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## Gift of a Life Estate with Absolute Power of Disposal by Deed

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a preference in the case of insolvent state banks has no justification whatever and that it occupies a peculiar position of being disowned even by its beneficiaries, the bonding companies. It is further one of those rare classes of case where the West Virginia Supreme Court may reverse its former holding without interfering either with its system of logical principles or with any vested social or economic interest which had been built up under the former rule.

—T. W. ARNOLD,

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**GIFT OF A LIFE ESTATE WITH ABSOLUTE POWER OF DISPOSAL BY DEED.**—A testator ought to be permitted to dispose of his property by will in accordance with his desires, and if his intent appears from his language, such intent should be effectuated by the law unless there are good reasons of policy to the contrary. But there have been rules of property law which have operated to defeat intent. The classic example is the Rule in Shelley's Case, which in this state is partially abolished by statute,<sup>1</sup> and should the proposed revision of the Code be enacted by the Legislature will be completely destroyed. Such a rule of construction of words, which is entirely contrary to the ordinary meaning of such words as understood by the layman, is a dangerous trap for one who makes a will or conveys property by deed. The courts of Virginia, in a case officially published in 1871, followed some thirty years later by those of West Virginia, have established another dangerous trap for one who makes a will or deed which is on a par with the notorious Rule in Shelley's Case. This is the now firmly established rule of property law that where there is a gift for life, followed by a general power to dispose of the fee by deed, the estate created is not a life estate with power of disposal, but is an absolute fee simple estate.<sup>2</sup> Like the Rule in Shelley's Case this is a fixed rule of construction of language, and the courts hold it means what the one who used it clearly did not mean. A recent case<sup>3</sup> furnishes an example of the operation of this rule. A testator by the fourth clause of his will devised all the residue of his property to his wife "for and during the term of her natural life . . . to be used and enjoyed by her for her

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<sup>1</sup> CODE OF W. VA., ch. 71, § 11.

<sup>2</sup> *Ogden v. Maxwell*, 104 W. Va. 553; 140 S. E. 554 (1927); *National Surety Co. v. Jarrett*, 95 W. Va. 420, 121 S. E. 291 (1924); *Blake v. Blake*, 92 W. Va. 663, 115 S. E. 794 (1923); *Morgan v. Morgan*, 60 W. Va. 327, 55 S. E. 389 (1906).

<sup>3</sup> *Ogden v. Maxwell*, *supra*.

sole use, benefit and support, with full power and authority to sell, deed, grant and convey any and all real estate that may be necessary, or found expedient so to do for the maintenance, comfort and support of my wife." A following clause made a gift over all property undisposed of at the death of the wife. The entire estate was appraised at less than \$8000. The intent of the testator seems plain. He desired his wife to have comfortable support during her life, and as the income might well prove inadequate, he gave her power to dispose of the real estate so that she could use the proceeds for her support if she so desired, but such property including any remnant of the proceeds as she did not so use he gave as directed in later clauses of the will. He certainly did not intend to give her an absolute fee simple. If he had so intended he would have done so and would not have added any more to his will. But the testator's intent was defeated by holding that the wife had an absolute fee simple. Having so decided the court then assumed that the gift over in the later part of the will was void.<sup>4</sup> It is a settled rule of law, not a mere matter of construction, that by a general power of disposition following a gift of a life estate the testator expresses his intention to give a fee simple. There seems no particular reason for this unless the courts believe this is what the power of disposition clearly means. They say that this is the dominant intent of the testator, while the intent to give a life estate is a secondary intent which must give way to the inconsistent dominant intent. Of course the testator himself was not aware of his dominant intent. The court provided him with that. Had he been aware of it he would have used other language. He believed he gave a life estate with a power of disposition. The courts do not seem to deny but that a life estate with a power is possible.<sup>5</sup> There is no policy urged against it.<sup>6</sup> In fact such a thing has been known and upheld for centuries in other jurisdic-

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<sup>4</sup> If the devise is of a fee to A and if he fails to convey during his lifetime, then on his death without issue surviving over to B and his heirs, Mr. Kales plausibly contended the gift over ought to be sustained. See *KALES FUTURE INTERESTS*, §§ 717, 719, citing *Doe v. Glover*, 1 Com. Bench 448 (1845) as being to this effect. In *Ogden v. Maxwell supra* the gift over was not on failure of issue.

