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CONTINGENT REMAINDER OR EXECUTORY DEVISE?

When a case has been accepted for more than one hundred and sixty years as authority for the modification of an old and introduction of a new principle of law, constantly cited, discussed, distinguished, denied and affirmed in part or in whole, by the courts and the profession, it may be presumptuous to question whether it really decided the main point it has been supposed to have decided and on which so much labor and learning have since been expended. But the question is not a mere academic one and without interest, because the case is still an authority for what it is supposed to have established, although there has not been lacking in many instances a strong inclination to repudiate it, at least in part. The courts and the profession in Pennsylvania have had occasion to deal with it, and while much of the learning as to the distinctions between contingent remainders and executory devises is not applicable in those cases where trustees are appointed to preserve contingent interests, cases however do arise calling for a direct application of such

knowledge. When this is the case it is of great importance to be able to distinguish the one from the other, as the legal effect is very different.

A few elementary observations as to the character of each may not be amiss in refreshing the memory and preparing the mind for what is to follow.

"Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious or uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect."[1]

Contingent remainders must be supported by a particular estate: if the remainder amounts to a freehold, the particular estate must not be less than a freehold: it must vest during the continuance of the particular estate or *eo instanti* that it determines.

"An executory devise is strictly such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal it is more properly an executory bequest) as the law admits in the case of a will though contrary to the rules of limitation in conveyances at common law."[2]

By executory devise a fee may be limited on a fee within the law as to perpetuities, or a future estate may be given without reference to a preceding particular estate.

A future estate will always be construed to be a remainder, when it can be, in preference to an executory devise.

"The great and essential difference between the nature of a contingent remainder and that of an executory devise (and that indeed which renders it material to distinguish the one from the other in their creation) consists in this: that the first may be barred and destroyed, or prevented from taking effect by several different means, as I have already shown, whereas it is a rule that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited."[3]

[1] 2 Bl. Com. 169.
[2] Fearne on Rem. 386.
[3] Fearne on Rem. 418.

All of this has practical application in Pennsylvania. The common law doctrine of forfeiture for the purpose of barring contingent remainders has been extended to Pennsylvania in *Lyle* v. *Richards,*[4] and that "executory devises are recognized in Pennsylvania as valid testamentary dispositions of an estate" is said in *Fisher* v. *Wister.*[5] In this case the last quotation from Fearne is quoted with approval, and many other cases might be cited wherein the principles above stated were actually applied.[6]

With so much premised, we take up the consideration of *Gulliver* v. *Wickett.*[7] Here was a devise to the testator's wife Katharine for her life, and after her death to such child as she was then supposed to be enseint with, and to the heirs of such child forever, provided that if such child as should happen to be born should die before the age of twenty-one years, leaving no issue of its body, the reversion of one-third of the said lands should go to his wife and her heirs, one-third to his sister Elizabeth and her heirs, and the other third to his sister Ann and her heirs.

Quoting from the report: "The testator died soon afterwards leaving his wife who was not with child, nor never had one, and three sisters, Elizabeth, Ann and Mary, his heirs at law. . . . The lessor of the plaintiff claims under the wife and the two sisters, Elizabeth and Ann, and the defendant claims under the other sister, Mary.

"The principal question for the consideration of the court is, whether the devise over to Katharine, Elizabeth and Ann be a good devise or not; for if it is good, then judgment must be for the plaintiff, if not good, then one-third descended to Mary, and it will be for the defendant."

The points of the case are suggested to the mind in the following order: What was the character of the devise to the child? Was the devise over good? If so, what was its nature?

In *Gulliver* v. *Wickett,* the will came into court for con-

[4] 9 S. & R. 322 (1823).

[5] 154 Pa. 79 (1893).

[6] *E. g. Taylor* v. *Taylor,* 63 Pa. 481 (1870); Ingersoll's Appeal, 86 Pa. 240 (1878); *Ralston* v. *Truesdell,* 178 Pa. 429 (1896).

[7] 1 Wils. 105 (1745).

struction for the fourth time.* In the first two cases the ulterior devise was held to be good: the subject matter was the leasehold part of the estate. In *Roe* v. *Wickett* the decision was upon the freehold and the devise over was not sustained. The court distinguished the case from *Andrews* v. *Fulham* on the ground that the plaintiff in this last case had assented to the devise over and so was concluded, but also on the difference between the leasehold and freehold, it being the rule that an heir at law is favored and is not to be disinherited but by express words or necessary implication.

