift over will be valid where the first taker is not given power to dispose of the property at his death. In other words, whether the testator intends for the first taker to have an absolute interest *not* subject to a valid gift over depends, in the final analysis, on whether he intended for the first taker to have the power to make a testamentary disposition of any property not consumed or disposed of in his lifetime. At least by inference, these cases suggest that he may be given the power to use and manage, as well as the power to dispose of it by gift or sale inter vivos, without making the gift over invalid.

Since these enumerated incidents of ownership are the decisive factors in determining the testator's intention as to the nature of the first taker's estate, which in turn governs the validity of the gift over, they constitute a good basis for analysis of the interim decisions between the *Hanks* and *Collings* cases. Under this approach, the critical incident of ownership obviously is the power to will the property.

In the first of these cases, *Swango* v. *Swango's Adm'r*,[8] the testator devised all his property, in the first clause of his will, to his wife giving her power to use, sell, or *spend it as she saw fit.* A subsequent

[5] Pirtle v. Kirkpatrick, 297 Ky. 785, 181 S.W. 2d 425 (1944): Wells v. Jennell, 232 Ky. 92, 22 S.W. 2d 414 (1929); Jackson v. Ku Klux Klan, 231 Ky. 370, 21 S.W. 2d 477 (1929).

[6] Note, 40 KY. L. J. 350 (1952).

[7] 311 Ky. 366, 224 S.W. 2d 117 (1949).

[8] 313 Ky. 495, 232 S.W. 2d 347 (1950).

clause provided that it was his "desire" that any property remaining at her death be divided equally between his and her heirs.[9] In an action between the widow's devisees and the testator's heirs, the Court of Appeals expressly stated that the testator in the first paragraph gave the property to the wife absolutely. They then said that the subsequent clause contained only precatory words having no legally binding effect. The court went on to say that if the words of gift over had not been precatory they might possibly be given effect as to any property not disposed of at the first taker's death. In at least one later case, discussed *infra,* this dictum seems to be the basis of a square holding that a gift over following a fee is valid. The decision in the *Swango* case leaves unanswered the question as to who would take the property if the widow died intestate. The court expressly stated that the widow owned the property in fee, but did not identify the precise basis for this conclusion. They seemed not to take into consideration, one way or the other, whether the testator intended to confer on her a power to will the property in addition to the other decisive incidents of ownership which he did confer.

A year later the court handed down a very brief opinion in *Hall* v. *Hall*[10] where the will consisted of only one pertinent sentence:

> I want my wife Lena R. Hall if she is the longest liver to have all of my belongings and at her death if my brothers Bert Hall and Tom Hall are still living, it can be divided between the two families, and if she Lena R. Hall wants to make any changes she is at liberty to do so.[11]

In its decision the court merely quoted the Chancellor and without elaboration adopted his opinion which held that the widow was bequethed the entire estate with powers of management, control, as well as the right of inter-vivos and *testamentary* disposition. But the Chancellor also held that if the widow should die without disposing of any part of the property, then that portion would pass to the brothers if they survived her, or to *her heirs* if they did not. This decision would seem to hold (almost by default) that there is a valid gift over even where the first taker is given expressly the power to will the property. Apparently this gift over extends only to the property not disposed of during the first taker's lifetime. Admittedly, this conclusion might be

[9] *Id.* at 496, 232 S.W. 2d at 347. "I bequeath all [my estate] . . . unto my wife, Jimmie Swango, *to and for her absolute use and benefit* according to nature and quality thereof respectively, *I want her to use the above to suit herself, to sell, trade or barter, or spend as she sees fit,* subject only to the payment of my just debts . . . [and expenses].

"After my wife's death I *desire* the real and personal property, money *if any,* that be left to be divided equally between my wife's and my heirs. . . ."

[10] 314 Ky. 733, 237 S.W. 2d 55 (1951).

[11] *Id.* at 733, 237 S.W. 2d at 55.

justified if the right of the first taker to make a testamentary disposition were conferred in the form of a general power of appointment. But here there is nothing to show that the court would not permit the same result by upholding a remainder after a fee.

Weakley v. *Weakley*[12] was decided in the same year as the *Hall* case. There the court sought to construe a holographic will in which the following pertinent language appeared:

> I leave all real estate and personal property to my beloved son, L. M. Weakley, to do with as he sees fit. Then goes [sic] to my grandchildren at his death to share alike.[13]

The court clearly differentiated between a gift of an absolute fee followed by a gift over of the *entire* estate, and a gift over of that which *remains* of the corpus after the first taker dies. The court pointed out that the *Hanks* rule applies only to the latter situation and serves only to prevent the gift over from being presumed void conclusively. As to the will in the instant case, the court, without expressing its reasons, overruled a prior decision[14] and stated that the gift over to the grandchildren was a gift of the *entire* estate, but that the life tenant had power to encroach on the corpus. The court explained that this construction would necessarily lead to the conclusion that the first taker had merely a life estate. Since, however, the testator must have known that the life tenant could sell and dispose of his life estate in any event, he could only have intended for the words "to do with as he sees fit" to pertain to the corpus. Thus he could enroach on it, with anything left over going to the second donee.

