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Future Interests--Gifts Over of Undisposed Property in Kentucky

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FUTURE INTERESTS—GIFTS OVER OF UNDISPOSED PROPERTY IN KENTUCKY

This note deals with a situation in which A purports to give an estate in fee to B and, in a later part of his will, or by codicil, gives the remainder undisposed of by B during his lifetime to C. Such a gift over of undisposed property is termed an executory devise, which has been defined as a limitation by will of a future estate or interest in land which cannot, consistently with the rules of law, take effect as a remainder.

In *Watkins' Ad'mr* v. *Watkins' Ex'r.*,[1] the Kentucky Court said:

> " the law is well settled in this state that after a devise of a fee a limitation over of what is left or undisposed of is void, as being inconsistent with the fee. Thus if property be given to one with power to sell or dispose of it, such language implies a fee; likewise when property is given to one with power to use and enjoy as he may see fit. In every such case where the devisee or legatee has the right to dispose of the property at pleasure, the devise over is inoperative."

In the case of *Clay* v. *Chenault*,[2] it was said:

> "The executory interest is wholly exempted from the power of the taker. If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the proprety without lawful issue, the remainder over or the remainder over the property which he, dying without heirs, should leave, or without selling or devising the same,—in all such cases the remainder over is void as a remainder, because of the preceding fee, and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will."

Where, however, a life estate or interest in the property is given the first taker, with power of disposition, then the limitation over of such devised property as should remain undisposed of at death of the life tenant is valid. In *McCullough's Administrator* v. *Anderson*,[4] the court said:

> "We think there is a marked distinction between a power given to one who already has the fee and that given to a life tenant, who may acquire the fee by the

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[1] 120 S.W 341 (Ky. 1909)

108 Ky. 77, 85, 55 S.W 729 (1900).

[3] Craig v Rodelman, 199 Ky. 501, 251 S.W 637 (1923) Woodward v. Anderson, 145 Ky. 134, 140 S.W 57 (1911) McCullough's Admr. v. Anderson, 90 Ky. 126, 13 S.W 353 (1890).

[4] 90 Ky. 126, 137, 13 S.W 353 (1890). *See* also: Roberts, *Future Property Interests in Kentucky* (1924) 13 Ky. L. J. 186.

> exercise of the power given him. In the latter instance it is the manifest intention to the testator that the life tenant must acquire the fee in the mode provided by the will, and if the power is not executed, those in remainder take the estate."

Tiffany says that there are certain objections made to these limitations over,

> "because 'inconsistent with absolute property supposed in the first devisee,' while in the other, the invalidity of the limitation was based on the ground that 'a valid executory devise of real or personal estate cannot be defeated at the will and pleasure of the first taker,' and the gift of the power of disposition enables this to be done."[5]

It is further argued that the limitation is too indefinite since it is generally impossible to determine the exact property left. The rule at common law against limitations over by deed or will has been changed toward a more flexible attitude, so as to give the grantor or devisor more freedom in disposing of his property. These limitations now have the sanction of the legislature and the old argument that a remainder would fail for the lack of a supporting estate is no longer a sound distinction between a remainder and an executory devise. *Kentucky Revised Statutes,* Section 381.040, provides: "any estate may be made to commence in the future by deed, in like manner as by will, and any estate which would be good as an executory devise or bequest shall be good if created by deed." This statute places deeds and wills on the same footing as to future estates and lends a helping hand to the creation of a springing or shifting use.

The rule that the gift over is void if the interest in the first taker is absolute, is harsh, and it seems indefensible on principle.[6]

Mr. Gray has this to say·

> "It has been often said and held that a devise to A in fee, but if A dies without having disposed of the land by deed or by will, then over to B, is bad. It is not at first easy to say why this should be so; the owner of the land has full power of alienation, either by deed or will. It rests indeed with him to say whether the gift over shall take effect, but that is the case with many executory devises. A devise may be made to A with a gift over, unless at his death he has been married, or has been called to the bar, or has gone to Rome, or has given $100 to B; and no one will question the gift over is good, although it may rest entirely within A's control whether the event which is to prevent the gift over shall take place or not. What illegality is there

[5] TIFFANY, REAL PROPERTY (2d ed. 1920) Sec. 167.

[6] KALES, ESTATES FUTURE INTEREST (2d ed. 1920) Sec. 168.

> in an executory devise depending on A's not making a deed or will, if he has the power of making one should he so wish."[7]

Kales divides these gifts over into six different classes. For our purposes here we will deal with his Case 1. "to A absolutely, but if he does not dispose of the property by deed or will, then to B"[8] The gift over has been declared void on various grounds. It was first stated that such a gift over was repugnant to the estate in fee given to the first taker and so was void.[9] Taken literally this was unworkable since it would make all shifting interest by deed or will invalid. This idea of repugnancy has been developed to mean that it is a necessary incident to the estate in fee that it descend to the owner's heirs upon his death intestate, so that the gift over upon the death of the first taker intestate is in reality a forfeiture upon alienation by descent.[10] In this view the invalidity of gifts over by way of intestacy is merely an extension of the rule that gifts over by way of forfeiture upon alienation in a particular manner by deed or will are void.[11] The difficulty with this is, that it is not every gift over by way of forfeiture on alienation that is void. Those only are condemned where public policy is violated. Thus, gifts over by way of forfeiture on alienation to particular persons have been sustained.[12] It has never been contended that any principle of public policy was violated by a gift over on intestacy Quite the contrary appears, for it always has been held that upon a gift to A for life, with full power of disposal by deed or will, a remainder in case he does not alienate, is valid.[13] In one New York case which held a gift over on intestacy valid, the court spoke of the rule making gift over void with contempt. Mr. Justice Peckham called it "a wholly artificial and technical rule founded, as I think, neither upon policy nor sound reasoning."[14]

The second reason proclaimed for the rule that a gift over on intestacy was void is that any executory devise defeating or abridging an estate in fee by altering the course of its devolution is bad. This suggestion applies directly to the case of a gift over on the first taker's dying without issue surviving him. If this were literally carried out, it would, like the reason of repugnancy, destroy the most common and unobjectionable sort of executory devise.