However, this distinction in favor of the heir was brushed aside in *Gulliver* v. *Wickett,* where the ulterior devise of the freehold was held to be good. The decision is reported as follows:

"The intention of the testator upon the face of this will is very plain and clear, and therefore it ought to be fulfilled if by law it can; the devise to 'Katharine for life, with remainder to such child as my wife is enseint with' in fee, we are of opinion, is a good contingent remainder to a supposed child in *ventre sa mere;* and if there had been no devise to the wife for life, the devise to the child in *ventre sa mere,* being *in futuro,* would have been a good executory devise; but as in the present case the devise to the child in *ventre sa mere* is after a freehold to the wife, it is certainly a good contingent remainder.[8] The devise being to the child and its heirs, if the will had stopped there it would have been an absolute fee, but the proviso which follows has contracted it, and made it a fee simple conditional.

"But it is objected that the proviso is a condition precedent and that the birth of a child is a condition precedent, but we are of opinion that the devise to the child is a limitation of a remainder,[9] and by Holt, C. Justice, the word condition is to be considered as a limitation whereby it appears that it

*A side note on p. 513 of Butler's edition of Fearne on Remainders is as follows: "N. B. *Jones* v. *Westcomb, Andrews* v. *Fulham, Roe* v. *Wickett* and *Gulliver* v. *Wickett,* all appear to relate to the same will."

[8] Citing Salk. 229 (1698); Cro. Jac. 590 (1620); 2 Saunders 388 (1683); Bridgman, 3 (1620).

[9] Citing 1 Vern. 304 (1684); Pollex 72 (1682); 3 Keb. 122 (1684); 2 Lev. 21 (1683); 1 Vent. 229 (1676); Page and Hayward, Trin. 4 Annae (1706).

may be considered as a limitation either where the devise is in tail or in fee.

"Then it is further objected, that though it is now settled that a devise to a child in *ventre sa mere* may be good *ab initio,* and take effect when such child comes into life, yet where it appears afterwards that no such child ever was *in rerum natura,* the devise becomes void *ex post facto;* but in answer to this it must be observed that no case has been cited to support this, nor is there any reason for this difference, for we are of opinion that whether the limitation to the child ever took effect, or whether it did, and was determined, is the same thing, as appears by the cases cited.[10] As the remainder to the child never could take place, the next devise over must take effect,[11] for taking the proviso to be a limitation, and not a condition precedent, these cases amount to a full answer; and therefore we are all of opinion, that the true construction of this will is, that here is a good devise to the wife for life, with remainder to the child in contingency in fee with a devise over, which we hold a good executory devise, as it is to commence within twenty-one years after a life in being; and if the contingency of a child never happened, then the last remainder to take effect upon the death of the wife, and the number of contingencies are not material, if they are all to happen within a life in being, or a reasonable time afterwards. Judgment for the plaintiff."

It is perfectly clear that the principal question was as to the validity of the ulterior devise: it had evidently been argued in all the cases that the devise to the child (there being none) was void and that therefore the devise over fell with it. In *Jones* v. *Westcomb*[12] Lord Harcourt held that the devise over was good. The decision was the same in *Andrews* v. *Fulham.*[13] In *Roe* v. *Wickett*[14] it was *contra* on account of the favor shown to the heir at law.

The *character* of the devise over was a matter of second-

[10] 1 Leon. 197 (1589).
[11] Dyer, 300 (1571), 2 Vern. 723 (1716).
[12] 1 Eq. Abr. 245 (1711).
[13] Cited in 1 Vez. Sen. 421 (1749).
[14] Cited in 1 Vez. Sen. 421 (1749).

ary importance, it being sufficient that it was good in any shape. It was said in *Gulliver* v. *Wickett,* "the devise over was to be considered as a limitation subsequent; the first as a preceding limitation (not condition) which, whatever way it was laid out of the case, the other took effect." This was the main question in all four cases. It was a question of title in actions of ejectment, wherein it made no difference whether the wife *et al,* as lessors, were entitled, because the limitation over had taken effect as an executory devise or as a contingent remainder. In neither case could they have demised until their interest had vested. It vested so soon as it was determined there was no child, just as it would have vested had there been a child who died before attaining to twenty-one years. The question as to the validity of the devise over can therefore be answered in the affirmative. It was good: no matter what went before; whether the devise to the child was void, or vested and subsequently divested, or contingent, the devise over was good. We shall say more on this subject later on.

