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If, however, a search reveals that his title is not traceable back to a patent, he must assert his claim in equity on a theory of unjust enrichment. In either event, he is entitled to a lien which he may enforce against the land.

ROBERT F STEPHENS

THE VALIDITY OF THE GIFT OVER IN KENTUCKY
DETERMINED THROUGH CONSTRUCTION OF ESTATE
IN FIRST TAKER

When one devises or bequeaths property absolutely, but purports to provide in the same instrument for a gift over of so much of the property as remains undisposed of by the first taker at death, the gift over is invalid and of no effect. The theory underlying this well established, long standing rule of property law is that a fee simple has been given to the first taker, leaving nothing which can be the subject of a gift over or remainder.¹ This view of the invalidity of the gift over is consistent with fundamental concepts of property law, but it is not always clear that the real intent of the testator is given effect through this construction. An instrument containing his kind of gift over provision often presents the courts with a difficult construction problem because the specific terms of the will may vary considerably from case to case, depending on the definiteness with which the estate of the first taker is described.

In comparatively recent years, a series of interesting cases has reopened the question of the validity of this type of gift over provision in Kentucky and other states.² Although the rule of property law would seem to be unchanged, it is being applied with a new rule of construction which places much more value on the intent of the testator as drawn from the whole of the instrument. To this extent at least, it seems particularly evident that the Kentucky Court has broken away from the consequences of the old rule and will construe the gift over valid when it finds that such is the intent of the maker as drawn from the entire instrument.

It is the purpose of this note to discuss the effect of these cases against the background of earlier Kentucky decisions and to point

¹ 2 SIMES, LAW ON FUTURE INTERESTS, at 510 *et. seq.* (1936).

Stewart v. Morris, 313 Ky. 424 (S.W. 2d 1950), 231 S.W. 2d, 70; Jacobs v. Barnard, 307 Ky. 321, 210 S.W. 2d 972 (1948); Hanks v. McDannell, 307 Ky. 243, 210 S.W. 2d 784 (1948).

out some of the construction problems inherent in the use of certain traditional phraseology so that the Kentucky draftsman and testator may guard against invalid dispositions.

It is clear that in order for the gift over to be valid, the estate of the first taker must be reduced to something less than a fee simple in order that there may be a remaining interest to vest in the recipient of the gift over. In fact, the whole problem may be said to lie in determining the estate of the first taker, which in effect means that seemingly inconsistent clauses in the will must be reconciled. As a matter of construction, the critical question is whether to determine the testator's intent from a single clause or from the whole instrument. Kentucky decisions³ before the 1938 case of *Hanks v McDannell*⁴ consistently held that phrases employed to give the first taker power over the property which would tend to vest in him more than the ordinary powers consistent with a life estate, created in the first taker a fee simple, leaving the gift over invalid. The typical wills provision was in effect as follows: A devises to B his whole estate specifying that he should have, hold, and enjoy the estate and do with it whatever he might wish, but later in the will A states that any part of the estate remaining at the time of B's death goes to C.⁵ It appearing evident from the will that the first taker had power to sell or convey part of all of the estate, the court held that the subsequent clauses devising a residue of the property failed to take effect.⁶ Even in early decisions, the court stated that if a life estate only were devised, with unlimited powers of disposition, the gift over clause would be valid.⁷ A 1940 case held that a will giving the wife, as first taker, power to mortgage the property as necessary for the support of herself and her children, plus a codicil giving her power to sell the property as necessary, did not give her such unlimited powers over the property as to create a fee simple, but rather gave her only a life estate and the gift over clause was good because only a life estate was devised to the first taker.⁸

In 1948, the court decided the case of *Hanks v McDannell*,⁹ where the will to be interpreted was that of J. H. McDannell, and read in part:

³ *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).

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

⁵ *Jackson v. Ku Klux Klan*, 231 Ky. 370, 21 S.W. 2d 477 (1929).

⁶ *Pirtle v. Kirkpatrick*, 297 Ky. 785, 181 S.W. 2d 425 (1944).

⁷ *Plaggen Borg v. Molendyck's Adm'r.*, 187 Ky. 509, 219 S.W. 438 (1920).

⁸ *Harlow v. Riley's Ex'r.*, 282 Ky. 437, 138 S.W. 2d 946 (1940).

⁹ *Supra* note 4 at 245, 210 S.W. 2d at 785.

"After payment of my just debts and funeral expenses, I give and bequeath to my beloved wife, Sallie A. McDannell, all the residue of my property, real and personal, to be used, enjoyed and disposed of by her in any way she may choose with this provision however—that, should any of said property belonging to my estate remain at the death of my said wife, the same shall be devised equally among Mollie Bledsoe, Louisa Hanks, John W. McDannell and Flora Wooley."

