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Wills--Construction--Gift to One During Widowhood

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conclusion only can be fairly drawn from the evidence, and in such cases the question becomes one of law for the courts.[6] In the Waggener case the court applied the latter rule.

RICHARD BUSH, JR.

WILLS—CONSTRUCTION—GIFT TO ONE DURING WIDOWHOOD.

Testator devised his entire estate to his wife, "to be hers and subject to her use and for her benefit, so long as she shall remain a widow, after my death, and until she shall remarry." Other paragraphs disposed of the estate in the event of such remarriage. An action was brought by the executrix-widow for construction of the will to determine her power to execute a coal lease binding upon the estate, collect rents and royalties, and hold same under the will. *Held*, that the widow took a fee simple title subject to defeasance upon the event of her remarriage. Thomas, J., dissenting. *Davis* v. *Bennet's Exrx. et al.*, 272 Ky. 674, 114 S. W. (2d) 1150 (1938).

As is ably pointed out in the dissenting opinion, there are two well-defined classes of cases of this general nature, the first arising where there is a devise of a fee simple title without qualifying or modifying words, but to which is added a defeasance clause taking effect in case of remarriage, or other words indicating an intention to create a fee;[1] the second where the devise is coupled with words providing for a limitation over in the event of a subsequent remarriage.[2] It seems essential that any given case be regarded with this classification in mind. This the Kentucky Court has done in previous cases,[3] but seems to have

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Deshazer v. Cheatham, 233 Ky. 59, 24 S. W. (2d) 936 (1930); Schrader v. New York C. R. R. Co., 254 N. Y. 148, 172 N. E. 272 (1930); Lanstein v. Acme White Lead & Color Works, 285 Mass. 328, 189 N. E. 44 (1934).

[6] Hines v. May, 191 Ky. 493, 230 S. W. 924 (1921); McMurtry's Admrx. v. Kentucky Utilities Co., 194 Ky. 294, 239 S. W. 62 (1932); Taecker v. Pickins, 58 S. D. 177, 235 N. W. 504 (1931); Tapp v. Tennessee Electric Power Co., 9 Tenn. App. 632 (1929).

[1] Cummings v. Lohr, 246 Ill. 577, 92 N. E. 970 (1910); Gaven v. Allen, 100 Mo. 293, 13 S. W. 501 (1889); Weiss v. Mt. Vernon, 157 App. Div. 383, 142 N. Y. Supp. 250 (1913); Redding v. Rice, 171 Pa. St. 301, 33 Atl. 330 (1895); Squier v. Harvey, 16 R. I. 226, 14 Atl. 862 (1888); *In re* Weymouth's Will, 165 Wis. 455, 161 N. W. 373 (1917).

[2] Belt v. Gay, 142 Ga. 366, 82 S. E. 1071 (1914); Brunk v. Brunk, 157 Ia. 51, 137 N. W. 1065 (1912); Cowman v. Glos, 255 Ill. 377, 99 N. E. 586 (1912); Hibbits v. Jack, 97 Ind. 570, 49 Am. Rep. 478 (1884); Nash v. Simpson, 78 Me. 142, 3 Atl. 53 (1886); Hale v. Neilson, 112 Miss. 291, 72 So. 1011 (1916).

[3] (a) In the following cases an intention to create a fee is reasonably clear, there being a defeasance clause operating in the event of subsequent remarriage: Lehfart v. Scharre, 143 Ky. 849, 137 S. W. 775 (1911); Huerkamp v. Huerkamp, 145 Ky. 194, 140 S. W. 182 (1911); Prindible v. Prindible, 186 Ky. 280, 216 S. W. 583 (1919); Hutter v. Crawford, 225 Ky. 215, 7 S. W. (2d) 1043 (1928).

(b) In the following cases the words of the devise are so restrictive as to create a life estate, subject to termination in the event of a subsequent remarriage: Napier, et ux. v. Davis, 7 J. J. Marsh. 283 (Ky.,

failed to do so in the instant case. Where the very clause creating the estate contains words providing for termination of the estate in the event of remarriage, an intent to devise an estate less than a fee simple seems evident, and the principal case appears to be of this type. This question has been much litigated,[4] and the weight of authority is that a devise to a person so long as he or she remains unmarried, with a limitation over in case of marriage, gives, in the absence of language clearly indicating a contrary intent, a determinable life estate.[5]

STEVE WHITE.

CONSTITUTIONAL LAW—ELECTIONS—VOTING MACHINES.

The Kentucky legislature passed an act[1] authorizing counties, municipalities, and other voting districts to purchase, rent, or lease voting machines for use in elections. In a suit to test the constitutionality of the act, *held* unconstitutional as repugnant to sec. 147 of the Kentucky constitution which provides ". . . all elections by the people shall be by secret official ballot . . . marked by each voter in private at the polls and then and there deposited." *Jefferson County* v. *Jefferson County Fiscal Court*, 273 Ky. 674, 117 S. W. (2) 918 (1938).

The court, after conceding that voting machines may be used when the constitutional provision requires that all elections shall be "by ballot",[2] reasons that this is prevented by the provision that the Kentucky ballot be marked and deposited by the voter. The court thinks that is not the effect of the use of the voting machine. It also bases

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1832); Best v. Best, 88 Ky. 569, 11 S. W. 600 (1889); McKensey v. McKensey, 16 K. L. R. 474, 28 S. W. 782 (1894); Morgan v. Christian, 142 Ky. 14, 133 S. W. 982 (1911); Mason v. Tuell, 161 Ky. 392, 170 S. W. 950 (1914).

The cases of Hinkle v. Hinkle, 168 Ky. 286, 181 S. W. 1116 (1916), and Riner v. Fallis, 176 Ky. 575, 195 S. W. 1102 (1917), seem to be in conflict both with earlier Kentucky decisions, and with the weight of authority.

[4] Staak, et al. v. Detterding, et al., 182 Ia. 582, 161 N. W. 44 (1917), L. R. A. 1918C, 856; Fidelity Trust Co. v. Bobloski, 228 Pa. 52, 76 Atl. 720 (1910), 28 L. R. A. (N. S.), 1093.

[5] Maddox v. Yoe, 121 Md. 288, 88 Atl. 225 (1913), Ann. Cas. 1915B, 1235; 1 Tiffany on Real Property, p. 79; see cases cited *supra*, note 3 (b).

[1] Kentucky Stat. (Supp., May, 1938), Sec. 1596d-1, et seq.

[2] "All elections shall be by ballot" held to authorize the use of voting machines: Lynch v. Malley, 215 Ill. 574, 74 N. E. 732 (1905); Speckerman v. Goddard, 182 Ind. 523, 107 N. E. 2 (1905); U. S. Standard Voting Machine Co. v. Hobson, 132 Ia. 38, 109 N. W. 458 (1906); Norris v. Mayor and City Council of Baltimore, 172 Md. 667, 192 Atl. 531 (1937); Detroit v. Inspectors of Elections, 139 Mich. 548, 102 N. W. 1029 (1905); Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113 (1906); State ex rel. Fenner v. Keating, 53 Mont. 371, 163 Pac. 1156 (1917); State ex rel. Automatic Registering Machine Co. v. Green, 121 Ohio St. 301, 168 N. E. 131 (1929); *Cf.*, People v. Wintermute, 194 N. Y. 99, 86 N. E. 818 (1909); *Re* Voting Machine, 19 R. I. 729, 36 Atl. 716 (1897); State ex rel. Empire Voting Machine Co. v. Carrol, 78 Wash. 83, 138 Pac. 306 (1914).