As to the character of the devise to the supposed child, it has been variously considered as a void devise, a vested remainder, and, as in the case under discussion, as a contingent remainder. Thus in *Jones* v. *Westcomb,* Lee, C. J., delivered the opinion of the court, "that the devise to the infant being ineffectual was out of the case."

In *Roe* v. *Wickett* the court was of opinion, "that the event of no child being born was a *casus omissus,* concerning which no direction was given by the will." This was followed by *Gulliver* v. *Wickett* in which Lee, C. J., again delivered the opinion of the court, "that there was a good devise to the wife for life, with contingent remainder to the child in fee." Notwithstanding this final determination on the will in question, the correctness of the decision on this point has been denied in subsequent cases. One or two examples will suffice for the present purpose: In *Herbert* v. *Selby,*[15] Bayley, J., said: "The description of the child there [*Gulliver* v. *Wickett*] was a clear *designatio personæ,* and as a child in *ventre sa mere* is for many purposes considered as *in esse,* the first remainder, a fee determinable, was vested

[15] 2 Barn. & Cress. 926 (1825).

in the child, and the remainder over could only operate by way of executory devise." In *Wells* v. *Ritter*,[16] Kennedy, J., in commenting on our case says: "It is clear, that as the testator was altogether mistaken about his wife being in a state of pregnancy, the remainder was absolutely void."

By referring to the opinion it is clear that every such view was carefully considered by the court. Subsequent commentators have added nothing to this aspect of the case. As between the vested and contingent aspects it is sufficient to say, that if it could not have been contingent because there was no child, for the same reason, *a fortiori*, it could not have been vested. The erroneous supposition of the testator could not alter the case.

The void aspect could only be urged *ex post facto*. At the time of the testator's death the fact was not known, and the remainder would seem to have been contingent until it was ascertained. But the character of the devise to the child is of minor importance in this discussion, which is concerned with the general acceptance of the limitation over as an executory devise notwithstanding the life estate to the wife and the decision that the devise to the child was a contingent remainder in fee.

Of course there would be no trouble had the devise to the child been decided to be void or vested, as in either case the limitation over would have taken effect as an executory devise: in the one case just so soon as it was ascertained there was no child and in the other by the death of the child before attaining to twenty-one years.

Those constructions were given to the devise to the child in *Herbert* v. *Selby* and *Wells* v. *Ritter, supra*, and so in both cases it was considered that the limitation over could only take effect as an executory devise. Suffice it to say here that the weight of subsequent authority seems to fully sustain the opinion that the devise to the child was a contingent remainder.

How then could the ulterior devise have been decided to be, as universally supposed, an executory devise? It is now submitted that such was not the decision, but that the devise over was a contingent remainder. Had the opinion been

[16] 3 Wh. 221 (1837).

so understood when the case came to be construed as a precedent and authority, it would not have become more prominent than any other leading case in line with the general sentiment of the profession. It owes its special distinction to its supposed anomaly. Admitting that the devise to the child was a contingent remainder, we would expect on principle that the subsequent limitation would also be a contingent remainder. An executory devise can be limited to take effect *in futuro* independently of any preceding estate, or upon the defeasance of a vested estate within the rule against perpetuities, but not after a contingent remainder in fee.

Whenever a contingent limitation is preceded by a freehold capable of supporting it, it is construed a contingent remainder and not an executory devise.

This rule is older than *Gulliver* v. *Wickett,* and the opinion in that case is evidently opposed to it if the case has been correctly interpreted.

It is this part of the decision that has given rise to so much discussion. Assuming that the limitation over was held to be an executory devise, the principle on which such an opinion rests has been expressed as follows: "And even where there is a limitation after a devise in fee simple, though such antecedent devise in fee be not vested, but contingent, yet if the ulterior devise is limited so as to take effect in defeasance of the estate first devised, on an event subsequent to its becoming vested, it has been held to operate as an executory devise."[17]

The case cited in support of this principle is *Gulliver* v. *Wickett* and it is fair to presume that the principle grew out of that case.