Two cases involving this general problem were decided in the federal courts in 1952. In the first,[15] the court elaborately described the history of the former Kentucky rule of construction known as the "biting" rule[16] and also mentioned the adoption of the "polar star" or "four corners" rule[17] in the *Hanks* case. However, since the will in controversy became effective before April 23, 1948 (the effective date of the *Hanks* doctrine) the court correctly held that its construction was governed by the older doctrine.

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[12] 237 S.W. 2d 524 (Ky. 1951).
[13] *Id.* at 525.
[14] Price v. Price, 298 Ky. 608, 183 S.W. 2d 652 (1944).
[15] United States v. 711.4 Acres of Land, More or Less, Situate in Clinton and Russell Counties, Kentucky, 107 F. Supp. 62 (W.D. Ky. 1952).
[16] *Id.* at 64. "This means that where an entire estate is devised to one with the full right to use the corpus of the estate or to take a 'bite' out of the estate as well as to receive the income from it the devise over is void."
[17] This is the doctine of construction in which the court attempts to ascertain from the four corners of the instrument what the intent of the testator was, in order to uphold that intent.

In the second case,[18] the court took the words of the initial clause, ". . . I give, bequeath, and devise to my wife, Lucy Brammer, to use and dispose of as she deems fit, and she is to have full control and use of said property . . .."[19] and read them with the second clause which created a gift over extending only to the undisposed of portion at her death. After referring to a prior Kentucky case[20] which stated that the ". . . power to sell or dispose of [the property] as the devisee may deem proper, carries the fee," the court then decided that because the widow had the power to "dispose" of the property and because the gift over extended to the undisposed of portion of the estate, she had a fee simple absolute. Although the court did not say expressly that the power to "dispose" includes both intervivos and testamentary disposal, it is inconceivable that it would make any distinction between the two meanings of the word "dispose," particularly in light of the broad scope of its decision.

The final case having any bearing on this problem is *Haysley* v. *Rogers*[21] where the court reiterated that mandatory language is essential to a good gift over, but decided that the particular gift over[22] was invalid for failure to comply with the Statute of Wills since it attempted to devise the property according to an extraneous verbal agreement.[23]

In conclusion, it may be pointed out that the court in the *Collings* case expressly follows the *Hanks* doctrine by stating that the controlling principle in determining the validity of the gift over is whether the testator gave the primary devisee a power of testamentary disposition. If the testator does bestow this power, he thereby gives the first donee an absolute fee. However, if the first donee can only dispose of the devised estate intervivos, then his interest is limited to a mere life estate with power to encroach on the corpus.

After establishing these principles, the court examined the language of the will and discovered no reference to a power of disposition, either intervivos or testamentary. They found it necessary therefore to solve the problem by implication. They concluded that since the testator himself controlled the eventual disposition of the remainder by giving it to his cousin in clause 4, it was "unmistakably clear" that

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[18] Brammer v. Wallace, 198 F. 2d 742 (6th Cir. 1952).
[19] *Id.* at 743.
[20] Scott v. Smith, 286 Ky. 697, 151 S.W. 2d 770 (1941).
[21] 255 S.W. 2d 649 (Ky. 1952).
[22] *Id.* at 651 ". . . I give to Willie C. Rogers . . . all the balance of my estate . . . for taking care of me and see that I am furnished a home up to the time of my death, *with the understanding that any of my estate remaining at the time* of his death, be given according to a verbal agreement between us."
[23] KY. REV. STAT. 390.040, 394.050 (1953).

he did not intend that the widow should have it. The natural implication from this fact is that the widow was given a life estate with power to use and enjoy all of the principal, but she could not waste it, nor give nor will it away.

While the *Swango* and *Haysley* cases may be cited for the requirement of mandatory language to make the gifts over valid, there was reason to believe, prior to the instant case, that the dicta in these opinions and the square holding in the *Hall* case meant that there could be a valid gift over after a fee. On this point at least, the *Collings* case seems clear. There must be either an absolute fee simple or else a life estate in the first taker. However, the life tenant may have very broad powers conferred on him like those in the *Weakley* case where he could "do with [the corpus] as he see fit." And most important of all, the *Collings* case removes any doubt about the type of "disposal" powers which the *Brammer* case established as necessary to create a fee.

Therefore the present Kentucky law appears to be that where the gift over extends to the *entire* estate given the first donee, a life estate only is created in the first donee. If only that *portion* of the estate *remaining* after the primary devisee dies is given over, then there will be a life estate with power of encroachment unless the first donee is given the power of testamentary disposition. If this power is given, then the gift over is void, and the first donee takes a fee simple absolute. The principle contribution of the *Collings* case is that it substantially clarifies the point that there can be no valid gift over following a fee simple.

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