<sup>5</sup> This was held in *Milhollen v. Rice*, 13 W. Va. 520 and its propriety was recognized in *Englerth and Rowland v. Kellar*, 50 W. Va. 259, 40 S. E. 465 (1901); "If the primary or dominant intent be to create a life estate, then such intent will prevail over words indicating an absolute and unlimited power of disposition..." *Morgan v. Morgan, supra*, at page 333.

<sup>6</sup> This was expressly recognized in *Morgan v. Morgan, supra*, which is the case which established the rule in this state. See excerpt from this case in the note above.

tions and if it is now impossible to create in this state it is only so because the courts arbitrarily say the general power of disposal in itself constitutes a fee simple gift. The testator is thus held to have made the very foolish mistake of giving a life estate and a fee simple in the same land to the same person.

Is there any reason of policy why a creation of a life estate with a general power of disposition attached should not be permitted? Is there a reason sufficiently strong to justify defeating the testator's intent as expressed in his will? The courts have never argued that such was the case. On the contrary they seem to admit that such a life estate followed by such a power is possible and will be upheld when the dominant intent appears to be to give a life estate. The only argument is that the general power following a life estate expresses the testator's intent to give a fee simple, and if this is his dominant intent then it follows the attempt to give a life estate is a mistake and must be disregarded. The cases which seem finally to have established this rule of law are *May v. Joynes*<sup>7</sup> in Virginia decided in 1871 and *Morgan v. Morgan*<sup>8</sup> in West Virginia decided in 1906. The older cases of *Burwell v. Anderson*<sup>9</sup> and *Milhollen v. Rice*<sup>10</sup> are not authority for the rule as it has been established. The latter case carefully explains that where there is an express gift of a life estate, it will not be enlarged into a fee simple by a general power of disposition following. Judge Green carefully explains that formerly a gift to A followed by a general power of disposition, was construed to give A a fee simple, because since no words of limitation were used, the gift to A was a life estate, and courts would construe such a gift as a fee if there was other language in the will to indicate a fee was intended. The general power of disposition was taken as justifying the construction giving A a fee. But this of course did not apply where the gift was expressly to A for life. The gift to A generally is now by statute a gift in fee simple so the former construction has fallen into disuse.

Perhaps a word might be said as to the policy of the law against restraint on alienation. If there is a gift of a fee with power to dispose of the property by deed only, followed by an attempted gift over at the death of the donee, the latter gift may be void because the gift of the fee with power to convey by deed amounts to a restriction on the donee's power to devise, and therefore may be void as a restraint on alienation. But in the matter under

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<sup>7</sup> 20 Gratt. 692, (Decided in 1857 but published in 1871).

<sup>8</sup> 60 W. Va. 327, 55 S. E. 389 (1906).

<sup>9</sup> 3 Leigh 348 (1833).

<sup>10</sup> 13 W. Va. 510 (1878).

consideration the courts have contrary to the apparent intent of the testator, made the gift a gift of a fee, and having done so of course then it may be argued the gift over is contrary to the policy against restraints on alienation. But where there is a gift of a life estate followed by a power in the life tenant to convey in fee simple there is a life estate with an added power of alienation, and to this there can be no objection.

In conclusion it may be well to point out the present state of the law in other jurisdictions. Besides Virginia and West Virginia it seems that Tennessee and Michigan have this rule which defeats the intent of the testator.<sup>11</sup> Contra to these are England, Canada and no less than twenty-two of our states.<sup>12</sup> The number probably would be greater were it not for statutes in some of the rest of the states. Men do make such provisions in wills and they will continue to do so regardless of the rules of law of which they are and will remain ignorant. If this rule is retained it will continue to defeat the intent of testators frequently in the years to come. It is submitted the rule of law has nothing to commend it and that it furnishes a trap for the man who makes a will.

—JAMES W. SIMONTON.

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<sup>11</sup> The cases are collected in an exhaustive note in 36 A. L. R. 1218.

<sup>12</sup> See collection of cases in 36 A. L. R. 1180.