There may be circumstances to which such a rule would apply, but it was unnecessary in *Gulliver* v. *Wickett.* Here there was a particular estate of freehold in the wife to support the subsequent devises, and the first of these being a contingent remainder in fee it would seem that the devise over must also be a contingent remainder.

The case was cited in *Dunwoodie* v. *Reed,*[18] where Tilgh-

[17] Fearne on Rem. 396.

[18] 3 S. & R. 442 (1817).

man, C. J., and Gibson, J., in separate opinions seemed to consider it an exception to the general rule, and were apparently embarrassed in attempting to reconcile it with the principle above stated as to contingent remainders. They both distinguished it on the principle laid down by Fearne. Thus Gibson, J., said: "This case proves that, where there is a limitation, after a devise in fee not vested, which is to take effect in defeasance of the fee on an event subsequent to its having become vested, it can do so only as an executory devise."[19] Likewise Tilghman, C. J., as follows: "In *Gulliver* v. *Wickett,* when the testator made his will, he supposed his wife to be enseint, and if she had been, and the child had been born, and taken the estate intended for it, there would have been no way of giving effect to the subsequent estate to the wife, but by way of executory devise; and that was the reason of the decision."

Inasmuch therefore as the wife was not enseint, and therefore no child was born, which therefore could not die before attaining to twenty-one years, on the happening of all of which it was intended the limitation over should take effect, it must nevertheless take effect in the same way as though it all had happened. This does not appear to be the perfection of reason, and from it the rule might be deduced that where a devise over takes effect in the person, but not on an event intended by or within the contemplation of the testator, it shall take effect in that quality in which alone it could have operated had his intention been carried out. This seems to be extending to the limit the rule that full effect shall be given, where possible, to the testator's intention. Tilghman, C. J., said in *Dunwoodie* v. *Reed, supra,* of the intent of the testator in that case: "As to that, it is not to be supposed that the testator had any intent, because in all probability he knew nothing of the terms contingent remainder and executory devise, or the difference between them. The law, therefore, must decide." As a matter of fact, in *Gulliver* v. *Wickett* the intention would have been fulfilled by deciding the ulterior devise to be a contingent remainder instead of an executory devise. It would have taken effect in the same persons, and being one of those cases which

[19] Citing 2 Fearne Rem. 19.

could be determined by the event (as if there really had been a child the remainder would have been vested even while *en ventre sa mere*) there would have been no danger of the subsequent estates being destroyed by any of the ways in which that could be done. Just so soon as it was determined that there was no child the devise over vested and could not be destroyed.

Fearne in commenting on the decision says: "Upon the same case we are further to observe, that although one of the contingencies on which the ulterior devise was construed to depend, viz., there being no child to take as supposed, must have been decided, immediately on the determination of the particular estate without the antecedent limitation in fee ever becoming vested, and therefore such devise would, had it depended on that event only, have been considered as a contingent remainder, equally with the alternative one to the child; yet the other event, and that indeed on which the limitation over was expressly limited to take effect, viz., the death of the supposed child under the age of twenty-one years, could not possibly happen till after the fee simple had actually vested in such child on its birth; in which case it clearly could not operate as a remainder, and therefore must have been void in its creation, if not allowed to enure as an executory devise."[20]

While it is true that the testator believed his wife to be enseint, and intended the devise over to take effect only on the determination of the fee by the death of the child under twenty-one without issue, it is nevertheless difficult to see why his intention as applied to a fundamental error of fact should have been allowed to control the determination under actual conditions, totally different, and in violation of a well-established principle of law. Referring to the last quotation from Fearne, why should the actual contingency, "there being no child to take as supposed," be controlled by an event which could not then have happened, "the death of the supposed child under the age of twenty-one years"? Why was not the "ulterior devise," "there being no child to take as supposed," made to depend "on that event only,

[20] P. 397.

and considered as a contingent remainder, equally with the alternative one to the child"? Why should "the other event, and that indeed on which the limitation over was expressly limited to take effect" have entered into the determination since it never happened? It was contemplated only on the supposition there was a child, and could not have possibly happened unless there had been one. Undoubtedly if there had been a child, its death under the age of twenty-one years could not have happened "till after the fee simple had actually vested in such child on its birth; in which case the limitation over clearly could not operate as a remainder, and therefore must have been void in its creation, if not allowed to enure as an executory devise."

