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Wills--Devise of Specific Portion of Property Held in Contenancy

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subordinate to the *D's* interest arising from the after-acquired property clause. The failure of *D's* financing statement to include the after-acquired property clause was held immaterial as the financing statement gave notice only that there might be a security interest. Had *D* had actual notice of *P's* interest, the after-acquired property clause would have been void as to *P's* interest. W. VA. CODE ch. 46, art 9, § 301(1)(b) (Michie Supp. 1963).

The notice filing system is a simplification of protective recording statutes brought about by increased economic endeavor in the field of credit purchases. Where formerly the security instrument needed to be recorded in its entirety, now mere notice of its existence on a one-page financing statement will suffice. The requirements of the financing statement are typical of the simplicity contemplated by the Uniform Commercial Code.

Charles Marion Love III

Wills—Devise of Specific Portion of Property Held in Cotenancy

D's father attempted by codicil to devise to *D* a specific portion or parcel of a tract held as cotenants by *D's* father and mother. The residue of his estate was to go to his eight children, including *D*. The surviving cotenant failed for seventeen years to object to the purported devise, and at her death her one-half undivided interest in the tract passed to the seven surviving children. To *P's* action for sale and distribution *D* asserted the purported devise from her father as a defense. The trial court ruled that *D* took her father's one-half undivided interest in the portion purportedly devised by the codicil. *Held,* reversed. The owner of an undivided interest in real property does not have the power to devise a particular portion of the tract or his interest in that portion. *Mauzy v. Nelson,* 131 S.E.2d 389 (W. Va. 1963).

In the principal case the court declared that the testator's purported devise to *D* "is void and can be given no effect." The rationale was that the mother's interest would have been prejudiced had the codicil been effective. The testator, having attempted to devise more than he owned, succeeded in devising nothing.

In *Boggess v. Meredith,* 16 W. Va. 1 (1879) the court considered a conveyance by one cotenant of a portion of the common property by metes and bounds to a third party. In that case the court recognized that the grantee ". . . has rights, which will be considered by the court in making the partition of the whole tract." *Id.* at 29. These rights will be protected in so far as is possible without prejudice to the nonconveying cotenant. "In making such partition," the court said, "if the parcel . . . can be assigned to the purchaser as a part or the whole of the share of his grantor without prejudice to the cotenant of the grantor in the entire tract, the court will so assign it, thereby making the purchaser's title perfect." *Id.* at 29. The theme of the grantee having rights in the property conveyed, subject only to the rights of he grantor's cotenant, was repeated in *Oneal v. Stimson,* 70 W. Va. 452, 74 S.E. 413 (1912), and *Worthington v. Staunton,* 16 W. Va. 208 (1880).

The recognition that such a conveyance is not void is not limited to West Virginia. This recognition is well illustrated by Annot., 77 A.L.R.2d 1376, 1379 (1961): "The doctrine which now obtains in most jurisdictions is that . . . [the grantee is] . . . equitably entitled to have the parcel . . . allotted to him . . . where that course can be adopted without injury or prejudice to the interests of the nonconveying owners." The general principle is that the conveyance will not be given effect if the other cotenant's right to partition is prejudiced. 2 AMERICAN LAW OF PROPERTY § 6.10 (Casner ed. 1952).

In *Lane v. Malcolm,* 141 Ga. 424, 427, 81 S.E. 125, 127 (1914), the court said the deed ". . . is not void and inoperative and is not voidable except at the instance of a cotenant." The court in *Highland Park Mfg. Co. v. Steele,* 235 Fed. 465, 470 (4th Cir. 1916), took the position that: "The courts permit the deed to so operate as to effectuate the intention of the parties to it without prejudicing the right of the other tenants in common."

