December 1957

Wills--Construction of Ambiguous Residuary Clause--Fee Simple or Life Estate

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dation on what seemingly is an extension of the conditions whereby res ipsa loquitur is applicable in bottled beverage cases.

J. E. D., Jr.

WILLS—CONSTRUCTION OF AMBIGUOUS RESIDUARY CLAUSE—Fee Simple or Life Estate.—Testator, in the residuary clause of his will ambiguously devised the remainder of his property to his wife absolutely in fee simple, and after her death the residue was to be equally divided among his three daughters. The state tax commissioner contends the clause gave the testator's wife an estate in fee simple and thus made the property subject to the state inheritance tax as a part of the wife's estate. Held, affirming the circuit court, that the language construed in conjunction with the entire will and in light of the circumstances surrounding the testator when he made the will gave the wife a life estate with a remainder to the daughters. Weiss v. Soto, 96 S.E.2d 727 (W. Va. 1957).

The problem raised by the ambiguous devise of a gift over after a fee simple is open to controversy. A number of the courts resolve the ambiguity through the ancient rule of property that a gift over after a devise in fee simple is void as repugnant to the first gift. In re Lewis Estate, 80 N.W.2d 347 (Iowa 1957); Bardfield v. Bardfield, 23 N.J. Super. 248, 92 A.2d 854 (1952); Clarkson v. Bliley, 185 Va. 82, 38 S.E.2d 22 (1946). A more recent view, adopted by the principal case, is that the testator's intention, as determined from the will as a whole and the circumstances surrounding the testator when he made the will, prevails over conflicting rules of law. Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948); Dyal v. Brunt, 155 Kan. 141, 123 P.2d 307 (1942).

These two currents of thought are in agreement that the cardinal rule in the construction of wills is the ascertainment of the testator's intention, but the older view refuses to uphold it where it conflicts with their basic premise. Perdue v. Morris, 93 Ohio App. 538, 114 N.E.2d 286 (1952). The strength of the adherents to the more recent view lies in the assertion that the testator may not have intended to create a fee simple in the first place, and if so found, then there is no need for the application of the repugnancy doctrine. In re Hanna's Estate, 344 Pa. 548, 26 A.2d 311 (1942).

A third view maintains that an unequivocal gift in fee simple cannot be reduced by a subsequent clause, unless the provisions are equally as clear and decisive as the words of donation. Platz v.
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Walk, 3 Ill. 2d 313, 121 N.E.2d 483 (1954); Mangnum v. Wilson, 235 N.C. 353, 70 S.E.2d 19 (1952); Stoplet v. Stoplet, 22 Ohio App. 327, 153 N.E. 867 (1926). In the principal case this rule was held inapplicable since the court had found that the testator did not intend to create a fee simple, but only intended to create a life estate; therefore, there was no fee simple to be reduced by a subsequent clause. This rule amounts to nothing more than a presumption in favor of the absolute estate, and can be rendered inoperative by the application of another rule of construction holding that the latter of two conflicting provisions prevails. 1 Simes and Smith, the Law of Future Interests 460 (1956).

It is submitted that the view of the principal case is the better one, since the other views can operate to defeat the intention of the testator. This decision is a clear indication that West Virginia follows the modern view that the testator's intention as gathered from the whole will is the paramount consideration, and that intention so found cannot be defeated by the application of rules of law which conflict with it.

J. O. F.

ABSTRACTS OF RECENT CASES

Criminal Law—Incest—No Intent Requirement.—P was convicted of the crime of incest and was sentenced to a term of five to ten years imprisonment. He later sought a writ of habeas corpus ad subjiciendum on the ground that the indictment under which he was convicted was void in that it failed to state that he committed the act wilfully or with intent. Held, that incest is a statutory crime and that no particular mental state or condition is specified by the statute as a necessary element of the offense; therefore such a state or condition need not be alleged in the indictment. Writ denied. United States ex rel. Preece v. Coiner, 150 F. Supp. 511 (N.D. W. Va. 1957).

The first case in West Virginia to cast a spell of doubt upon the wholesomeness of the doctrine of absolute criminal liability was one involving the very question before the court in the principal case. State v. Pennington, 41 W. Va. 599, 23 S.E. 918 (1896). There Judge Brannon, referring to a Vermont case which stated that ignorance was no defense to an indictment for incest, wrote, "I must be allowed to doubt so much of that opinion as holds that.