But all this is hypothetical. Having discussed the nature of the ulterior devise, on principle, let us now turn to the opinion itself to ascertain whether it really did decide what it has been supposed to have decided.

This question has not been free from doubt from the beginning The following note is appended to the report of the case: "N., the Chief Justice, sometimes called this devise over executory, and sometimes he called it a remainder [in delivering the opinion of the court] so that it seems to me uncertain whether they determined it an executory devise or a contingent remainder." It is worthy of comment here that while the report of the case to which we have had access makes Lee, C. J., say: "And therefore we are all of opinion," it is however stated in the argument in *Smith* v. *Horlock*[21] (another instance, by the way, in which our case caused trouble), "*Gulliver* v. *Wickett* does not apply (and it is stated in *Wilson* that three judges of this court held the contrary). It was unnecessary there to decide whether it was an executory devise or a contingent remainder; and the judges do not affect to decide it: if any estate were given, it sufficed." Commenting on the note of the reporter, *supra,* Fearne says: "But I can conceive this doubt would have been prevented by his adverting to the language of the court, when they said it was good as an executory devise; as it was to commence within twenty-one years after a life in being;

[21] 7 Taunt. 142 (1816).

and that the number of contingencies was not material, if they were to happen within a life in being, or a reasonable time after; neither of which circumstances hath any sort of relation to a contingent remainder, or can be understood as applicable to the idea of it."[22]

Much of the difficulty in this case seems to have been occasioned by considering it under two aspects: under the conditions existing at the testator's death, and in view of the facts as they turned out.

Under the first aspect, the supposition of the testator is assumed to have been correct, and of course with such premises the conclusion of an executory devise easily follows. But viewing the case in the light of the event, we have different premises and therefore, of course, a different conclusion.

Thus in *Herbert* v. *Selby, supra,* the court said the description of the child was a clear *designatio personæ* and the first remainder vested, whereas in *Wells* v. *Ritter, supra,* it was said that the devise to the child was clearly void. It appears that the court in *Gulliver* v. *Wickett* viewed the case under the first aspect, but without any assumption of fact; "We are all of opinion, that the true construction of this will is, that here is a good devise to the wife for life with remainder to the child in contingency in fee with a devise over, which we hold a good *executory devise,* as it is to commence within twenty-one years after a life in being; and if the contingency of a child never happened, then the *last remainder* to take effect upon the death of the wife, and the number of contingencies are not material if they are all to happen within a life in being or a reasonable time afterwards." It seems that the court had in view the two contingencies of there being a child and there not being one, otherwise why the words "and if the contingency of a child never happened"? Admittedly the case was badly reported: we know how imperfect many of the old reports are. The words were taken down hurriedly in open court as they came from the mouth of the judge, and there were not the same facilities as we have to-day for accurate work. A careful perusal

[22] P. 397.

reveals even its grammatical imperfections. Under our construction the opinion would read as follows (we bracket the completing words): "Here is a good devise to the wife for life, with remainder to the child in contingency in fee [pending the uncertainty] with a devise over which we hold a good *executory devise* [in the event of there being a child, as contemplated]; . . .and if the contingency of a child never happened, then the last *remainder* to take effect upon the death of the wife," etc. This completes the sense. If the court had not had in mind the alternative of there being and not being a child the latter part would be unnecessary. It evidently looked at the case as it appeared at the death of the testator (which is in accordance with the general rule) at which time it was uncertain whether or not there was a child. The words "executory devise" in the first clause and "last remainder" in the second are significant, and certainly confirm the reporter's note. The court had drawn the proper distinction in a former part of its opinion, and taking that in connection with what we have just said almost conclusively proves our contention. It had held that the remainder to the child is a good contingent remainder to a supposed child *in ventre sa mere;* and if there had been no devise to the wife for life the devise to the child *in ventre sa mere* being *in futuro* would have been a good executory devise, "But as in the present case the devise to the child is after a freehold to the wife it is certainly a good contingent remainder." And it might have added that the ulterior devise being supported by the same freehold was also a good contingent remainder. Nor from the standpoint of the court is this argument affected by the fact that there was no child because the court says, "In answer to this it must be observed that no case has been cited to support this, nor is there any reason for this difference, for we are of the opinion that whether the limitation to the child never took effect, or whether it did, and was determined, is the same thing as appears by the cases cited." The expressions "as it is to commence within twenty-one years after a life in being," "and the number of contingencies are not material"