Though few cases have been uncovered giving the same rights to a devisee as to a grantee it would seem a fair assumption that the equitable principles would be as applicable to one as the other. Since the cases considered have placed no stress on the ". . . special equities of the innocent purchaser for value, . . . the basic operation of the equitable partition doctrine would apply to devises as well as to cases involving deeds." 35 N.C.L. REV. 431 (1957). 2

AMERICAN LAW OF PROPERTY, *op. cit. supra,* § 6.10 takes a similar position by implication in that the last three cases cited in the section recognizing the validity of such conveyances are concerned with devises. Such a position was taken by *Broughton v. Millis,* 67 S.W.2d 650, 655 (Tex. Civ. App. 1934), where the court considered a devise by a cotenant of a specific portion of the common estate and said that it would operate ". . . as a conveyance by deed would operate . . ." where no injustice is done to the other cotenant.

Though the decision in the principal case restricts itself to devises, the language used by the court in its rationale is peculiar to deeds. The court stated that the codicil is void for having violated a positive rule of law. The rule cited deals with "conveyances" and characterizes the transferor as "grantor" and the transferee as "grantee."

With the touchstone of "prejudice to the nonconveying cotenant" as a guide, the instant case is seen from a different aspect. Any prejudice sustained by *Ps* in the devise from the testator was not as the testator's cotenants, with rights of partition to be protected, but was as devisees of the residue of an estate substantially reduced by the exclusion of the portion claimed by *D. Ps,* acquiring their interest in the testator's undivided interest at his death, could not fulfill one of the requisites of cotenancy, *i.e.* unity of possession. 2 AMERICAN LAW OF PROPERTY, *op. cit. supra,* § 6.5.

Ps, having been shown to have no rights as cotenants under the testator's will, rose again, clothed in interests acquired from their mother, to play new roles in the same production. The court in the principal case pointed out that the mother had not lost the right to challenge the testator's disposition of the common property. The court further recognized that this right passed to *Ps* at their mother's death.

Ps alleged that their rights as heirs of the mother had been prejudiced by the testator's devise to *D.* Such a position would have been precarious had they sought partition in kind, but, seeking sale and distribution, their position became patently untenable. It is the cotenant's right to partition which the court seeks to protect. 2 AMERICAN LAW OF PROPERTY, *op. cit. supra,* § 6.10. Here *Ps* claimed a partition in kind would result in inequities and asked instead that the property be sold and the proceeds divided. It is difficult to imagine how the *Ps* would have been prejudiced, as

heirs of their mother, if the testator's intent had been carried out. The tract, less *D's* share, could have been sold to satisfy the interests of the other cotenants. If, however, the portion claimed by *D* exceeds the testator's one-half undivided interest in the whole property, the entire tract would have to be sold to protect the interests of all parties.

Richard Marion Alker

ABSTRACTS

Corporations—Restraint on Stock Transfers

P and *D* entered into a stock option agreement whereby it was agreed that in the event of the death of *D*, or in the event of his offering his stock for sale during his life, he would sell and *P* would buy all of *D's* stock in *X* corporation at one dollar per share. If the option were not exercised then *D* had the right to sell without restriction. They owned all the stock in *X* corporation. Upon *D's* death *P* tendered one dollar per share to the executors of *D's* estate, but the executor refused to sell. The actual value per share was $1,060. The Orphan's Court of Chester County, Pennsylvania ordered specific performance. *Held,* affirmed. The restriction of sale was not absolute or unreasonable. It was made between mature members of a close family without over-reaching, fraud or deceit. The discrepancy between the sale price and the actual value did not invalidate the agreement. *In re Mather's Estate,* 410 Pa. 373, 189 A.2d 586 (1963).

In the principal case the dissent argued that the agreement created an absolute restraint against tranfers because the first refusal price was nominal in relation to the value of the shares at the time the arrangement was made. The AMERICAN LAW OF PROPERTY supports the dissent, stating that the effect of a preemption as a restraint on alienation hinges upon the matter of price. If the property is required to be offered at a sacrifice price this is a restraint on alienation because the owner will keep it rather than sell. 6 AMERICAN LAW OF PROPERTY § 26.65 (Casner ed. 1952).

The problem of restraining alienation of stock, whether by price or other means, is one of conflict of basic ideas. On the one hand