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[7] GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895) Sec. 57.

[8] KALES, *op. cit. supra* note 6, Sec. 717.

[9] Snyder v. Snyder, 202 Ky 321, 259 S.W 700 (1924).

[10] Shaw v. Ford, 7 Ch. Div 669 (1877)

[11] KALES, *op. cit. supra* note 6, Sec. 168.

[12] GRAY, *op. cit. supra* note 7, Secs. 31, 44. See also KALES, *op. cit. supra* note 6, Sec. 723.

[13] Thurmond v Thurmond, 190 Ky. 582, 228 S. W 29 (1921).

[14] Greyston v. Clark, 48 N. Y. Sup. Ct. Rep. 125 (1886).

Chancellor Kent declares the gift over void, on the ground that the executory devise was contingent upon a circumstance which it was in the power of the first taker to prevent happening.[15] This view was taken by the Kentucky Court in the case of *Clay* v. *Chenault*.[16] Kales says:

> " that an executory devise was indestructible, meant that the first taker could not by tortious conveyance destroy it as the life tenant could destroy a contingent remainder. Such a rule has no possible connection with the question whether an executory devise is void, the inference would be, not that the gift over was void but that the gift over was valid and the power given to the first taker to destroy it by conveying by deed or will would be void.[17]

According to Gray, a devise to A with a gift over unless devisee is married at his death, is not questioned " although it may rest entirely within A's control whether the event which is to prevent the gift over shall take place or not. What illegality is there in an executory devise depending on A's not making a deed or will, if he has the power of making one should he so wish?"[18] These notions have done much to cast doubt upon the validity of all shifting interests by deed or will. A reexamination on principle, then, of the real nature of the rule, will, it is believed, do much to aid in permanently removing this doubt. It does not follow the modern tendency of statutes to give one more freedom in the disposition of his property and smacks of the old handicaps of livery of seisin and attornment.

Let us now look at a very recent Kentucky case, *Berner* v. *Luckett, Commissioner of Revenue*.[19] The facts of the will were as follows:

> "After the payment of my said debts, I give and bequeath to my beloved wife, Carrie, all my estate of every kind and description, real, mixed and personal, with full power to sell, mortgage or otherwise convey or dispose of any part of same and pass a good and valid title thereto. At the death of my said wife, I desire all of the property undisposed of by her to go to my children, share and share alike. Should my wife remarry, then I desire that the amount of the estate then left in her hands be ascertained and my said wife to take one-third of the estate, the remaining two-thirds to be divided among my children, in the same manner as the estate that would descend to them on the death of my wife."

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[15] Jackson v. Robins, 16 Johns (N. Y.) 537.
[16] 108 Ky 77, 55 S.W 729 (1900).
[17] KALES, *op. cit. supra* note 6, Sec. 723.
[18] GRAY, *op. cit. supra* note 7, Sec. 57.
[19] 299 Ky 744, 186 S.W 2d 905 (1945).

The court states that we shall look to the four corners of the will to determine the intention of the testator. It is said further:

> "It is true, however, that this court since the case of *Clay* v. *Chenault*,[20] has adhered to a rule of construction to the effect that, where there has been an absolute gift of a fee with unlimited power of disposition a gift over of what remains of the corpus of the estate after the death of the first taker is void. On the other hand, we have continued to hold that, where there is a gift over of the entire estate, the first taker takes only a life interest in the property, notwithstanding the fact the will employed language giving him an absolute fee."

The court, after stating these two propositions, then failed to bring the facts of the case within either. It was held that the testator left to his wife a life estate with power to dispose in fee, when actually according to the will the only part which was to go over was only such part as was not disposed of by the first taker.

The intention of the testator was fully in accord with the facts of *Clay* v. *Chenault*, in which the remainder undisposed of was to go over upon the death of the first taker. In the case of *Snyder* v. *Snyder*,[21] it was held that if the limitation only purported to apply, or by necessary implication from the language employed, is restricted to such of the property devised as the absolute taker may leave or not dispose of, the limitation will not be upheld because of its being repugnant to the absolute gift. Surely the language used in the will, "with full power to sell, mortgage, or otherwise convey or dispose of any part of same and pass a good and valid title thereto," purports to give a fee. "At the death of my said wife, I desire all of the property undisposed of by her to go to my children share and share alike." This without a doubt is an attempt to give over the remainder undisposed of by the first taker.

The result reached in this case is no doubt a more desirable one than merely holding the gift over void. This result in the final analysis is not far from the result reached if the gift over were deemed good. In the latter case the first taker would have the property during his lifetime and could dispose of it in any manner which he saw fit and on his death it would go over.

This case comes within Kales' Case 1, and because of the reasons heretofore given should have been considered in a different light and a different result reached. The first taker should have taken a fee subject to defeasance by marriage of the first taker, and the remainder over in fee was subject to alienation by first taker during her lifetime.

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[20] 108 Ky. 77, 55 S.W 729 (1900).
[21] 202 Ky. 321, 259 S.W 700 (1924).