undoubtedly, as said by Fearne, relate to the executory devise aspect which, however, was not the only one under consideration. Unquestionably the main question before the court was that of the validity of the devise over. It was much more a question of whether that was good than of what was its character.

All the cases on the same will show this. In *Jones* v. *Westcomb,* Fearne tells us: "One question was whether the devise to the wife was good, as the event happened; because the wife was not enseint and so the contingency upon which the devise was made to her, viz., the child's death under twenty-one years of age, never happened. Lord Harcourt held *that it was good.*" In *Andrews* v. *Fulham* it was said "That the *limitation over was good,* that the devise to the infant being ineffectual, was out of the case, and the law the same, whether the devise immediately preceding the limitation over was originally void, or became so by nonexistence or nonentity of the person; for that since the law allows such limitation over, it allows the waiting for it; that is was one of those executory limitations which depend on some contingency, on the failure of a preceding limitation; none of which take in all the ways of failing, but still it was the same thing." On the theory that the devise to the child was void, the executory devise view was adopted; hence the words "since the law allows such limitation over, it allows the waiting for it." In *Roe* v. *Wickett* the devise over of the freehold was considered bad. The rule was "that an heir at law is not to be disinherited but by express words or necessary implication; so that upon that ground the *devise over could not take effect.*"

In *Gulliver* v. *Wickett* it is very evident that this was the main point: "for we are of opinion that whether the limitation to the child never took effect, or whether it did and was determined, is the same thing, as appears by the cases cited. As the remainder to the child never could take place, the *next devise over must take effect.*"

In bringing this discussion to a close we quote an interesting comment by a learned writer. Speaking of the character of ulterior devises taking effect in defeasance of an estate first devised on an event subsequent to the vesting of

such prior estate, he says: "Upon the authority of the cases of *Davy* v. *Burnsall* and *Wooley* v. *Norwood* it must be admitted that, in the event which happened, the limitation over in *Gulliver* v. *Wickett* would now be considered a contingent remainder, and not an executory devise, and consequently that case is not an authority for the doctrine in question.

"None of these cases, however, in the events which happened, and according to the construction which was adopted, involved the position which we are now considering; the ulterior devises did not take effect in defeasance of the estates first devised, on an event subsequent to their becoming vested, for, no child having been born, the estates first devised never did vest; and the question whether in these cases, if a child had been born and died under twenty-one without having had any issue, the ulterior devises would have taken effect, is not decided by those authorities; and it is submitted that they would have been allowed to operate as executory devises."[23] This discredits the supposed opinion, and makes the distinction that we have already drawn: "the ulterior devises did not take effect in defeasance of the estates first devised, and on an event subsequent to their becoming vested, for, no child having been born, the estates first devised never did vest." As we have said, it would seem a strange reason that because the events upon which the limitation over was to take effect did not happen, therefore it did take effect as if they had happened.

We believe, in conclusion, that it is more than probable that the devise over was held to be a contingent remainder and not an executory devise, and for the following reasons:

The main question was not as to the character of the devise over, but whether it was good in any character;

The language of the opinion on close analysis, while not free from doubt, seems rather to establish than to disaffirm our conclusion;

The case having been imperfectly reported, as admitted by the reporter himself, must be interpreted as much in conformity with established principles as the language will al-

[23] Wilson on Springing Uses, P. 19.

low, and any doubt be resolved in its favor as regular and not exceptional; and finally,

There was a freehold particular estate sufficient to support the ulterior as well as the prior devise as a contingent remainder, wherefore, in accordance with the rule, it should have been so declared. The case was also within the rule that the remainder must vest during the continuance of the particular estate or *eo instanti* that it determines.

James M. Willcox.