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Estates--Effect of Power in Life Tenant to Make Absolute Disposition of Property--Governing Statute

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ESTATES—EFFECT OF POWER IN LIFE TENANT TO MAKE ABSOLUTE DISPOSITION OF PROPERTY—GOVERNING STATUTE.—A new section of our Code[1] provides:

> "If any interest in or claim to real or personal property be given by sale or gift inter vivos or by will to one, with a limitation over either by way of remainder or of executory devise or any other limitation, and by the same conveyance or will there be conferred, expressly or by implication, a power upon the first taker in his lifetime or by will to use or dispose absolutely of such property, the limitation over shall not fail or be defeated except to the extent that the first taker shall have lawfully exercised such power of disposal. The proceeds of a disposal under such power shall be held subject to the same limitations and the same power of use and disposal as the original property, unless a contrary intent shall appear from the conveyance or will;" (Here follows a proviso as to conveyance by deed of trust or mortgage.)

This section is patterned after Section 5147 of the Virginia

[1] OFFICIAL CODE OF W. VA. (1931) c. 36, art. 1, § 16.

Code of 1919[2] but with changes which very materially affect its meaning. Section 5147 of the Virginia Code applies only to a gift of an interest in property *for life* with a power of disposal absolutely by deed or by will, and was intended to abolish the doctrine of *May v. Joynes*,[3] a case decided in that state in 1857, which became settled law both in Virginia[4] and in West Virginia.[5] By the doctrine of this case a gift of a life estate with an absolute power of disposal by deed gave the first taker a fee simple. Any limitation over of what such first taker might have undisposed of at his death was repugnant and void. But experience has shown that the existence of this doctrine did not prevent testators from attempting so to limit a remainder after a life estate with such a power of disposal. Under the Virginia statute such testators will have the evident intent expressed in their language effectuated, and the rule of *May v. Joynes* will no longer operate to defeat such intention. Under the above West Virginia statute such testator may also have his intent effectuated, but here we find two very material changes have been made.

The first change to be noted is that our act is not limited to cases where the gift to the first taker is for life, but is intended to extend to cases where the gift to the first taker is in fee, if it is of land, or of absolute property, if it is personalty, provided there follows a limitation over of what is undisposed of by deed or will. The statute makes limitations over on intestacy valid. Suppose property is given to A, and any remaining undisposed of by deed or will by A, to go over to B. This could be brought under the Virginia statute only by construing the gift to A as a gift for life, but so worded it would probably be construed as a gift in fee[6] and if so the limitation over would be void. But such a limitation over would be valid under our statute. Suppose a gift to A and his heirs (or in fee simple) with a limitation over of any that remained undisposed of by A by deed or by will. This could not possibly be construed to come under the Virginia statute but under our statute the limitation over would be valid. But under our statute both of these supposed gifts in fee, in effect, become gifts for life with power of absolute disposal by deed or by will. In other words the limitation over of the property or any

[2] VA. CODE ANN. (1930) § 5147.
[3] 20 Gratt. 348 (Decided in 1857 but published in 1871).
[4] See collection of Virginia cases in VA. CODE ANN. (1930) § 5147.
[5] The cases are collected in note (1930) 36 W. VA. L. QUAR. 288.
[6] Under VA. CODE ANN. (1930) § 5147 dispensing with necessity of words of limitation.

residue on intestacy of A is made valid.[7] The writer can see no valid objection to this in so far as gifts of land[8] are concerned at least unless it is that our system of future interests is already sufficiently wierd and wonderful without adding a new sort of limitation. As to some forms of personal property such as money, another objection was made by the early English courts which both Mr. Gray and Mr. Kales believed had great weight. That is, it is very difficult, if not impossible, to identify the subject matter after the first taker has had it a number of years and the gift over was accordingly held void.[9] But both the Virginia statute and our statute cover personalty as well as real estate. In many cases the property consists of an estate, such as a farm with stock and fixtures, so perhaps as a practical matter since purely personal estates are seldom bequeathed in this manner, it is better to class both sorts of property together than to attempt to separate them.[10]

As to this first change all the comment made by the Revisers is, "It would seem the same provision should be made in cases of more durable interests than life interests where there is a remainder or limitation over upon a contingency." The only "more durable interests" we have must be a fee simple in land or absolute property on personalty. This change does make these "more durable interests" considerably less durable than formerly. It is doubtful whether anyone will give absolute property to one, and then make a gift over of any residue on intestacy so perhaps this change will have little practical effect.

The second change is in the provision of our section that "The proceeds of a disposal under such a power shall be held subject to the same limitations and the same power of use and

[7] What in most jurisdictions is a fee simple absolute becomes a life estate with power of disposal by deed or by will.

[8] Both Professor Gray and Professor Kales have pointed out that there is no rule of policy against a limitation over of property undisposed of. It clearly does not restrain alienability. Most courts say the limitation is void for repugnancy but this is merely a historical formula with no apparent present reason supporting it. See GRAY, RESTRAINTS ON ALIENATION (2d ed. 1895) §§ 56-56b, 74-74g; KALES, FUTURE INTERESTS (2d ed. 1920) §§ 720-723.

[9] See GRAY, *op. cit. supra* n. 7, § 58 for early English cases and § 65 for collection of American cases. The latter hold the limitation over void but on the same ground given in the cases involving real estate. See also KALES, *op. cit. supra* n. 7, § 722.

[10] In many cases since the property left consists of both realty and personalty it is probably simpler as a practical matter to treat both alike as provided in these statutes than to require the separate treatment of the two kinds of property. Besides many forms of personal property are no more difficult to identify than is the realty.

disposal as the original property, unless a contrary intent shall appear from the conveyance or will". As to this sentence the Revisers say "The provision with reference to the proceeds is not included in the Virginia statute, but seems to afford a reasonable working rule, in the absence of a contrary intent". What the Revisers mean by "a reasonable working rule" the writer does not understand. It is the opinion of the writer that the reasonable construction of both the Virginia act, and of that part of our act which precedes the above quoted sentence, is, that if the first taker disposes of the property or any part by deed the limitation over is defeated as to any proceeds which the first taker may have received for such property. In other words any disposal of the property by deed defeats the limitation to that extent.[11] If this construction is correct then this new sentence in our act makes a profound change in that it extends the limitation to proceeds of any property disposed of by the first taker during his lifetime. How much litigation may arise from this change it is difficult to foresee. Suppose the first taker sells land under his power and reinvests the proceeds mingled with money of his own in various forms of property some of which increase in value and some of which decrease in value, and from time to time sells and reinvests the proceeds of portions of this property. A problem of following assets will arise as difficult and complicated as sometimes arises in trusts. Imagine the numerous things the first taker may do with the proceeds which will cause troublesome, annoying and expensive litigation and the only advantage will be to permit an assumed intent of the testator to be carried out a little more completely! Furthermore this provision enhances the objection that was made above to such gifts of money because land sold will usually result in money proceeds and there will follow all the difficulties of identification of the property subject to the limitation which the English courts foresaw. It is submitted that this sentence ought to be eliminated from the statute as soon as possible.

—JAMES W. SIMONTON.

[11] The statute provides, " . . . . the limitation over shall not fail or be defeated except to the extent that the first taker shall have lawfully exercised such power of disposal". The inference is justified that the limitation over shall be defeated to the extent such power has been lawfully exercised. It is submitted this is the reasonable construction and that if our statute ended here the limitation over would not bind proceeds of a sale of the property. This would be easy to administer except as to some forms of personalty such as money, and ought to work well. It is submitted the "reasonable working rule" of the Revisers has injected a great uncertainty and that we will have a very complicated working rule.