Sallie A. McDaniel attempted to devise the remaining part of the estate to persons other than those who had been devisees under the gift over clause of her husband's will. The action was brought by the latter group against the devisees of Sallie A. McDannell. The court held that the gift over clause was valid and that the remaining portion of the property would vest in the devisees under his will. The court stated that it deemed the foremost consideration should be the intent of the maker as drawn from the whole instrument and it would seem that the very insertion of the gift over clause purports that the intention of the testator was that the clause should have effect. Although the court did not expressly define the estate which was devised to the first taker, it was spoken of in terms of a life estate in the first taker and a valid gift over with power of disposition. Further the court did not really attempt to reconcile its construction of the creation of a life estate in the first taker and a valid gift over with those which had formerly been construed as devising a fee simple without possible remainder. It is clear, therefore, that they made no fundamental change in the rule of the gift over, but rather a change in the rule of construction to be applied. Realistic analysis requires, however, the observation that a change in the application of any rule of law in effect amounts to a fundamental change in the rule, even though this "change" is effected through a new rule of construction.

It is reasonable to assume that certain limitations must be placed upon the estate of the first taker under the will as construed by the court so that the distinction between the life estate created under the new rule of construction as represented in the *Hanks* case and the fee simple given under the former decisions may be more than an arbitrary one. Admittedly the court in the *Hanks* case was not faced with the problem of conveyance of the property by the wife during her lifetime. Had the problem been presented, the logical conclusion to be drawn from the opinion is that the conveyance would have been upheld since it was stated in that opinion that the life estate carried with it power of disposition. The one limitation which this decision did unequivocally enforce through the terms of the will is that the first taker must not be given power to dispose of the property by will,

and that any devise made by the first taker is invalid and gives way to the gift over clause of the original will.

Again in 1948, the problem was presented to the court¹⁰ in a situation very similar to that of the *Hanks* case. The testator had devised his estate to his wife "to have and to hold and to use as she thinks best" and in a subsequent clause devised any part remaining at her death to his brothers and sisters and their heirs, share and share alike. After the wife's death, the devisees under the gift over clause sold the property at auction. The purchaser filed exception to the report of sale raising the question as to whether or not the wife had taken a fee simple under her husband's will. Again the court held the gift over good. This decision affirmed a decision by a lower court which had stated that the wife *perhaps* had power to encroach upon the corpus of the estate if it were necessary for her support and maintenance. This brings into question the powers of disposition which the *Hanks* case seemingly recognized in the first taker. But in the opinion of the latter case, the court stated that it was applying the rules of the *Hanks* case which should be referred to for the reasoning employed to reach the conclusion. From this statement, the writer concludes that this case did not qualify the decision of the *Hanks* case by the affirmation of the lower court decision, and had the problem of conveyance by the wife during her lifetime been faced, the court would have held the conveyance good regardless of circumstances as so limited by the lower court's decision.

The issue of whether a conveyance by the first taker is valid was squarely faced in the 1949 case of *Wiglesworth v Smith*.¹¹ Harve Baird's will provided:

"2. All the rest and residue of my estate of whatever the same may consist whether real or personal or mixed property, I will, devise and bequeath to my wife Mary Catherine Baird, her life time with the right to use any or all of the same if in her opinion it may be *necessary for her support and maintenance*. (Italics are writer's)

"3. If at the death of my wife she has not used and expended all of my estate, I will and devise and bequeath any remainder to H. C. (Doc) Wiglesworth and his wife, Lola Wiglesworth, in fee. It is to be understood that this item is to be no restraint on my wife's use of my property but just in the event any remains at her death I make this provision because of the kindness and care they have shown toward my wife and myself."¹²

The court held that the wife could use the estate and convey it as provided in the will, but that she could not give it away or devise it.

¹⁰ *Jacobs v. Barnard*, 307 Ky. 321, 210 S.W. 2d 972 (1948).

¹¹ *Wiglesworth v. Smith*, 311 Ky. 366, 224 S.W. 2d 177 (1949).

¹² *Id.* at 367, S.W. 2d at 177.

She could sell the property as she deemed necessary even without first going through court procedure to have the sale adjudged necessary for her support. This will did limit the wife's estate somewhat by the necessity clause. But the court placed the weight of interpretation on the wife's opinion of necessity for the sale and therefore gave her power to use her estate through her own discretion, providing that she did not give it away or devise it.

It is not to be concluded from these recent decisions that the law of Kentucky pertaining to the gift over proposition is settled. But from these decisions, the Kentucky draftsman and testator may be guided in drafting a will which will devise to the first taker an estate with somewhat unlimited powers, and yet vest a gift over. From the *Hanks* and *Jackson* cases the conclusion may be drawn that the gift over clause will be construed as valid so long as the first taker is not given power to devise, that an attempt by the first taker to do so will be invalid, and that the first taker will be given power of disposition.

To this conclusion, the *Wiglesworth* case adds the proposition that the amount of power of disposition given to the first taker will be drawn from the phraseology of the will, giving the testator power to limit or expand the estate as he may wish so long as he does not attempt to give to the first taker the power to devise the estate or any part thereof or to otherwise empower him to dispose of the property at death.

It is submitted that a valid gift over may be sustained through the following provision: I, A, will, devise, and bequeath to B, the whole (or a specified part) of my estate, both real and personal, to be used in any way which he deems desirable or necessary, to be sold or conveyed during his lifetime in any way and at any time he may desire. I further provide that if any of my estate remains at the time of B's death, after use by B consistent with the foregoing provision, that part shall go to C in fee simple.

NORMA D. BOSTER



FRANK MURRAY